SUPREME COURT OF ARIZONA

JEAN CUNDIFF, Plaintiff/Appellant/Cross-Appellee, vs. STATE FARM MUTUAL AUTO-MOBILE INSURANCE COMPANY, Defendant/Appellee/Cross-Appellant.	Supreme Court No. CV-07-0057-PR Court of Appeals No. 2 CA-CV 2005-0209 Pima County Superior Court No. C-20024600

BRIEF OF AMICUS CURIAE UNITED POLICYHOLDERS

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In a published opinion, the Court of Appeals has permitted enforcement of the so-called offset clause in the underinsured motorist (UIM) coverage of an automobile insurance policy, thus permitting the insurer to reduce the amount of UIM benefits paid to its policyholder by the amount of benefits the policyholder received from a workers' compensation insurer. *Cundiff v. State Farm Mut. Auto. Ins. Co.*, 213 Ariz. 541, 145 P.3d 638 (App. 2006). Cundiff has filed a petition for review presenting, *inter alia*, two related issues, one concerning enforcement of the workers' compensation offset clause and the other application of the collateral source rule to prevent reduction of UIM benefits. Amicus urges the court to grant review on Cundiff's issues 1 and 3, to permit filing of supplemental briefs, and to hear oral argument.

Amicus takes no position with regard to Cundiff's issue 2, which is case-specific and fact-intensive.

A. Reasons to grant review

There are multiple reasons that amicus believes militate in favor of granting review.

1. The question of enforceability of a workers' compensation offset clause in UIM and uninsured motorist (UM) coverage is a matter of first impression for this court.[1] It is also a matter of statewide importance and interest, given the number of UIM and UM coverages extant in Arizona automobile policies, the provision of A.R.S.

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[1] The offset was approved by the Court of Appeals in *Terry v. Auto-Owners Ins. Co.*, 154 Ariz. 246, 908 P.2d 60 (App. 1995), a case relied on by the *Cundiff* court. *See Cundiff*, 213 Ariz. at 547-48 ¶ 24, 145 P.3d at 644-45 ¶ 24.

§ 20-259.01 (requiring the offer of such coverage to Arizona motorists), and the public policy of this state favoring the liberal interpretation of coverage protecting drivers against uninsured and underinsured motorists. *Taylor v. Travelers Indem. Co.*, 198 Ariz. 310, 314 ¶ 11, 9 P.3d 1049, 1053 ¶ 11 (2000).

2. Resolution of these issues requires interpretation of two cases decided by this court: *Schultz v. Farmers Ins. Group*, 167 Ariz. 148, 805 P.2d 381 (1991), and *Taylor*, 198 Ariz. 310, 9 P.3d 1049. As will be noted below, the Court of Appeals' interpretation of *Schultz* impairs if not destroys the holding in *Taylor*, which was decided nine years after *Schultz*. *See Cundiff*, 213 Ariz. at 545-46 ¶ 15, 145 P.3d at 642-43 ¶ 15 (finding *Taylor* to be "difficult to reconcile" with *Schultz*).

3. The Court of Appeals failed to apply the principles set forth by this court in *Spain v. Valley Forge Ins. Co.*, 152 Ariz. 189, 731 P.2d 84 (1986). *See Cundiff*, 213 Ariz. at 547 ¶ 21-22, 145 P.3d at 644 ¶ 21-22.

4. The Court of Appeals erred in failing to apply longstanding Arizona authority that forbids the recognition of offsets used by insurers to reduce the amount of UIM benefits when Arizona authority has required such carriers to pay their insureds the difference between the total damages recoverable against the tortfeasor and the amount recoverable from the tortfeasor's liability carrier. *Compare Cundiff*, 213 Ariz. at 547 ¶ 22, 145 P.3d at 644 ¶ 22, *with Spain*, 152 Ariz. at 193-94, 731 P.2d at 88-89 (disallowing an offset between UM and liability coverage). The Court of Appeals also erred in failing to apply and follow persuasive authority from other states that disallow the offset.

5. If review is not granted, the Court of Appeals' published opinion will have "important legal and practical consequences"[2] for insureds because it will allow insurers to apply a significant number of varying offset clauses contained in UIM and UM policies, notwithstanding this court's previous rulings casting doubt on such enforcement. Review is therefore appropriate.

6. There is or may be disagreement between the divisions of the Court of Appeals. In the present case, Division Two relied on a Division One opinion, *Terry v. Auto-Owners Insurance Co.*, 184 Ariz. 246, 908 P.2d 60 (App. 1995). But Division One has reached a conclusion seemingly contrary in part to both *Terry* and Division Two's conclusion in this case. *See Western Agricultural Ins. Co. v. Simpson*, No. 1 CA CV 00-0253, mem. dec. at 8 ¶ 15 (Ariz.App. filed Dec. 26, 2000) (Attachment 1). This conflict illustrates the need for review by this court.

