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Metropolitan Casualty Insurance Co. V. Robert Tepper

SC07-2428

THE NEXT CASE ON THE COURT'S AGENDA IS METROPOLITAN CASUALTY INSURANCE COMPANY VERSUS ROBERT TEPPER.

>> MR. BELL.

>> GOOD MORNING, YOUR HONOR.

MAY IT PLEASE THE COURT.

MY NAME IS MIKE BELL AND I REPRESENT METROPOLITAN CASUALTY INSURANCE COMPANY AND I'M HERE TODAY TO ASK THIS COURT TO REVERSE THE FIFTH DISTRICT AND HOLD THAT IN CASES WHERE AN INSURED TORT-FEASOR HAS HAD HIS PROPOSED SETTLEMENT FUNDED BY THE INSURANCE CARRIER, THAT HE REMAIN A PARTY IN THE ACTION.

>> CAN I GET -- I NEED TO JUST GET SOME BACKGROUND HELP ME BECAUSE I KNOW UNINSURED MOTORIST LAWS CHANGE SO MUCH OVER THE YEARS AND THEY'RE -- TIMES IT WAS ARBITRATION AND THEN THERE WERE TIMES THAT THERE WERE, YOU KNOW, TRIALS. AT THIS TIME AND WITH YOUR POLICY WHEN THE INJURED, YOUR, YOUR INSURED, THE INSURANCE PERSON, TEPPER, FILED THE LAWSUIT, FILED THE LAWSUIT ONE COUNT OF UNINSURED MOTORIST CLAIM AND THE OTHER COUNT AGAINST THE TORT-FEASOR. I UNDERSTAND YOUR POLICY HAD SOMETHING IN EFFECT THAT ALLOWED YOUR INSURED TO MITIGATE THE UNINSURED MOTORIST CLAIM IN COURT?

>> THE POLICY REQUIRES THAT IN ANY SUIT AGAINST THE UM CARRIER, THAT THE PLAINTIFF, THE INSURED, JOIN AS A PARTY TO THE ACTION THE TORT FEEZER.

>> OKAY.

>> AND THAT'S WHAT WAS DONE HERE BELOW.

>> SO BUT YOU WERE -- BUT THE,
BUT THEY IT DOESN'T PROVIDE
ANYMORE FOR ARBITRATION.

>> NO.

>> SO WHAT WAS GOING TO HAPPEN
THEN, AND LET ME UNDERSTAND
THIS, AND WE'RE REALLY DEALING
WITH THE STATUTORY CONSTRUCTION
THING BUT I WANT TO -- AFTER
YOU PAID THE 25,000, THEN YOUR
INSURED MR., IS IT'S -- IT'S
MR. TEPPER?

CONTINUED WITH THE IN{SH}NERED
-- UNINSURED MOTORIST CLAIM
AGAINST METROPOLITAN AND THE
IDEA WOULD BE UNDER THE STATUTE
IF WE UPHOLD THE FIFTH
DISTRICT, MR. LUCAS
DISMISSATHIZE PARTY BECAUSE
MR. TEPPER DIDN'T AT LEAST
OPPOSE THAT AND YOU COULD SAY
WELL HE BY NOT OPPOSING IT
MAYBE HE VIOLATED THE POLICY
BUT THAT'S NOT BEFORE US.
THEN YOU PROCEED TO A VERDICT
ON THE UNINSURED MOTORIST
CLAIM, SAY HE GETS AN AMOUNT OF
WHAT'S THE LIMIT OF YOUR --

>> \$100,000.

>> GETS THE VERDICT OF
\$125,000.

AT THAT POINT THE UNINSURED
MOTORIST CLAIM HAS, HAS
CONCLUDED.

>> BEEN QUANTIFIED.

>> THEN YOU WILL -- THEN THE
STATUTE OF LIMITATIONS WOULD
ALLEGEDLY BEGIN TO RUN ON YOUR
CLAIM AGAINST LUCAS.

FOR THE, FOR \$100,000.

MR. TEPPER HAVING GIVEN UP THE
EXTRA \$25,000 BECAUSE HE
DISMISSED MR. LUCAS FROM THE
LAWSUIT.

IS THAT HOW THIS WOULD WORK?

>> I THINK THE COURT HAS AN
EXCELLENT UNDERSTANDING --

>> WELL, WAIT A MINUTE.

I'VE GOT A PROBLEM WITH THAT.
THE STATUTE OF LIMITATIONS
ASPECT.

EVERYTHING UP TO THAT, I MEAN
IT SEEMS LIKE IT FLOWS BUT THE
STATUTE OF LIMITATIONS DOESN'T

FLOW BECAUSE THAT'S BASED ON THE SUBROGATED RIGHT AND THE STATUTE OF LIMITATIONS GOING TO RUN FROM THE DATE OF THE ACCIDENT NOT FROM THE DATE YOU MAKE PAYMENT, IS IT?

>> WELL THERE'S A CONFLICT WITH THAT.

>> WELL, NO I'M JUST ASKING A QUESTION BECAUSE IT SEEMS TO ME THAT'S ALL PART OF THIS WHOLE THING.

>> WELL, WE THINK THAT THE BETTER PRACTICE WOULD REQUIRE THE INSURED TORT-FEASOR.

>> I UNDERSTAND BUT THEN -- BUT GETTING BACK TO THIS, SO WE HAVE A FUNDAMENTAL UNDERSTANDING ARE YOU SAYING THAT THERE'S A NEW STATUTE OF LIMITATIONS?

AND IF SO, WHAT'S THE BASIS FOR THAT.

>> WELL, IN THE DEMINEN OF CANADA CASE, THE CASE ON WHICH THIS COURT GRANTED CONFLICT JURISDICTION, THAT CASE HOLDS THAT THE STATUTE DOESN'T RUN UNTIL, UNTIL A FINAL RESOLUTION.

>> WELL, THEN WE ARE GOING TO QUASH THAT CASE.

SO I MEAN, WE'RE IN --

>> I MEAN, THE PROBLEM YOU ARE GOING TO HAVE, AND I GUESS THAT'S WHY I WANTED TO UNDERSTAND.

OBVIOUSLY THE, I WOULDN'T THINK THE LEGISLATURE WOULD WANT TO CREATE A SCHEME THAT WOULDN'T ALLOW YOU TO BEGIN TO BE ABLE TO SUE THE TORT-FEASOR IF THE STATUTE OF LIMITATIONS IS ALREADY RUN.

SO WE'VE GOT TO HARMONIZE THOSE TWO VALUES -- THOSE TWO FACTORS.

YOU CAN'T BE PUT -- YOU KNOW, YOU MAY NOT LIKE THE PROCEDURE THE LEGISLATURE HAS PUT INTO PLACE AND YOU THINK LUCAS SHOULD'VE REMAINED THE IN THE CASE AND YOU THINK IT SHOULD'VE BEEN ONE LAWSUIT, ONE

DETERMINATION, I THINK THAT
WOULD'VE BEEN A FINE PRACTICE.

IT JUST DOESN'T SEEM THAT
THAT'S WHAT THE LEGISLATURE
CONTEMPLATED SO IF I THROUGH IN
THE STATUTE OF LIMITATIONS I
DID IT BECAUSE I DON'T
UNDERSTAND HOW YOU COULD
PRESERVE YOUR RIGHTS IF YOU
HAVE TO WAIT UNTIL THE
UNINSURED MOTORIST CLAIM IS, IS
INCLUDED TO
SUE FOR YOUR SUBROGATION RIGHTS
SO HELP ME ON THAT ONE.

IN OTHER WORDS, YOU WANTED IT
EITHER TO BE ONE WAY OR THE
OTHER BUT YOU CAN'T BE CAUGHT
IN THE MIDDLE.

