IN THE SUPREME COURT OF GEORGIA
STATE OF GEORGIA

TERRY E. DEES and FRETA G. DEES,	)	
	)	Case No. : S07C0290
Petitioners,	)	
	)	Georgia Court of Appeals
vs.	)	Case No.: A06A0929
	)	
SHIRLEY A. LOGAN,	)	
	)	
Respondent.	)	

BRIEF OF AMICUS CURIAE GEORGIA TRIAL LAWYERS ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA IN THE CASE WHERE STATE FARM'S COLLATERAL SOURCE REDUCTION PROVISION IN AN UNINSURED/UNDERINSURED MOTORIST ("U/M") INSURANCE POLICY IS UNENFORCEABLE BECAUSE IT CONFLICTS WITH GEORGIA'S U/M STATUTE AND GEORGIA'S PUBLIC POLICY

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1. STATEMENT OF INTEREST

The Georgia Trial Lawyer's Association ("GTLA") is a membership association composed of trial lawyers who are committed to preserving the jury system and representing those injured by the wrongdoing of others. The issues in the instant case affect more than just these litigants. The individual consumer lacks the bargaining power to negotiate provisions in an uninsured/underinsured motorist ("U/M") insurance policy.

2. THIS CASE INVOLVES ISSUES OF GREAT CONCERN, GRAVITY, AND IMPORTANCE TO THE PUBLIC.

Georgia consumers pay premiums for U/M insurance. U/M insurance is the way consumers can protect themselves from a wrongdoer who has no or low auto liability insurance.

If this Court does not grant this Writ of Certiorari, then U/M coverage will be nothing more than an illusion. When consumers make U/M claims the U/M insurer can simply point to a collateral source reduction provision and reduce U/M coverage. The U/M insurer can reduce the purchased U/M coverage to zero.

Georgia's U/M Statute (O.C.G.A. Section 33-7-11) requires U/M insurance to pay the insured all sums which said insurer shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle. The operative two words are "all sums." All sums mean all sums. It does not mean all sums minus collateral sources of the insured.

3. GEORGIA'S U/M STATUTE PROHIBITS ANY COLLATERAL SOURCE REDUCTION PROVISION FOR AN INSURED'S BODILY INJURY.

The first place to look for guidance on whether a collateral source reduction provision is permitted is Georgia's U/M Statute. Is Georgia's U/M Statute silent on this issue? No, it is not silent. It is specifically addressed in Georgia's U/M statute itself.

Does Georgia's U/M Statute allow a collateral source reduction provision for the insured's bodily injury? The answer to this question is found in Georgia U/M Statute, O.C.G.A. Section 33-7-11 (i). The statute reads:

> *The endorsement or provisions of the [u/m] policy providing the coverage required by this Code section may contain provisions which exclude any liability of the insurer for injury or destruction of property of the insured for which he has been compensated by other property or physical damage insurance*. (Emphasis Added)

Here is the answer to the question. Georgia's U/M policy may only contain a collateral source reduction provision for the injury or destruction of property of the insured and not for the bodily injury of the insured. No where in Georgia's U/M Statute does it authorize a collateral source reduction provision for bodily injury.

State Farm's collateral source reduction provision reads:

> *any amounts payable under this coverage shall be reduced by any amount paid or payable to or for the insureds: (a) under any workers' compensation, disability benefits or other similar law (R. 906).* (Emphasis Added)

Workers' compensation and disability benefits compensate for the bodily injury of the insured and not property damage of the insured. It is clear that a

collateral source reduction provision is only allowed for property damage and not for bodily injury.

Where there is a conflict between an insurance policy and Georgia's U/M Statute, the U/M statute controls. Hartford Accident, etc. Co. vs. Booker, 140 Ga. App. 3, 4 (1), 230 S.E. 2d 70 (1976). Since there is a direct conflict between State Farm's collateral source reduction provision for bodily injury and Georgia's U/M Statute, the statute controls. State Farm's collateral source reduction provision is unenforceable because it is contrary to Georgia's U/M Statute. The Georgia Court of Appeals opinion in our case ignores the language in Georgia's U/M Statute on this point.