B. Argument

The question is fairly simple. May a tort victim's UIM carrier reduce the amount of coverage payable to its insured by deducting the benefits the insured received from his or her workers' compensation carrier? In *Cundiff,* the court held that the clause could be enforced because it does not prevent the insured from obtaining full compensation. The court reasoned that the reduced UIM benefit, when added to the workers' compensation benefit, would compensate the victim for his or her total loss. 213 Ariz.

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[2] *See Deer Valley Unified Sch. Dist. No. 97 v. Houser*, ___ Ariz. ____, ____ ¶ 5, 152 P.3d 490, 492 ¶ 5 (2007).

at 547 ¶ 22, 145 P.3d at 644 ¶ 22. The court held the UIM carrier is not the "alter ego" of the tortfeasor and is not required to pay the full amount of damages left owing after the deduction of any recovery from the tortfeasor's liability carrier. *Id*. (quoting *Allied Mut. Ins. Co. v. Larriva*, 19 Ariz.App. 385, 387, 507 P.2d 997, 999 (1973)). Thus, the court goes on to say, the collateral source rule is inapplicable and there is no authority "suggesting a UIM insurer should be treated as a tortfeasor for purposes of the collateral source rule." *Id*. The court erred in these holdings in several ways.

1. The court's holding conflicts with the statute

First, whatever the term "alter ego" means in the context of this case, it is nonetheless true that a UIM carrier is required in Arizona to

> make up the difference between [the victim's] actual damages and the available liability coverage. We will not interline the UM and UIM statutes to permit exclusions that have not been mentioned by the legislature.

Taylor, 198 Ariz. at 318 ¶ 22, 9 P.3d at 1057 ¶ 22. What has been mentioned by the Legislature is set forth in very plain words:

> To the extent that the total damages [of the victim] exceed the total applicable liability limits [of the tortfeasor], the underinsured motorist coverage provided in subsection B of this section is applicable to the difference.

A.R.S. § 20-259.01(G).

Under Arizona law, the total or actual damages of the victim are not reduced by the victim's workers' compensation benefits. *See* A.R.S. § 23-1023; *cf*. *Aitken v. Industrial Comm'n*, 183 Ariz. 387, 391-92, 904 P.2d 456, 460-61 (1995) ("It is clear

that in adopting A.R.S. § 23-1023, the legislature wanted to encourage suits against culpable third parties, thereby relieving some of the compensation burden on employers, their insurance carriers, and the system."). A victim's receipt of workers' compensation benefits does not reduce the total damages recoverable from the tortfeasor. On the contrary, recovery from the tortfeasor is allocated in part for reimbursement to the workers' compensation carrier. *See* A.R.S. § 23-1023(B) and (C).

Other benefits received by the victim are treated similarly. Suppose the victim had the foresight to purchase a disability policy for medical insurance with his or her own funds and therefore received benefits from such insurance. It is, of course, black-letter law that the tortfeasor may not deduct the amount of such benefits from tort damages otherwise payable.

> The collateral source or collateral benefit rule denies the defendant any credit for payments or benefits conferred upon the plaintiff by any person other than the defendant himself or someone identified with him. Payments made by the plaintiff's own insurer, or gratuitous benefits conferred by others, for example, do not reduce the defendant's tort liability, even though the payments operate to reduce the plaintiff's loss. Such payments are "collateral" benefits, independent of the defendant. Except as modified by statute, the rule is almost invariably accepted in the courts.

2 DAN B. DOBBS, LAW OF REMEDIES § 8.6(3) at 493 (2d ed. 1993) (internal footnotes omitted); *see also Lopez v. Safeway Stores, Inc.*, 212 Ariz. 198, 202 ¶ 13, 129 P.3d 487, 491 ¶ 13 (App. 2006); *Michael v. Cole*, 122 Ariz. 450, 452, 595 P.2d 995, 997 (1979). Under Arizona law, the damages sustained by the victim are computed without reference to collateral source benefits. Nothing in the UIM statute or previous Arizona case law can be cited for any different result.

The UIM statute says that the "coverage provided in subsection B . . . is applicable to the difference" between "total damages for bodily injury" and the "total applicable liability limits [of the tortfeasor]." A.R.S. § 20-259.01(G). The phrase "liability limits" means "the amount actually collectible" from the tortfeasor. *Taylor*, 198 Ariz. at 313 ¶ 5, 9 P.3d at 1052 ¶ 5. That amount, as we have shown, is not reduced by workers' compensation or collateral source payments received by the victim.

2. There is no double recovery or windfall

State Farm argued that preventing the victim from retaining workers' compensation benefits and full UIM benefits prevents "double recovery" and thus avoids giving the victim a windfall. *See Cundiff*, 213 Ariz. at 544 ¶ 8, 145 P.3d at 641 ¶ 8. But that argument overlooks the fact that workers' compensation benefits do not come without any consideration from the employee. To obtain those benefits, the worker/tort victim must have relinquished his or her right under the Arizona Constitution to reject workers' compensation benefits and thereby retain his or her right to sue a negligent employer. Ariz. Const. Art. XVIII, § 8. The right to workers' compensation benefits thus becomes part of the contractual agreement between employers and workers who have rejected the right to sue their employer and who have therefore given valuable consideration for the right to such benefits. *Grammatico v. Industrial Comm'n*, 211 Ariz. 67, 71 ¶¶ 16-17, 117 P.3d 786, 790 ¶¶ 16-17 (2005). This is so, of course, in the present case and almost every other case that comes before our courts.