>> WELL, THE STATUTE OF
LIMITATIONS WOULDN'T BE A
QUESTION IF THE COURT ACCEPTED
OUR POSITION NAT THE INSURED
TORT-FEASOR SHOULD REMAIN A
PARTY.

>> SO WHAT'S BEEN DECIDED IN
THAT CASE?

WHEN WAS THE TORT-FEASOR'S
LIABILITY DETERMINED?

>> IT WAS NOT.

>> RIGHT.

>> THE TORT-FEASOR'S INSURANCE
CARRIER, ALLSTATE OFFERED TO
PAY ITS \$25,000 BEFORE THE
LAWSUIT WAS ACTUALLY FILED.
THAT OFFER CAME TO PLAINTIFF'S
COUNSEL, TEPPER'S COUNSEL IN
DECEMBER OF 2005.

>> WELL, IS THERE -- IS THERE A
CASE THAT SAYS OTHER THAN THE
SECOND DISTRICT CASE, OR IS
THERE A CASE THAT SAYS THAT THE
SUBROGATION RIGHT ACCRUES AT
THE TIME OF THE ACCIDENT?

>> OTHER THAN THE SECOND
DISTRICT CASE, I'M NOT AWARE OF
IT.

>> OKAY.

SO IT WOULD SEEM TO ME THAT IT
WOULD BE -- IT WOULD BE LOGICAL
THAT THE STATUTE OF LIMITATIONS
ON SUBROGATION CLAIM WOULD
ACCRUE ET CETERA -- AT THE TIME
THAT THE PAYMENT WAS FINALLY

MADE BY THE UNINSURED MOTORIST CARRIER.

>> THAT WOULD BE CONSISTENT --
>> BECAUSE THAT WOULD BE THE TIME WHEN THE DAMAGE COULD BE MEASURED THAT WOULD BE A BASIS FOR THE SUBROGATION CLAIM.

>> THAT'S CORRECT.

>> AND THAT WOULD BE IN ALIGN WITH WHAT WE HAVE SAID IN THESE OTHER LITIGATIONS, STATUTE OF LIMITATIONS CASES.

BUT LET ME, LET ME ASK YOU THIS QUESTION.

WOULD THERE --, THE, IF LUCAS HAD NOT BEEN SUED, AND THE DEMAND HAD BEEN MADE UPON THE UIM CARRIER, AND THE UIM CARRIER HAD STEPPED IN, AND PAID IN ORDER TO PRESERVE THE CLAIM OF, OF THE, THE CLAIM AGAINST THE INSURED, THE TORT-FEASOR, IS IT YOUR POSITION THAT, THAT THE UIM CARRIER COULD FORCE A SUIT AGAINST THE TORT-FEASOR?

>> TO ANSWER YOUR QUESTION, THAT'S EXACTLY WHAT HAPPENED HERE.

THE UIM CARRIER ADVANCED THE TORT-FEASOR'S LIMITS PRIOR TO SUIT BEING FILED.

>> OKAY.

>> AND THEN TEPPER'S COUNSEL IN COMPLIANCE WITH THE TERMS OF THE POLICY BECAUSE HE DIDN'T WANT TO SOMEHOW PREJUDICE THE UM CARRIER'S RIGHT OF SUBROGATION WHICH WOULD EFFECT HIS UM CLAIM THEN HE SUBSEQUENTLY FILED SUIT AGAINST BOTH LUCAS --

>> WELL HE DID THAT ON THE BASIS -- MY QUESTION, I RECOGNIZE THAT HE DID THAT BUT HE DID THAT TO COMPLY WITH THE POLICY.

>> THAT'S CORRECT.

>> COOPERATION PROVISION.

COULD HE OTHER THAN THAT POLICY CONTRACT QUESTION, IS THERE ANY BASIS UPON WHICH THE SUBROGATED CARRIER COULD FORCE THE INSURED TO SUE OTHER THAN THE FACT THAT

THERE'S THAT PROVISION IN THE CONTRACT?

>> NO, SIR.

IF THAT POLICY PROVISION WASN'T THERE, I DON'T THINK THEY COULD. BUT BECAUSE THAT POLICY PROVISION IS IN THIS POLICY, AND IT'S IN MOST --

>> WELL, THEN THE QUESTION IS, DOES THE POLICY PROVISION CONFLICT WITH THE STATUTE? ISN'T THAT THE QUESTION?

>> I SUPPOSE THAT'S AN INQUIRY. I DON'T FEEL THAT IT CONFLICTS WITH THE STATUTE AT ALL. THE STATUTE DOESN'T REALLY PROVIDE US WITH ANY GUIDANCE. IT DOESN'T MANDATE A DISMISSAL OF THE INSURED TORTFEASOR BECAUSE THE UM CARRIER HAS FRONTED THE FUNDS, NOR DOES IT AUTHORIZE THAT HE BE MADE A PARTY TO THE SUIT.

>> TELL ME WHAT HAPPENED IN 1991.

THE LAST TIME I REMEMBER THE STATUTE AS A LAWYER, IT LOOKED -- IN 1991 THE LEGISLATURE -- AND, LISTEN, THESE ARE ALWAYS DONE.

I MEAN, THE INSURANCE, YOU KNOW, INDUSTRY IS VERY INVOLVED IN THESE STATUTORY CHANGES. YOU HAD SOMETHING THAT LOOKED LIKE WHAT YOU WANT NOW, WHICH IS THAT EVERYONE GETS JOINED IN ONE CASE.

YOU'VE GOT THE UNINSURED MOTORIST CARRIER, YOU'VE GOT THE TORTFEASOR, AND YOU'VE GOT THE INJURED PERSON IS ONE DETERMINATION OF LIABILITY AND DAMAGES, AND EVERYONE'S BOUND BY IT.

THAT LOOKS LIKE -- AND THEN THE SAME IDEA OF IF THE AMOUNT IS TENDERED, BUT IT CHANGED. SO TELL ME WHAT THE CHANGE WAS IF IT WASN'T THAT FOR WHATEVER REASON, AND IT MAY NOT BE A GOOD POLICY -- I MEAN, A GOOD PUBLIC POLICY REASON -- BUT IT CHANGED TO WHERE NOW YOU HAD A WAIT, AT

LEAST BY THE STATUTE, UNTIL THE UNINSURED MOTORIST CLAIM WAS CONCLUDED IN ORDER TO SEEK SUBROGATION.

>> WELL, THE STATUTE CHANGED SO THE INJURED PARTY COULD RECEIVE IMMEDIATE COMPENSATION THAT HAD BEEN OFFERED BY THE TORTFEASOR. IN THIS CASE TEPPER RECEIVED \$25,000 FROM LUCAS IMMEDIATELY BECAUSE METROPOLITAN HAD TO FRONT THAT MONEY TO RETAIN HIS RIGHT TO SUBROGATION.

>> DIDN'T THAT ALSO EXIST BACK AT THE TIME OF THE STATUTE SHE'S REFERRING TO?

>> NO, AT THE TIME -- THAT'S THE '92 STATUTE.

BEFORE THAT IF METROPOLITAN WOULD NOT PERMIT -- TEPPER'S ONLY RIGHT WAS TO FILE SUIT. NOW METROPOLITAN MUST FRONT THAT MONEY, BUT THE STATUTE DOESN'T HAVE ANY LANGUAGE IN IT TO INDICATE, OKAY, THAT MEANS LUCAS IS NO LONGER A PARTY, OR, YES, LUCAS NEEDS TO BE A PARTY.

>> EXCEPT IT ADDED THE LANGUAGE THAT IS THE LANGUAGE THAT IS AT ISSUE HERE WHICH IS TO SAY THAT THERE CAN'T BE SUBROGATION UNTIL UNINSURED MOTORIST CLAIM IS CONCLUDED OR SOMETHING TO THAT EFFECT.

