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

SUPPLEMENTAL BRIEF OF AMICUS CURIAE UNITED POLICYHOLDERS

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INTRODUCTION

The only question in this case is whether an insurer fulfills its statutory obligation to pay its insured the difference between the liability coverage available from an under-insured motorist and the actual damages sustained by the insured victim. *See* A.R.S. § 20-259.01(G). The operative language reads as follows:

> To the extent that the total damages exceed the total applicable liability limits, the underinsured motorist coverage . . . is applicable to the difference.

State Farm would have the court amend the statute by redefining the words "total damages" to exclude benefits received by the victim and not attributable to either the tortfeasor or his insurer or by adding a phrase at the end of the foregoing language so that it reads "is inapplicable to the difference *as reduced by application of excess, escape, prorata, and offset provisions contained in the UIM policy*."

But UIM coverage, once purchased by an insured, is mandatory in terms of its extent. The statute requires it to cover the difference between total damages and available liability limits. This court has interpreted the statute's mandate as follows:

> Uninsured motorist coverage is designed to protect insured victims from the negligence of uninsured motorists and "places the victim's insurer in the shoes of the tortfeasor as a source of payment to the victim."

Spain v. Valley Forge Ins. Co., 152 Ariz. 189, 191-92, 731 P.2d 84, 85-86 (1986) (quoting 12A G. COUCH, CYCLOPEDIA OF INSURANCE LAW § 45:652, at 212 (2d ed.1981)).

This case is that simple.

ARGUMENT

State Farm argues that the total damages for purposes of UIM coverage can be computed on some basis less than the amount for which the tortfeasor would be liable. Thus, it believes it may insert offset clauses for the victim's receipt of workers' compensation or other collateral benefits that, it says, can be part of a computation reducing total damages. These reductions, it argues, will still result in making the victim whole while preventing double recovery, a term appearing throughout State Farm's supplemental brief.

But the workers' compensation offset at issue in the present case, unlike any other approved by our courts, is not a benefit received from the tortfeasor or the UIM insurer. It is, rather, a benefit wholly collateral to either. Except for the Court of Appeals' opinion in *Terry v. Auto-Owners Insurance Co*., 184 Ariz. 246, 908 P.2d 60 (App. 1995), which should be disapproved, and the present case, no Arizona case has ever approved an offset, prorata, other insurance, escape clause, or any other policy provision that seeks to reduce the UIM insured's recovery to less than the total damages prescribed in the statute and interpreted by this court as meaning actual damages. *Taylor v. Travelers Indem. Co.*, 198 Ariz. 310, 318 ¶ 22, 9 P.3d 1049, 1057 ¶ 22 (2000).

Indeed, the case law is quite plain. In *Spain*, this court held that the insurer could not offset liability limits of its policy against its UM coverage unless and until the victim's damages had been paid in full. Only if and when those damages were paid in full could the duplication of benefits clause be applied so that the offset was allowed. 152 Ariz. at 194, 731 P.2d at 89. The court was specific: Only after "an insured has been fully

compensated under the liability coverage, [may the liability] payments . . . be credited under the UM coverage to avoid a duplication of benefits." *Id*. at 194 n.5, 731 P.2d at 89 n.5.

In *Brown v. State Farm Mutual Automobile Insurance Co.*, this court took the same position, again with the qualification that the insurer "may restrict recovery to the insured's actual damages by use of prorata, offset, or escape clauses." 163 Ariz. 323, 328, 788 P.2d 56, 61 (1989). In *Rashid v. State Farm Mutual Automobile Insurance Co.*, this court held that an other insurance clause in a UM/UIM policy could not be applied when the insured's damages exceeded the UM limits of a host driver's car. 163 Ariz. 270, 275-76, 787 P.2d 1066, 1071-72 (1990). Until the tortfeasor's debt was paid in full, any policy language that purported to exclude or reduce UM coverage was void. *Id*.

Finally, in *Taylor*, this court held that the statute means what it says so that, to the extent that the tortfeasor has insufficient liability coverage, the victim must be allowed to recover from her own UIM coverage despite any language to the contrary in the insurance policy. 198 Ariz. at 321 ¶ 32, 9 P.3d at 1060 ¶ 32. Thus, as State Farm says, there is a long line of Arizona precedents, but despite the snippets of language used by State Farm in its supplemental brief, the holding of each case is contrary to its position in the present case.