4. THE PRINCIPLE OF STATUTORY CONSTRUCTION - EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS - APPLIES IN THIS CASE

The goal in construing any Georgia statute is to ascertain the intent of the Georgia Lawmakers. In doing so Georgia Courts have applied the "venerable principle of statutory construction - expressio unius est exclusio alterius: the express mention of one thing implies the exclusion of another; ..." C. Brown Trucking, Inc. vs. Rushing, 265 Ga. App. 676, 595 S.E. 2d 346 (2004). In

Georgia's U/M Statute the Georgia Lawmakers have expressly allowed a collateral source reduction provision for property damage. The Georgia Lawmakers did not expressly allow a collateral source reduction provision for bodily injury. The omission of any such reference to bodily injury from Georgia's U/M Statute must be regarded as deliberate. If Georgia Lawmakers intended to include bodily injury as well as property damage they certainly would have said so.

5. STATE FARM WANTS TO REWRITE GEORGIA'S U/M STATUTE O.C.G.A. SECTION 33-7-11 (i) TO INCLUDE BODILY INJURY

If State Farm had its way Georgia's U/M Statute O.C.G.A. Section 33-7-11 (i) would be rewritten to include "bodily injury" as follows:

> *The endorsement or provisions of the policy providing the coverage required by this Code section may contain provisions which exclude any liability of the insurer for injury or destruction of property or bodily injury of the insured for which he has been compensated by other property or physical damage insurance or insurance for the insured's bodily injury. (Emphasis Added - underlined parts inserted.)*

Georgia Lawmakers did not write Georgia's U/M Statute to include any collateral source reduction provision for bodily injury of the insured. State Farm does not have the power to rewrite Georgia's U/M statute. The

limiting language of "by other property or physical damage insurance" is not surplusage. It was intended to be a meaningful limiting phrase. "Where possible, effect is to be given to all words of a statute, and it is firmly established that courts should not interpret a statute so as to render parts of it surplusage or meaningless." Jordan vs. State, 223 Ga. App. 176, 477 S.E. 2d 583 (1996). (Emphasis Added)

6. SUBROGATION/REIMBURSEMENT BY THE WORKERS' COMPENSATION INSURER AND DISABILITY BENEFITS PROVIDER PREVENTS DOUBLE RECOVERY OF THE SAME CATEGORIES OF DAMAGES BY THE INSURED.

The Court of Appeals opinion in our case ignores the impact of subrogation/reimbursement. Subrogation/Reimbursement prevents double recovery of the same category of damages by the insured. In the 1990's the Georgia General Assembly passed a new statute allowing workers' compensation insurers to seek subrogation/reimbursement for benefits paid to its injured employee if the injured employee has a tort action. O.C.G.A. Section 34-9-11.1 (b) reads in pertinent part:

> *In the event an employee has a right of action against such other person as contemplated in subsection (a) of this code section and the employer's liability under this chapter has been fully or partially paid, then the employer or such employer's insurer shall have a subrogation lien, not to exceed the actual amount of compensation paid pursuant to this chapter, against such recovery.* (Emphasis Added)

The employer or the employer's workers' compensation insurer has a subrogation lien against any such recovery. The employer or insurer may intervene in any action to protect and enforce such lien. O.C.G.A. Section 33-9-11.1 (b). The injured employee is not going to have a double recovery for the categories of damages paid by workers' compensation insurance.

Respondent in her Response to Petition for Writ of Certiorari wrote on page 7, "Georgia... has always prohibited a plaintiff from a double recovery of damages..." Under the Georgia's Workers' Compensation Subrogation Statute an employee is not entitled to double recovery for the same category of damages.

In disability benefits insurance policies there are subrogation/ reimbursement provisions that give the insurer a subrogation lien on any recovery.