AND SEE, THAT -- WHAT WAS THE REASON, YOU KNOW, AGAIN IT DOESN'T MAKE A LOT OF SENSE TO ME, BUT THERE MUST HAVE BEEN SOME REASON, AND IT'S PRETTY CLEAR LANGUAGE.

I GUESS, YOU KNOW, WE'RE DEALING WITH SOMETHING THAT MAY CONFLICT WITH THE POLICIES AS JUSTICE WELLS IS ALLUDING TO.

IT SEEMS TO ME IT COULD BE A CONFLICT, BUT IT SAYS WHAT IT SAYS.

>> WELL, THE OLD DOMINION CASE INDICATES THAT'S PERMISSION.

>> WELL, THEY WERE LOOKING AT A STATUTE OF LIMITATIONS, THEY WERE LOOKING AT DIFFERENT CONSIDERATIONS, LET'S PUT IT

THAT WAY.

>> I AGREE.

BUT AS A PRACTICAL MATTER IT'S
WORDED AS IT IS WORDED WHICH
MEANS IT CAN SEEK THE \$25,000 IT
ALREADY PAID AND THEN MONEY THE
JURY DETERMINED THE PLAINTIFF
SHOULD GET IN THE UM TRIAL OR
WHATEVER THE UM CARRIER SETTLED
FOR BECAUSE THOSE ARE THE TWO
AMOUNTS.

SO I THINK WHAT THE STATUTE IS
SAYING YOU CAN SEEK SUBROGATION
THEN ONCE YOUR CLAIM HAS BEEN
QUANTIFIED.

>> WHAT ARE THE PRACTICAL --
WHAT'S THIS ALL ABOUT?

[LAUGHTER]

WHY DON'T YOU TELL US THAT.

>> HERE'S WHAT I THINK IT'S ALL
ABOUT, AND I CHALLENGE MY
OPPONENT TO GET UP HERE AND
EXPLAIN OTHERWISE.

HOW DOES IT BENEFIT LUCAS THAT
SHE IS NO LONGER A PARTY TO THIS
ACTION?

NO LONGER A PARTY TO AN ACTION
WHERE METROPOLITAN WILL EITHER
SETTLE THE CASE OR A JURY WILL
DECIDE WHAT THE CASE IS WORTH,
AND LUCAS IS RESPONSIBLE FOR
THAT?

ISN'T IT A BETTER PRACTICE THAT
LUCAS COULD BE AT THAT TRIAL
WITH COUNSEL TO CONFRONT
WITNESSES, PERHAPS HIRE EXPERTS
AND DO THINGS EITHER TO DIMINISH
OR LIMIT TEPPER'S CLAIMS?

>> ONCE YOU BRING THAT
SUBROGATION ACTION, DOES LUCAS
HAVE ANY RIGHT TO TALK ABOUT
LIABILITY, OR IS IT JUST A
MATTER OF DAMAGES?

THAT'S WHAT IS REALLY CONFUSING
TO ME HERE IS THERE'S NEVER BEEN
ANY KIND OF DETERMINATION OF
LIABILITY EXCEPT, I GUESS, WHEN
YOU MAKE THE OFFER, ARE YOU
SAYING -- I GUESS YOU'RE SAYING
YOU'RE LIABLE.

BUT SO WHAT ARE THE ISSUES THAT
YOU WOULD BE HAVING IN
SUBROGATION CASE?

>> I'M NOT CERTAIN.

NOW, THE CASE LAW INDICATES YOU COULD HAVE INCONSISTENT RESULTS IN THAT SUBSEQUENT SUBROGATION ACTION.

THE FIFTH DISTRICT WAS SO CONCERNED ABOUT THAT THEY MENTIONED THAT IN FOOTNOTE FOUR OF THEIR OPINION, AND THERE'S A CASE WE CITE IN OUR BRIEF, THE ATTORNEY TITLE CASE --

>> CAN I JUST GO BACK TO SOMETHING AND THEN, PLEASE, TRY TO TALK ABOUT THE PRACTICAL ASPECTS.

IT SAYS, "UPON FINAL RESOLUTION OF THE UNINSURED MOTORIST CLAIM, THE UNDERINSURED MOTORIST IS ENTITLED TO SEEK SUBROGATION AGAINST THE MOTORIST AND THE LIABILITY INSURER FOR THE AMOUNTS PAID TO THE INJURED PARTY."

THAT'S WHAT THE STATUTE SAYS. AND I DON'T -- TELL ME AGAIN WHAT IS NOT CLEAR.

YOU'RE SEEMING TO SAY THAT THAT WOULD ALLOW YOU, FIRST, EVERY TIME YOU PAY AN AMOUNT TO SEEK SUBROGATION, BUT THAT'S NOT WHAT THIS SAYS.

IT SAYS, "UPON FINAL RESOLUTION OF THE UNDERINSURED MOTORIST CLAIM."

THERE'S NO QUESTION THAT YOU HAD NOT FINALLY RESOLVED THE UNDERINSURED MOTORIST CLAIM, CORRECT?

>> CORRECT.

>> OKAY.

SO NOW IF YOU COULD GO BACK TO PRACTICALLY SPEAKING, IS THERE A REAL PROBLEM ABOUT IF THE STATUTE OF LIMITATIONS IS NOT AS JUSTICE WELLS SAYS, BUT AS JUSTICE LEWIS BELIEVES IT IS WHICH IS IT RUNS FROM THE TIME OF THE ACCIDENT, THEN IS IT A POSSIBLE, PRACTICAL PROBLEM THAT BY THE TIME YOUR UNDERINSURED MOTORIST CLAIM IS RESOLVED, THAT THE STATUTE OF LIMITATIONS MAY HAVE ALREADY RUN?

>> THAT'S CERTAINLY POSSIBLE.

>> AND THAT WOULD BE AN -- THAT

IS CERTAINLY NOT AN -- AND I SEE THAT AS BEING BROUGHT -- THAT WOULD BE AN ABSURD, UNREASONABLE, IMPOSSIBLE RESULT, CORRECT?

FOR YOU TO BE --

>> OF COURSE.

>> -- FOR YOUR COMPANY TO BE WITHOUT A REMEDY.

>> THE ACCIDENT HAPPENS IN MAY 2004 IF WE ACCEPT JUSTICE LEWIS' FOUR-YEAR -- IT'S ALREADY EXPIRED.

>> BUT IN THE PRACTICAL PROBLEM, IT SEEMS THAT LUCAS IS THE ONE POTENTIALLY BEYOND EVERYBODY ELSE, HE IS THE ONE THAT IS REALLY POTENTIALLY HARMED THE GREATEST AS I SEE IT.

NOW, I DON'T KNOW WHO'S REPRESENTING LUCAS PERSONALLY BECAUSE THE INSURANCE COMPANY CERTAINLY IS NOT -- WELL, LET'S JUST PUT IT THIS WAY, IF YOU GET, IF THE VERDICT COMES IN FOR \$100,000 AND NOW YOU'RE SEEKING SUBROGATION FOR \$100,000, DOES THE INSURANCE COMPANY FOR LUCAS UNDER LIABILITY, DO THEY HAVE TO COME BACK AND REPRESENT HIM ON THAT?

>> THAT WOULD DEPEND ON THE POLICY ALLSTATE HAS.

THEY MAY WELL, BUT THEY'D ALREADY SPENT THAT, AND THEY WOULD BE ABLE TO PROVIDE LUCAS --

>> HOW HAVE THEY SPENT THEIR LIMITS?

I THOUGHT THEY DIDN'T PAY THEIR LIMITS, I THOUGHT YOU DID THAT.

>> IN THE SCENARIO YOU MENTIONED, LUCAS WOULD BE RESPONSIBLE FOR THE 75.