State Farm is really asking this court to depart from its cases, stake out new ground, and develop a new rule allowing the reduction of UIM benefits even though the result will leave the insured with less than her "actual damages" (*Taylor*) or "total damages"

(A.R.S. § 20-259.01(G)). But, we submit, before a court adopts a new rule in any area of law, it is well to consider what such a rule will mean in the future. If the Court of Appeals' opinion stands and the workers' compensation reduction at issue here is approved, what will prevent further offset provisions of this nature?[1] Suppose, for instance, an insurer inserts a clause offsetting $100,000 UIM limits by amounts the insured may recover from insurance the victim purchased with his or her own funds for protection against death, disability, or accidental injury.

Take the case where the insured is killed in an accident caused by a drunk with $15,000 limits. The victim has $100,000 in UIM coverage, and his survivors seek recovery from the victim's insurer, as is their right by A.R.S. § 20-259.03. But suppose further that the victim bought or his employer provided a $250,000 life insurance policy with a double indemnity clause so that the victim's survivors would receive $500,000 in death benefits. Under the rule proposed by State Farm, the offset for any insurance recovery to which the victim or his survivors would be entitled would eliminate the UIM coverage unless the damages exceeded $515,000. The insurer would argue that the survivors have been made whole by the life insurance proceeds, so any recovery for UIM would thus be a windfall, a duplication of benefits, or a double recovery.

If the court adopts the rule State Farm advocates, it will allow a multitude of offsets not mentioned in the statute and not excluded by the collateral source rule when computing

[1] An offset, we submit, is a euphemism for reduction of the insurance limits purchased by the consumer.

the damage caused by the tortfeasor. When that happens, the hypothetical outlined above and many more such provisions will begin to appear in UM/UIM policies.

A close hypothetical comes to mind: Suppose Plaintiff had sustained truly serious injuries, so that the workers' compensation benefits payable to her for medical expenses and lost earning capacity were $500,000. Under State Farm's view, then no UIM would be collectible on any basis unless the damages exceeded $500,000 because Plaintiff would have been fully compensated up to any loss less than that amount. But, of course, the concept of full recovery and windfall in such situations is a fiction.

The argument that recognizing the validity of the workers' compensation offset clause will do no more than prevent the insured from obtaining a double recovery, a windfall, or a duplication of benefits does not conform to reality let alone statutory and case law requirements. The workers' compensation benefits Plaintiff received and that State Farm seeks to offset were required by law to be repaid to the workers' compensation carrier from the recovery from the tortfeasor's liability carrier. Further, workers' compensation benefits do not compensate the victim for the entire loss; there is no payment for pain, suffering, or disability, nor any payment for economic loss except a partial payment of lost wages to the statutory maximum, which in many cases is far less than the injured worker was earning prior to the accident.

The workers' compensation benefits are entirely collateral to the tortfeasor and to the UIM carrier, which stands in the tortfeasor's place. They are benefits paid for and provided by the victim's employer and also paid for by the victim through his or her relinquishment of common-law tort rights against the employer. The same, of course,

may be said about many other kinds of benefits that tend to mitigate the loss a victim sustains in an accident. Many if not most victims have various collateral sources of benefits, whether they be received from a health plan, an employer's ERISA plan, the victim's own medical, life, or disability insurance, voluntary payments from families or charities, or Social Security benefits.[2] Indeed, so-called public benefits and other forms of governmental aid, many of which are entirely gratuitous, unlike workers' compensation, are all considered collateral sources and do not reduce the actual damages owed by the tortfeasor. *See* 2 DAN B. DOBBS, LAW OF REMEDIES § 8.6(2), (3), and n.5, at 493 (2d ed. 1993).

Many types of policies, of course, may and do permit offset of such benefits from the amounts payable by the insurer. Disability policies, for instance, commonly provide for offsets of amounts the insured receives from Social Security disability payments. Automobile medical pay provisions often contain clauses reducing payments by amounts paid to the insured from his or her health insurance or similar sources. But offsets in such policies are permitted because no statute regulates the contract between insurer and insured. The result reached by the Court of Appeals in the present case is quite different, for it flies in the face of a statute requiring the underinsurer to pay the difference between actual or total damages on the one hand and the amount of liability coverage on the other.

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[2] The collateral source rule, of course, applies to Social Security disability benefits. *See Seibel v. Liberty Homes, Inc.*, 752 P.2d 291, 295 (Ore. 1988).

As this court said in *Spain*, uninsured (and underinsured) motorist coverage puts the insurer "in the shoes of the tortfeasor as a source of payment to the victim." 152 Ariz. at 191-92, 731 P.2d at 85-86 (quoting 12A G. COUCH, CYCLOPEDIA OF INSURANCE LAW § 45:652, at 212 (2d ed.1981)). That, after all, was the beginning and should be the end of this case.

CONCLUSION

Amicus respectfully submits that the Court of Appeals' opinion should be vacated, the judgment reversed, and the matter remanded to the trial court for further proceedings.

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