It is also true, and evidently not considered by the Court of Appeals, that in the present case and in every other UIM case in which benefits have been paid, the victim is under a legal obligation to repay the benefits to the workers' compensation carrier. As noted, the benefits received are to be repaid to the compensation carrier from the victim's recovery from the tortfeasor or the tortfeasor's insurer. *See* A.R.S. § 23-1023(C). The workers' compensation carrier has a lien against the tort recovery. *Id*. Thus, in the present case and most others, after the UIM carrier deducts the amount of workers' compensation benefits received by the victim and the victim repays the compensation carrier from the recovery made from the liability carrier, the victim may receive little or nothing from the UIM carrier.[3] This is hardly what the Legislature contemplated in requiring insurers to offer UIM coverage to their insureds.

State Farm nevertheless argues that offsetting the workers' compensation benefits from the UIM proceeds leaves the victim in the same situation as though the tortfeasor had full liability coverage. (Response at 7-9) The broad picture with which the court must be concerned is blurred by the confused and unusual facts of this case. State Farm's argument is incorrect because it has overlooked the fact that the great majority of cases involve significant pain, suffering, physical disability, and other non-economic losses. Significantly, workers' compensation does not pay damages for such intangible losses.[4]

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[3] Amicus believes that the record in the present case established that Cundiff's entire recovery from the tortfeasor's liability carrier was required to be paid to the workers' compensation carrier.

[4] For example: Workers' compensation benefits pay only sixty-six and two-thirds percent of a victim's wage loss. A.R.S. §§ 23-1044(A) and 23-1045(A)(1). Payments are capped at $1,600 per month. A.R.S. § 23-1021(D)(5) (66.66% of $2,400).

Nor does it compensate for losses of earnings or earning capacity over the statutory cap. Thus, when the victim uses her recovey from the tortfeasor to reimburse the workers' compensation insurer for benefits received and is then docked for such amount by her UIM carrier, she does not get the full compensation the UIM statute seeks to confer. There is no windfall. The victim has given consideration for her workers' compensation benefits and has paid a premium to her insurer for her UIM benefits.

3. The court's holding conflicts with the weight of authority

The conclusions reached by the Court of Appeals not only directly conflict with long-established Arizona law but also conflict with the weight of authority throughout the country. The reason for this is simply that ignoring the collateral source rule would permit the UIM and UM carrier to reduce the damages to a sum less than the actual damages that the victim could recover if the tortfeasor had sufficient coverage. The law, on the other hand, is that the "insured is entitled to recover damages he or she would have been able to recover if the uninsured [motorist] had maintained a policy of liability insurance." *Calvert v. Farmers Ins. Co.*, 144 Ariz. 291, 294, 697 P.2d 684, 687 (1985); *see also Higgins v. Fireman's Fund Ins. Co.*, 160 Ariz. 20, 22, 770 P.2d 324, 326 (1989) (applying same rule to UIM coverage); *Spain*, 152 Ariz. at 193, 731 P.2d at 88.

As this court stated in *Taylor*, Arizona interprets its UIM and UM law liberally (and some might even say more liberally than other states). 198 Ariz. at 314 ¶ 11, 9 P.3d at 1053 ¶ 11. But the rule that we believe should be applied in the present case is hardly novel. The Court of Appeals said the UIM insurer is not the tortfeasor's "alter

ego," and it could find no authority "suggesting that a UIM insurer should be treated as a tortfeasor." *Cundiff*, 213 Ariz. at 547 ¶ 22, 145 P.3d at 644 ¶ 22. Other states, however, have held that the collateral source rule applies and that UIM and UM carriers are liable for the difference between the damages the victim could have recovered from the tortfeasor and the amount of liability coverage available, without allowing for any reductions or offsets for workers' compensation benefits. 1ALAN I. WIDISS & JEFFREY E. THOMAS, UNINSURED AND UNDERINSURED MOTORIST INSURANCE § 14.3 at 924 n.4 (3d ed. 2005) (citing cases establishing that the majority of jurisdictions that have considered the question have held the offset clause invalid). Further, as the authors state, "it is evident that workers' compensation benefits do not provide complete indemnification for an injured person." *Id*. at 924.

C. Conclusion

Amicus respectfully submits that the court should grant review and, on review, should vacate the Court of Appeals' opinion and disapprove of *Terry*, 184 Ariz. 246, 908 P.2d 60.

Dated this 2nd day of April, 2007.

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I certify that the original and seven copies of the foregoing Brief of Amicus Curiae were sent via FedEx on April 2, 2007, to:

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