>> BUT AS A PRACTICAL MATTER, DO THEY PAY THE 25,000, OR IS THERE SOMETHING THAT HAPPENS BETWEEN THE INSURANCE COMPANIES?

>> [INAUDIBLE]

>> -- THE POLICY IN WHICH THE LIMITS INCLUDE THE DEFENSE COST.

>> YES.

WELL, LUCAS WOULD BE DEFENDED IN A SUBROGATION ACTION, BUT

THERE'D BE NO MONEY TO PAY WHAT HE OWES METROPOLITAN.

>> RIGHT.

HOW DOES THIS WHOLE SCHEME -- IF YOU BIFURCATE THIS INTO TWO THINGS, I'M JUST THINKING OUT LOUD WITH IT -- YOU KNOW, ONCE YOU PAY THE FIRST AMOUNT IF YOU FILE AN ACTION BASED ON THAT ONLY, AREN'T YOU SPLITTING A CAUSE OF ACTION?

BECAUSE YOU'RE LATER GOING TO -- I MEAN, THAT ALSO COMES INTO PLAY.

SO WHY IS IT NOT THAT THAT MUST MATURE INTO ITS TOTALITY?

DO YOU UNDERSTAND WHAT I'M SAYING?

RATHER THAN SPLITTING THIS THING UP SO THAT IT ONLY GOES AT ONE TIME.

>> I UNDERSTAND.

I SUPPOSE METROPOLITAN COULD SUE FOR 25 NOW, AND THE DEFENSE WOULD BE UNDER SUBROGATION. THE STATUTE REQUIRES A FINAL RESOLUTION.

>> BUT UNLESS THE STATUTE RUNS, YOU ARE NOT -- I MEAN, IN TERMS OF THIS YOU WOULD HAVE YOUR UNDERINSURED MOTORIST CLAIM TO LITIGATE.

THAT GETS RESOLVED FOR WHATEVER AMOUNT, AND THEN YOU HAVE A SUBROGATION CLAIM.

SO THE DETRIMENT TO YOU IS THAT YOU'VE GOT A JURY JUST LOOKING AT METROPOLITAN FIRST TIME AROUND WITHOUT A REAL PERSON THERE, SUPPOSEDLY, AND THEN YOU'VE GOT TO SEEK SUBROGATION, YOU KNOW, BIG INSURANCE COMPANY AGAINST LITTLE LUCAS.

AND SO FROM A STRATEGIC POINT OF VIEW YOU DON'T LIKE IT, BUT IF THAT'S WHAT THE LEGISLATURE DECIDED TO DO, HOW DO WE CHANGE THAT?

>> I DON'T KNOW HOW THE LEGISLATURE COULD HAVE INTENDED THAT WE GO THROUGH A TRIAL AGAINST ONLY AN INSURANCE CARRIER WHERE A JURY'S LIKELY TO AWARD MORE MONEY WHICH WILL

ULTIMATELY BE THE RESPONSIBILITY OF AN INSURED WHO WAS NOT PRESENT TO DEFEND HIS INTERESTS, AND NOW HE'S GOING TO HAVE TO PAY THE BILL.

>> WHEN THE LAWSUIT PROCEEDS AGAINST METROPOLITAN ON THE UM COVERAGE, THEY'RE PROBABLY GOING TO BE CALLING LUCAS THERE AS TORTFEASOR, RIGHT?

IS THAT MECHANICALLY HOW THAT'S GOING TO HAPPEN?

>> IF THERE'S A LIABILITY DEFENSE, YES.

>> SO EVEN THOUGH LUCAS IS NOT A PARTY, THEY'RE GOING TO BE VERY MUCH INVOLVED AS A WITNESS IN THAT PROCEEDING.

>> LUCAS WOULD NOT HAVE COUNSEL THERE, WOULD NOT SIT AT THE TABLE UP HERE, THE JURY WOULDN'T BE LOOKING AT LUCAS.

THE PLAINTIFF'S ATTORNEY IN VOIR DIRE REFERRED TO THE INSURANCE COMPANY.

>> LET ME ASK YOU, TOO, HERE THERE WAS A DISMISSAL OF LUCAS BY THE TRIAL COURT, AND A LOT OF IT WAS ASSUMPTIONS THAT TEPPER DID NOT WANT TO PROCEED ON AND GET A JUDGMENT IN EXCESS OF WHAT THE COVERAGE AMOUNTS TO.

WHAT HAS THE LEGAL EFFECT HAD TEPPER ACCEPTED A VOLUNTARY OR DID A VOLUNTARY DISMISSAL?

WHAT IS THE LEGAL EFFECT ON THE UM CODES?

>> THE UM CARRIER WOULD CRY FOUL AND SAY YOU'VE VIOLATED A CLAUSE OF THE POLICY, AND YOU'RE SUPPOSED TO SUE PLAINTIFF, BOTH THE TORTFEASOR AND US, IN ANY ACTION AGAINST US.

>> BUT THE DISMISSAL PROCEDURALLY WOULD NOT COUNT AGAINST THE SUBROGATED CARRIER.

>> THAT'S CORRECT.

>> WELL, IF THIS CASE -- IF YOU SAY YOU'RE GOING TO HAVE A SEPARATE LAWSUIT AGAINST YOUR INSURED AND SAY THAT HE BREACHED THE COOPERATION CLAUSE, THEN ALL THIS IS -- WHY ARE WE EVEN WORRYING ABOUT THIS RIGHT NOW?

>> WELL, THAT'S ONLY IF HE DIDN'T JOIN AS A DEFENDANT THE TORTFEASOR.

>> BUT YOU'RE SAYING BY ALLOWING THE DISMISSAL, HE VIOLATED THE COOPERATION.

>> NO, NO, IF I SAID THAT, I MISSPOKE.

NO, I DIDN'T INTEND THAT AT ALL. WHAT I'M SAYING IS THE POLICY REQUIRES THE TORTFEASOR -- I'M SORRY, BE JOINED, THAT THE PLAINTIFF JOIN THE TORTFEASOR IN ANY ACTION AGAINST THE CARRIER. BUT THE PROBLEM HERE IS FROM LUCAS'S POINT OF VIEW, AND I THINK I NEED TO SHIFT THE PANEL TO LOOK AT IT FROM LUCAS'S POINT OF VIEW.

IT DOESN'T BENEFIT LUCAS.

THERE'S NO WAY IT BENEFITS HER. SHE CAN'T CONFRONT WITNESSES --

>> IT SEEMS TO ME, AGAIN, YOU'RE TALKING ABOUT WHAT'S MAYBE LOGICAL RATHER THAN WE'RE DEALING WITH WHAT THE LEGISLATURE SAID THE SECOND TIME AROUND.

THEY HAD PUT THE LANGUAGE IN FROM '91, IT WAS CLEAR THAT THEY BOTH -- THERE WAS GOING TO BE ONE VERDICT.

>> WELL, I CAN'T IMAGINE THE LEGISLATURE WOULD WANT TO DO ANYTHING ILLOGICAL.

[LAUGHTER]

I CAN'T IMAGINE THE LEGISLATURE WOULD NOT WANT A PARTY WHO'S GOING TO BE RESPONSIBLE FOR A SIGNIFICANT SUM OF MONEY NOT TO PARTICIPATE OR -- AND I CAN'T IMAGINE THE LEGISLATURE WOULD WANT TWO TRIALS WHEN ONE WOULD DO.

>> [INAUDIBLE] IT SAYS UPON FINAL RESOLUTION.

THOSE ARE KIND OF DIFFICULT WORDS TO GET AROUND.

I MEAN, AND THEY'RE THERE.

THE UNINSURED -- BOTH HOUSES PASSED IT, AND THE GOVERNOR SIGNED IT.