There is a specific Georgia Statute on this subrogation/reimbursement issue. O.C.G.A. Section 33-24-56.1 (b) reads in pertinent part, "In the event of recovery for personal injury... the benefit provider for the person injured <u>may require reimbursement from the injured party of benefits it has paid</u> on account of the injury..." (Emphasis Added) Georgia's Reimbursement Statute defines a benefits provider to include health insurers and disability insurers. This prevents double recovery for the same categories of damages.

Federal law gives subrogation/reimbursement rights to Medicare and Medicaid for any personal injury recovery. This prevents double recovery.

There are ample contractual and statutory safeguards to prevent double recovery. The U/M insurer should pay "all sums" and then any collateral source benefits provider can seek subrogation/reimbursement from a tort recovery or U/M recovery.

7. THE INSURED MUST BE PLACED IN THE SAME POSITION THAT HE WOULD HAVE BEEN IF THE U/M TORTFEASOR HAD LIABILITY LIMITS EQUAL TO THE U/M LIMITS OF THE INSURED.

Georgia's U/M Statute O.C.G.A. Section 33-7-11 (a)(1) reads in pertinent part that motor vehicle liability policies must contain a provision undertaking "to pay the insured all sums which said insured shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle, ..." (Emphasis Added) The insured is, in essence, buying liability insurance for an U/M tortfeasor. In this case State Farm became the adversary of its insured and litigated the case with the same tenacity as if it were the liability insurer of the tortfeasor.

The Montana courts have held a similar collateral source reduction provision to be unenforceable. The Montana Supreme Court in Sullivan vs. Doe, et al., 159 Mont. 50, 495 P2d 193 (1972) wrote:

> *The Legislative purpose behind the enactment of such statutory provisions on 'uninsured motorist' coverage is equally clear. It is simply to place the injured policy holder in the same position he would have been if the uninsured motorist had liability insurance and, accordingly, the amount of plaintiff's recovery from 'uninsured motorist' coverage can not be reduced by any workers' compensation benefits received by him.* (Emphasis Added)

The Montana Supreme Court held that other sources of insurance of the insured such as health insurance are not deductible for the same reason as workers' compensation benefits are not deductible. The non-deductibility of other insurance benefits applies for the same reasons that workman's benefits are not deductible. The majority of jurisdictions outside Montana declare void these clauses which purport to limit liability not expressly authorized by statute. Id at 63.

8. THE U/M TORTFEASOR IS NOT ENTITLED TO ANY OFFSET OF THE INSURED'S COLLATERAL SOURCES AND NEITHER IS THE U/M INSURER.

"As a general rule, it has been held that the fact that a person receives from a collateral source payments which have a tendency to mitigate the consequences of his injury, which he suffered as a result of the Defendant's tort, may not be appropriated by the Defendant as an offset to damages which Defendant would otherwise be required to pay. There has always been a widespread judicial refusal to credit to the benefit of the wrongdoer

money received in reparation of the victim's injuries from sources other than the wrongdoer himself." See Maxwell, The Collateral Source Rule in the American Law on Damages, 46 Minn. Law Revue 669; Annotations, 75 A.L.R. 2d 885 and 4 A.L.R. 3d 535.

The Collateral Source Rule is alive and well in the State of Georgia The Georgia Supreme Court in the landmark case of Denton vs. Con-Way Southern Express, Inc., et al., 261 Ga. 41, 402 S.E. 2d 269 (1991) addressed the Collateral Source Rule in the State of Georgia. The Georgia Supreme Court declared unconstitutional O.C.G.A. Section 51-12-1 that allowed collateral sources to be admitted as evidence to a jury and permitted the jury to reduce the Plaintiff's recovery based on the Plaintiff's collateral sources. The Georgia Supreme Court wrote in pertinent part, "Our tort law allows every person to recover the damage that resulted from torts committed to them." Id at 42.