>> THE UNINSURED MOTORIST CLAIM IS NOT QUANTIFIED UNTIL IT'S

FINAL.

IT CAN'T BE.

>> IS THERE ANY OTHER LANGUAGE ANYWHERE AROUND?

BEFORE WE HAD THIS STATUTE, I THINK EVERYONE WOULD AGREE THAT IF A UM CARRIER PAID ITS INSURED FOR DAMAGES CAUSED BY A TORTFEASOR THAT WITHOUT THE CONTRACT THERE WAS SUBROGATION, CORRECT?

>> YES, SIR.

>> DOES THIS STATUTE, OTHER THAN THAT ONE SENTENCE, SOMEHOW ADDRESS THAT?

ARE THERE TWO RIGHTS NOW? IS THERE A CONTRACTUAL -- A STATUTORY RIGHT AND THEN A COMMON LAW RIGHT OF SUBROGATION, OR WHAT'S THE STATUS WITH REGARD TO THAT?

>> I HONESTLY DON'T KNOW.

BUT, OBVIOUSLY, THE STATUTE HAS ONE THING TO SAY ABOUT THE CAUSE OF ACTION COMMENCING.

THERE ARE OTHER VIEWS IN THE CASES WE'VE BANTERED AROUND, BUT WE DON'T NEED TO REACH THIS ISSUE IF THE TORTFEASOR'S THERE TO DEFEND HER INTERESTS, AND I FEEL I'M HAVING DIFFICULTY CONVEYING THAT POINT TO THIS COURT, THAT HERE'S A PERSON WHO'S GOING TO GET A LAWSUIT SERVED ON HER FOR \$80,000 FOR A RESULT THAT CAME IN ON A TRIAL --

>> YOU'RE NOT HERE TO HELP THE TORTFEASOR OUT.

I MEAN, AGAIN, IN ALL DUE DEFERENCE, YOU ARE CONCERNED --

AND I THINK IF IT BOILS DOWN TO IT, YOU DON'T WANT A CASE TO PROCEED AGAINST METROPOLITAN BY AN INJURED PERSON.

AND THAT'S UNDERSTANDABLE.

YOUR REMEDY, IT SEEMS TO ME, IS PROBABLY WITH THE LEGISLATURE, NOT WITH THIS COURT.

WE UNDERSTAND WHAT YOU'RE SAYING.

MOST OF US, YOU KNOW, HAVE BEEN INVOLVED WITH THESE KINDS OF CASES AND KNOW WHAT IT'S LIKE IF

YOU HAVE AN INSURANCE COMPANY ON YOUR SIDE, THAT IT'S GOOD FOR THE PLAINTIFF, BAD FOR THE DEFENDANT.

BUT THAT -- I DON'T KNOW HOW YOU CAN IGNORE THE LANGUAGE THAT JUSTICE KENNEDY JUST MENTIONED, THAT I MENTIONED, THAT WE MENTIONED THAT SAYS FINAL RESOLUTION BEFORE SUBROGATION COMES UNLESS WE GO WITH THERE'S SEVERAL TYPES OF SUBROGATION, AND THIS IS A DIFFERENT TYPE. THAT WOULD BE ANOTHER WAY TO GET THERE.

>> OF COURSE IT FAVORS METROPOLITAN IF THERE'S A TORTFEASOR, YOU'RE ABSOLUTELY RIGHT.

BUT LOGIC DICTATES, AND I BELIEVE IT WAS YOUR HONOR THAT SAID IT WAS LOGIC, THE TORTFEASOR HAS A RIGHT TO BE HEARD.

-- THE '92 AMENDMENT TO BE PERMISSIVE.

>> AND WITH THAT, YOU HAVE GONE WELL OVER YOUR TIME, AND WE WILL GRANT YOU A MINUTE FOR REBUTTAL, BUT --

>> THANK YOU, YOUR HONOR.
>> THANK YOU VERY MUCH.
>> THANK YOU.

>> MR. HALL?

>> MAY IT PLEASE THE COURT, MY NAME IS MARK TINKER.

>> TINKER, OKAY.

>> -- ANGEL LUCAS, SEATED AT THE TABLE IS MY PARTNER, CHARLES HALL OUT OF DAYTONA BEACH. I'D JUST LIKE TO --

>> ARE YOU REPRESENTING ALLSTATE OR LUCAS?

>> WE REPRESENT ANGEL LUCAS.

>> AND WHY -- EXPLAIN TO ME THE PRACTICAL REASON FOR WANTING TO HAVE MR., MS. LUCAS?

>> MS.

>> -- DISMISSED FROM THE SUIT.

>> THE PRACTICAL REASON AS FAR AS MS. LUCAS IS CONCERNED IS,

NUMBER ONE, HAVING HER
DISMISSED, HAVING HER NO LONGER
BEING SUED BY THE TORTFEASOR
ESSENTIALLY CAPS HER LIABILITY
IN THIS CASE.

SHE HAS HER INSURANCE POLICY,
HER LIABILITY LIMITS, AND
THERE'S THE UM LIMITS THAT
METROPOLITAN HAS ABOVE HER.
IF SHE IS SUED BY THE
TORTFEASOR, THERE COULD BE A
JURY VERDICT OF 200,000,
300,000, THERE COULD BE ANY
AMOUNT OF LIABILITY IF THE
TORTFEASOR CONCERN.

>> I DON'T THINK YOU MEAN THE
TORTFEASOR --

>> I'M SORRY, THE INJURED PARTY
IS NO LONGER INTERESTED IN
PURSUING MS. LUCAS.

HER LIABILITY WOULD BE THE
AMOUNT IN EXCESS OF HER
INSURANCE POLICY LIMITS THAT
METROPOLITAN PAYS AND LIMITS
THAT I --

>> SO IN OTHER WORDS, IF A
VERDICT WAS \$125,000 AND
MR. TEPPER HAD NOT GIVEN UP
BEING ABLE TO -- HIS RIGHT TO
SUE TEPPER, HE COULD TRY TO
OBTAIN THE EXTRA 25,000?

>> CORRECT.

ANY EXCESS AMOUNT OVER THE
AMOUNT OF HER LIABILITY LIMITS
AND THE AVAILABLE UM COVERAGE HE
COULD STILL SEEK TO OBTAIN FROM
HER.

SO BY HAVING THE CLAIM THAT
MR. TEPPER PRESENTED AGAINST HER
DISMISSED, SHE IS --

>> BUT WOULDN'T IT BE BETTER FOR
MS. LUCAS TO HAVE BOTH?

IN OTHER WORDS, MR. TEPPER
DOESN'T WANT TO TRY TO PURSUE
LUCAS FOR OVER \$100,000, 25,000
IS PROTECTED BUT FROM 25-100 SHE
IS AT RISK, AND IF THERE'S A
LAWSUIT AGAINST JUST TEPPER TO
METROPOLITAN AND HE HAS, AND
TEPPER HAS GOT SUBSTANTIAL
INJURIES, CHANCES ARE THE JURY'S
GOING TO AWARD, YOU KNOW,
\$100,000.

SO \$75,000 IS GOING TO BE IN

LUCAS, YOU KNOW, THEY'RE GOING TO TRY TO GET IT BACK FROM LUCAS.

IF LUCAS AND ALLSTATE STAY ENACTIVELY MAYBE THERE CAN BE A RESOLUTION THAT RESOLVES THE CASE FOR LESS THAN 100,000, YOU KNOW, FOR 50,000.

IT LIMITS HER ULTIMATE LIABILITY FOR DAMAGES IN THIS CASE.

>> THE KEY THERE IS THAT IF SHE IS NO LONGER A PARTY TO THAT LITIGATION, THERE'S NO COLLATERAL [INAUDIBLE] AS TO HER.

SO WHATEVER HAPPENS BETWEEN MR. TEPPER AND HIS INSURER, METROPOLITAN, IS NOT GOING TO BE BINDING UPON HER IN A SUBROGATION SUIT THAT ULTIMATELY --

>> BUT LET ME GO BACK TO YOUR FIRST STATEMENT.

YOU DISMISSED -- LUCAS WAS DISMISSED WITHOUT PREJUDICE, RIGHT?

>> AS TO MR. TEPPER?

>> YES.

>> ACTION AGAINST HER I BELIEVE SHE WAS DISMISSED WITH PREJUDICE.

>> WITH PREJUDICE?

SHE BREACHED HER RIGHT WITH THE UIM CARRIER?

I DOUBT IT.

I HOPE SHE DIDN'T.

>> MS. LUCAS IS NOT THE INSURED, MR. TEPPER IS THE INSURED.

>> OKAY.

AND SO BUT DID TEPPER GIVE HER A DISMISSAL WITH PREJUDICE?

NO.

COULDN'T HAVE.

I MEAN, THAT WOULD HAVE DESTROYED THE COVERAGE TOTALLY, SO THAT DIDN'T HAPPEN.

>> THE TRIAL COURT GRANTED LUCAS MOTION TO DISMISS, THAT'S HOW IT HAPPENED.

>> CORRECT.

>> SO THERE'S NO REASON THAT SHE CAN'T BE SUED AGAIN.

>> THE ONLY WAY SHE COULD BE

SUED AGAIN IS IF METROPOLITAN FILES A THIRD-PARTY CLAIM FOR SUBROGATION WHICH THE LEGISLATURE HAS SAID IN A STATUTE THAT IT CANNOT DO UNTIL IT DISSOLVES ITS UM CLAIM --

>> WELL, AFTER IT'S OVER SHE'S SUBJECT TO --

>> FOR EVERYTHING.

SHE COULD BE SUED FOR THE EXCESS BY TEPPER UNLESS STATUTE OF LIMITATIONS HAS RUN OUT.

>> WELL, THERE WOULD BE, THERE WOULD BE NO EXCESS IN THAT SITUATION BECAUSE THE SUBROGATION CLAIM THAT METROPOLITAN WOULD BE FILING WOULD BE FOR THE AMOUNT OF UNINSURED MOTORIST LIMITS THAT IT PAID.

THERE WOULD BE NO EXCESS ABOVE THE CAUSE OF ACTION JUST BECAUSE TEPPER HAS RESOLVED THE CASE WITH ITS OWN INSURANCE COMPANY, I MEAN, THAT WOULDN'T BE DESTROYED UNLESS THE STATUTE OF LIMITATIONS HAS RUN.

TEPPER COULD TURN AROUND AND FILE THIS LAWSUIT BEFORE THE FOUR YEARS EXPIRES, AND THEN IT WOULD BE ADJUSTED BY WHOMEVER, YOU KNOW, RECOVERS THE AMOUNT. BUT WHAT WOULD PRECLUDE TEPPER FROM FILING A LAWSUIT AFTER DISMISSAL WITHOUT PREJUDICE FROM FILING THE LAWSUIT?

>> WELL, THE ANSWER IN PRACTICAL PURPOSES IN THIS CASE WOULD BE THE STATUTE OF LIMITATIONS.

THE SECOND ANSWER IS --

>> THAT'S WHAT THIS REALLY COMES DOWN TO IS THE STATUTE OF LIMITATIONS ISSUE?

>> NO, YOUR HONOR, I DON'T BELIEVE SO.

>> WELL, DID THE LEGISLATURE SAY THAT WE'RE GOING TO DESTROY THE COMMON LAW RIGHT OF SUBROGATION?

>> NO.

THE MAIN ISSUE, AND I THINK THIS GOES BACK TO THE PURPOSE OF THAT 1992 AMENDMENT TO THE STATUTE --

>> SHE HAS TO GO BEHIND THE

WORDS OF THE STATUTE --

>> ABSOLUTELY NOT, YOUR HONOR,
YOU LOOK AT THE PLAIN WORDS OF
THE STATUTE.

>> WHAT DO THE WORDS SAY?

>> THE WORDS SAY THAT
METROPOLITAN HAS TO "UPON FINAL
RESOLUTION OF ITS UM CLAIM IT IS
THEREAFTER ENTITLED TO" --

>> THAT'S WHAT I'M SAYING, DOES
THAT SENTENCE DESTROY THE COMMON
LAW SUBROGATION?

>> NO, IT DOES NOT.

>> OKAY.

SO THERE WOULD BE THE CONCEPT,
IT DOESN'T SAY, "YOU SHALL NO
LONGER HAVE THE RIGHT OF COMMON
LAW SUBROGATION," THERE'S NO
WORDING LIKE THAT.

>> WHAT IT ESTABLISHES, THE
REASON, THE PURPOSE FOR THAT
AMENDMENT, AND THIS HAS BEEN
DISCUSSED IN THE CASE LAW, IS TO
PREVENT INSURANCE COMPANIES LIKE
METROPOLITAN FROM USING THEIR
SUBROGATION RIGHTS TO
ESSENTIALLY, FOR LACK OF A
BETTER TERM, HOLD THEIR INSURERS
HOSTAGE.

WHAT SOME RECALCITRANT COMPANIES
WERE DOING, THEY WERE REFUSING
TO SETTLE AND THEREBY
DEPRIVING --

>> WELL, THAT'S THE PART WHERE
THEY HAVE TO COME UP AND ADVANCE
THE MONEY.

>> CORRECT.

IF THEY HAVE THIS SUBROGATION
RIGHT AND THEY WISH TO ASSERT
IT, THEY CANNOT USE THAT RIGHT
TO FORCE THEIR OWN INSURED TO
KEEP SUING THE TORTFEASOR IF THE
INSURED DOESN'T WANT TO DO THAT
AND TO ESSENTIALLY WITHHOLD THE
UM FUNDS --

>> OH, NO, I UNDERSTAND THAT,
BUT WHERE DOES IT SAY IF YOU
PAID THE FUNDS THAT SOMEHOW
YOU'VE LOST YOUR COMMON LAW
RIGHT TO SUBROGATION?

DOES THE STATUTE SAY THAT?

>> NO, IT DOES NOT.

>> WE HAVE TO INTERPRET THAT
LAST SENTENCE AS BEING THAT,

CORRECT?

>> NO, I DON'T BELIEVE YOU DO.
THE ONLY WAY TO INTERPRET THE
STATUTE, TO INTERPRET THAT
SENTENCE IS AS WRITTEN.

IF THE UM CARRIER WISHES TO
RESERVE SUBROGATION RIGHTS, IT
HAS TO SETTLE ITS CLAIM --

>> FOR THE FIRST 25, THAT'S WHAT
THIS MEANS?

IF YOU WANT TO PRESERVE YOUR
RIGHTS TO SUBROGATION FOR THE
FIRST 25, YOU HAVE TO PAY THEM,
AND THAT'S THE ONLY TIME YOU
HAVE SUBROGATION?

>> IF YOU PRESERVE AS TO THAT
25, CORRECT.

AND WHAT IT ESTABLISHES,
ESSENTIALLY, A CONDITION
PRECEDENT TO THE UM CARRIER
BEING ABLE TO FILE THE
SUBROGATION CLAIM TO PURSUE
RIGHTS AGAINST THE TORTFEASOR IS
IT HAS TO RESOLVE ITS UM CLAIM
FIRST.

>> SO YOU'RE SAYING -- AGAIN, I
WANT TO MAKE SURE -- SO YOU DO
NOT AGREE THAT METROPOLITAN
WOULD HAVE HAD THE RIGHT AFTER
PAYING THE \$25,000 AND AFTER
LUCAS WAS DISMISSED TO SUE LUCAS
FOR THE FIRST 25,000?