New Jersey Courts have held that provisions of their uninsured motorists endorsements that provided for reduction in an amount payable for bodily injury by an amount of any workers' compensation award were void and unenforceable. Walkowitz v. Royal Globe Insurance Company, 142 N.J. Super 442, 374 A.2d 40 (1974)

New Jersey's U/M statute was similar to Georgia's U/M statute. The New Jersey U/M statute mandated the offer of U/M coverage. It required U/M coverage for payment of sums "which the insured or his legal representative shall be legally entitled to recover for damages from the operator or owner of an uninsured automobile." Id at 445.

The New Jersey U/M statute "contains no suggestion of relief from its undertaking in favor of an issuing insurer merely because the insured may also have a right to recover benefits under Our Workers' Compensation Act for the same injury... Consequently any attempt by the insurer to limit his liability under this [U/M] coverage by providing for reduction in the amount due thereunder by the amount of workers' compensation benefits received by or awarded to the insured violates the clear mandate of the statute and is against the public policy of the State. We therefore hold that the workers' compensation setoff provision of the U/M endorsement is void and unenforceable." Id at 445. (Emphasis Added)

9. IF THE COLLATERAL SOURCE REDUCTION PROVISION FOR WORKERS' COMPENSATION, SOCIAL SECURITY DISABILITY OR OTHER SIMILAR LAWS IS PERMITTED THERE IS NOTHING STOPPING U/M INSURERS FROM ADDING REDUCTIONS FOR THEIR INSURED'S HEALTH INSURANCE.

State Farm's current U/M collateral source reduction provision applies to "workers' compensation benefits, disability benefits or similar laws." If

that is not stopped State Farm and other U/M insurers in Georgia could easily amend their current auto U/M policies to expand these collateral sources. State Farm could add "the health insurance" of their insured to the reduction provision. State Farm could even expand it beyond collateral sources of insurance. State Farm could expand it to any collateral source that could include, but is not limited to, the payment of its insured's medical expenses by a wealthy uncle of its insured.

U/M insurers could sell U/M coverage that would in reality be an illusion. An illusion because the U/M limits could be reduced to zero such as in the instant case.

10. CONTRARY LANGUAGE IN THE NORTHBROOK CASE AND ITS PROGENY MUST BE OVERRULED BECAUSE THE CONCLUSION IS FLAWED.

The Georgia Court of Appeals in its opinion in this case relies upon legal authority from Northbrook Properties and Casualty Insurance Company vs. Merchant, 251 Ga. App. 273 (1994) and Ferqueron vs. State Farm Casualty Insurance Company, 271 Ga. App. 572 (2005). The Court of Appeals in our case wrote on page 5, "In Georgia, U/M insurance policy language that provides for a setoff for damages awarded to the extent that workers' compensation has paid benefits to the insured is proper." (Emphasis Added) That conclusion is flawed.

A close reading of the opinions in Northbrook and Ferqueron show that there was no in depth analysis of Georgia's U/M Statute and Georgia public policy on this issue.

Parts of Northbrook and Ferqueron should be specifically overruled because the collateral source reduction provision in a U/M insurance policy conflicts with Georgia's U/M statute and Georgia's public policy. No collateral source reduction for bodily injury is permitted by Georgia's U/M statute.

11. CONCLUSION:

This Court should grant the Petition for Writ of Certiorari because the Collateral Source Reduction provision in a U/M insurance policy is of great concern, gravity, and importance to the public. All occupants of motor vehicles are affected. The purpose of U/M coverage is to protect innocent occupants of motor vehicles from wrongdoers who have no auto liability insurance or low auto liability insurance. If this is not corrected other U/M insurance policies will be issued that allow for collateral source reductions for their insured's health insurance benefits.

State Farm's collateral source reduction provision is unenforceable because it conflicts directly with Georgia's U/M Statute and Georgia's public policy. Parts of the opinions of the Georgia Court of Appeals contained in the

Northbrook case and its progeny should be overruled since they conflict directly with Georgia's U/M Statute and Georgia's public policy.

This the ____ day of _____, 2006.

Respectfully submitted:

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CERTIFICATE OF SERVICE

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