>> NOT YET.

>> AND SO IN TERMS OF THIS ISSUE
OF THE STATUTE OF LIMITATIONS
FOR METROPOLITAN, IT WOULD ONLY
RUN OR BEGIN TO RUN WHEN THE
UNINSURED MOTORIST COVERAGE
CLAIM IS FINALLY RESOLVED?
BECAUSE WE NEED TO KNOW THAT.
WE'VE GOT TO PUT THAT IN BECAUSE
YOU CAN'T, CAN'T HAVE IT BOTH
WAYS.

WOULD THAT BE THE CASE?
IF IT'S PAID, IT'S FINALLY
RESOLVED, AND THAT'S WHEN THE
STATUTE BEGINS TO RUN AGAINST
LUCAS?

>> I AGREE WITH THAT, AND ONE
THING I WOULD SAY, I KNOW WE'VE
BEEN TALKING ABOUT --

>> WELL, ISN'T THAT A HARM TO

LUCAS WHICH IS THAT UNDER ONE SITUATION LUCAS GOT THE -- WOULD HAVE HAD THE ABILITY TO JUST HAVE THIS ALL RESOLVED WITHIN A SHORT PERIOD OF TIME, NOW IT COULD BE YEARS LATER LUCAS IS NOW BROUGHT INTO, BACK INTO COURT?

>> THAT'S -- WHAT WE'RE DOING HERE, AND WITH YOUR QUESTION AND WITH MY RESPONSE EARLIER ABOUT THE PURPOSE OF THIS IS TO PREVENT UM CARRIERS FROM WITHHOLDING MONEY FROM THEIR OWN INSURED, THE INJURED PERSON AS THEY'RE LITIGATING THIS SUBROGATION ISSUE IS WE'RE ESSENTIALLY DEBATING PUBLIC POLICY.

THERE ARE BENEFITS TO ONE SIDE AND THE OTHER.

>> I UNDERSTAND THAT, BUT ON THE STATUTE OF LIMITATIONS -- AGAIN, SO WE'RE CLEAR ON THIS -- WHAT YOU ARE SAYING IS THAT DOMINION IS WRONG ON THE STATUTE OF LIMITATIONS.

THE STATUTE OF LIMITATIONS DOESN'T BEGIN TO RUN BASED ON THIS LEGISLATIVE SCHEME UNTIL THE UNDERINSURED MOTORIST CLAIM OR UNINSURED MOTORIST CLAIM IS FINALLY RESOLVED.

>> I BELIEVE SO, AND QUITE FRANKLY, I BELIEVE THIS IS AN ISSUE FOR ANOTHER DAY. IF I AM WRONG ABOUT THAT AND IF METROPOLITAN IS PREJUDICED IF IT FILES A SUBROGATION ACTION, THERE'S A STATUTE OF LIMITATIONS DEFENSE RAISED, AND IT'S DISMISSED.

>> WELL, WE HAVE TO RESOLVE -- UNLESS WE DON'T TAKE THIS CASE AT ALL, WE'VE GOT TO RESOLVE IT BECAUSE DOMINION DEALS WITH STATUTE OF LIMITATIONS, DOESN'T IT?

>> DOMINION DOES, BUT I DON'T BELIEVE THAT'S THE ISSUE THAT PROVIDED THIS COURT WITH A CONFLICT JURISDICTION.

>> I MEAN --

>> IS THERE ANY ISSUE IN ANY BRIEF ABOUT STATUTE OF LIMITATIONS?

>> NO, THERE IS NOT.

>> OKAY.

>> THE DOMINION COURT, WHAT WE'RE LOOKING AT, THE REASON THAT DOMINION WAS USED TO ESSENTIALLY GET THIS CASE TO THIS COURT SAYS THAT THAT LAST SENTENCE OF 627, 727 IS PERMISSIVE IN NATURE.

>> LET ME GO BACK TO WHAT IS IN THE BRIEF, AND THAT'S METROPOLITAN.

THEY RAISED THE POINT THAT AN ISSUE WHERE, YES, THIS PROCEEDS ON THEN METROPOLITAN OVER THE 25 THEY'D ALREADY -- THEY'VE ALREADY PAID MAY BE LIABLE TO THE INSURER FOR ADDITIONAL MONEY, AND THEN THEY CAN THEN SUE LUCAS FOR THEIR SUBROGATION CLAIM, BUT THEN LUCAS IS STILL LEFT WITH AN EXCESS AMOUNT OVER THE 25 ON A PERMANENT LEVEL BEYOND THE 25.

WHAT'S YOUR RESPONSE TO THAT SCENARIO?

>> THAT'S GOING TO EXIST IN ANY CONTEXT.

IS MS. LUCAS -- IF SHE WAS REMAINING IN THE LAWSUIT THAT MR. TEPPER FILED, SHE WOULD BE LIABLE FOR ANY AMOUNTS ABOVE THE INSURANCE COVERAGE REGARDLESS. THERE'S NO DIFFERENCE IN THE LAWSUIT THAT'S GOING TO BE FILED BY METROPOLITAN AS FAR AS REGAINING SUBROGATION RIGHTS OR ENFORCING SUBROGATION RIGHTS AGAINST HER.

THE LIABILITIES ARE THE SAME, AND AS I STATED EARLIER, SHE WILL HAVE ALL OF HER DEFENSES AVAILABLE.

>> SO IT'S A CORRECT OBSERVATION, IT JUST DOESN'T MATTER TO YOU.

>> CORRECT.

>> I'M STILL CONCERNED ABOUT --

>> [INAUDIBLE] I DIDN'T HEAR WHAT YOUR QUESTION WAS THAT HE SAID YES TO.

>> IT'S A CORRECT OBSERVATION THAT IT'S NOT RELEVANT TO THIS PROCEEDING BECAUSE THE RESULT IS GOING TO BE THE SAME EITHER WAY. THE ONLY QUESTION IS MS. LUCAS IS GOING TO HAVE THE SAME POTENTIAL LIABILITIES WHETHER IT'S PAYING METROPOLITAN OR MR. TEPPER DIRECTLY UNDER THE SCENARIO THAT WAS JUST PROVIDED. THE ONLY DIFFERENCE IS WHEN MR. TEPPER GETS HIS MONEY, AND THAT --

>> BUT FOR THE STATE OF FLORIDA AND THE COURT SYSTEM IT'S A HUGE DIFFERENCE WHETHER IT BE ONE VERDICT, EVERYBODY AND ANOTHER -- HOW CAN YOU SAY THAT IT'S NO DIFFERENCE TO LUCAS OR TO THE INSURANCE COMPANIES? I MEAN, WE'RE DEALING WITH A VERY PRACTICALLY DIFFERENT SITUATION.

>> IT'S THE ONLY DIFFERENCE IS WHO IS FILING THE CLAIM AGAINST MS. LUCAS AS FAR AS HER OWN LIABILITY WHETHER IT'S MR. TEPPER FILING A CLAIM DIRECTLY, OR IT'S METROPOLITAN FILING IT IN SUBROGATION. HER LIABILITIES ARE THE SAME. THE ONLY DIFFERENCE IS WHEN MR. TEPPER IS ABLE TO RECOVER HIS MONEY, WHETHER HE HAS TO WAIT THROUGHOUT THE ENTIRE LITIGATION WHERE METROPOLITAN'S ATTEMPTING TO FORCE --

>> BUT I'M STILL CONCERNED ABOUT WHEN YOU CAN FILE THIS SUBROGATION CLAIM BECAUSE IT SEEMS TO ME FROM WHAT YOU HAVE SAID THAT MR., THAT METROPOLITAN CANNOT FILE THEIR SUBROGATION CLAIM UNTIL THE WHOLE THING IS OVER, YET YOU SEEM TO SUGGEST THAT YOU STILL HAVE TO HAVE FILED THE SUBROGATION CLAIM WITHIN THAT ORIGINAL FOUR-YEAR STATUTE OF LIMITATIONS PERIOD. AND IT JUST SEEMS TO ME THAT THE INSURER HERE IS IN A CATCH 22. SO I WANT TO GO BACK TO THAT STATUTE OF LIMITATIONS ISSUE

EVEN THOUGH YOU SAY IT'S REALLY NOT IMPORTANT HERE.
DOES METROPOLITAN HAVE THE RIGHT ONCE THIS UM CLAIM IS FINAL TO FILE THIS SUBROGATION CLAIM, OR ARE THEY STILL SUBJECT TO A STATUTE OF LIMITATIONS DEFENSE?
>> THEY HAVE -- WHAT THIS COMES DOWN TO IS THE PLAIN LANGUAGE OF THE STATUTE.
THEY HAVE TO WAIT UNTIL THE UM CLAIM IS RESOLVED.
THEY ABSOLUTELY HAVE THE RIGHT TO FILE THEIR SUBROGATION CLAIM, AND THAT CLAIM WOULD BE SUBJECT TO ANY DEFENSES INCLUDING EQUITABLE, INCLUDING STATUTE OF LIMITATIONS IF IT APPLIES --
>> PLEASE ANSWER HER QUESTION AS TO WHEN DOES THE STATUTE OF LIMITATIONS ARISE IN THIS CASE.
>> THERE ARE ACTUALLY -- ACCORDING TO THE DOMINION OF CANADA CASE, THERE'S CONTRACTUAL SUBROGATION, THE STATUTE OF LIMITATIONS ON THAT CLAIM ARISES AS OF THE DATE OF THE ACCIDENT. THERE'S EQUITABLE WHICH ARISES AS OF THE DATE OF PAYMENT. SO THE ISSUE ADDRESSED IN THE DOMINION CASE WAS THE CONTRACTUAL SUBROGATION CLAIM HAD EXPIRED, BUT IT STILL DID --
>> BUT WOULDN'T IT MAKE SENSE -- DOES THAT ANSWER YOUR QUESTION, CHIEF?
>> WE'LL GO ON.
>> WOULDN'T IT MAKE SENSE IN THIS SETTING TO RUN FROM WHEN THE UIM PAYMENT, THE UIM CLAIM BECAME FINAL BECAUSE THAT WOULD MAKE IT CONSISTENT WITH THIS WHOLE LINE OF CASES THIS COURT HAS COME OUT WITH?
AND THEN IN THE BEGINNING AND ABOUT 1996 ON WHEN THE STATUTE OF LIMITATION RUNS IN CLAIMS AND LITIGATED MATTERS?
AND SO THAT WOULD BE A TIME WHEN THE STATUTE OF LIMITATIONS WOULD RUN BECAUSE THAT WOULD BE WHEN, EVIDENCED BY THIS STATUTE, THE SUBROGATION BECAME FINAL.
>> I AGREE.

>> AND THAT'S SORT OF WHERE I STARTED MY QUESTION AT THE BEGINNING TO SAY THAT'S WHAT WOULD HAPPEN.

I THINK WHAT HAPPENED IS WE'RE NOW TALKING ABOUT CONTRACTUAL SUBROGATION, YOU KNOW, EQUITABLE SUBROGATION, AND MAYBE STATUTORY SUBROGATION.

AND I THINK WE ALL WOULD HAVE TO AGREE THAT IF THE LEGISLATURE INTENDED FOR METROPOLITAN OR ANY UNINSURED MOTORIST CARRIER NOT TO BE ABLE TO SEEK SUBROGATION UNTIL THEIR CLAIM WAS FINALLY RESOLVED, THEY COULDN'T AT THE SAME TIME HAVE ENVISIONED THAT THE STATUTE OF LIMITATION MIGHT HAVE RUN.

I MEAN, THEY COULDN'T CREATE A RIGHT AND THEN SAY THAT RIGHT NEVER EXISTED, IT EXPIRED BEFORE YOU WERE ABLE TO FILE YOUR LAWSUIT.

>> I AGREE, AND THAT'S MY UNDERSTANDING OF EQUITABLE SUBROGATION, IT ARISES AT PAYMENT.

THE UM CARRIER IS IN CONTROL OF WHEN IT MAKES THAT PAYMENT.

>> WHO DO YOU REPRESENT?

>> ANGEL LUCAS.

>> AND WHO IS PAYING YOUR FEE?

>> ALLSTATE INSURANCE COMPANY.

>> THE THING THAT IS, I FIND REALLY INTERESTING IS THAT THE INSURANCE COMPANIES ARE SHOOTING AT EACH OTHER HERE ON THIS THING, AND OFTEN THESE KINDS OF CASES GET DETERMINED IN THAT FASHION WHETHER TWO INSURANCE COMPANIES, YOU KNOW, SHOOTING AT EACH OTHER.

ALLSTATE ALSO PROVIDES UNINSURED MOTORIST COVERAGE TO ITS INSURED, SO YOU'RE HEARING THE QUESTION, WHAT'S THE PRACTICAL REASON FOR THESE THINGS?

YOU KNOW, THAT'S WHY WE TALK ABOUT STATUTE OF LIMITATIONS, YOU KNOW, THIS WHOLE WORLD GOES AROUND, BUT IT COMES AROUND AS WELL.

THAT'S THE KIND OF THING, WE UNDERSTAND ESOTERIC ARGUMENTS AND TECHNICAL ARGUMENTS, BUT THAT'S WHY WE MANY TIMES TRY TO GET TO WHAT'S THE MEAT HERE?

>> THE MEAT OF IT IS, QUITE FRANKLY, ALLSTATE'S POSITION IS THAT IT WILL ALWAYS WAIVE SUBROGATION IF IT DOES NOT BELIEVE THAT THE TORTFEASOR IS COLLECTIBLE, IF IT DOES NOT BELIEVE IT'S GOING TO ENFORCE THAT RIGHT, IT WAIVES SUBROGATION --

>> [INAUDIBLE]

>> AND WHAT --

>> COUNSEL, I DON'T WANT YOU TO MAKE THAT KIND OF REPRESENTATION.

I MEAN, I PRACTICED IN THIS FIELD FOR 30 YEARS FOR AND AGAINST ALLSTATE, AND EACH CASE IS DIFFERENT.

AND EACH CLAIMS REPRESENTATIVE IS DIFFERENT AND THE HOME OFFICE MAKES DIFFERENT DECISIONS, SO DO NOT SAY THAT ALLSTATE IS GONNA DO A CERTAIN THING IN EVERY INSTANCE.

AT LEAST AS FAR AS MY, I'M CONCERNED BECAUSE I KNOW MY EXPERIENCE IS DIFFERENT.

>> I UNDERSTAND, AND TO GET TO THE MEAT OF IT, THE PRACTICAL PURPOSE OF THIS IS, AGAIN, THE LEGISLATURE'S PURPOSE IN THIS AMENDMENT IN WRITING THIS STATUTORY LANGUAGE WAS TO PREVENT INSURANCE COMPANIES FROM USING THAT SUBROGATION RIGHT TO HOLD THEIR INSURANCE HOSTAGE.

>> COULDN'T THEY HAVE DONE THAT AT THE SAME TIME AS, SAY, YOU PAY THE 25, SO THE, THE INJURED PARTY -- I MEAN, IT'S NOT ALWAYS GOING TO BE 25, IT COULD BE 10, IT COULD BE 100, BUT THEN THAT IT WOULD MAKE SENSE TO STILL HAVE THE OTHER ASPECTS OF THE PRE-'92 STATUTE WHICH WOULD HAVE ONE RESOLUTION, ONE LAWSUIT IN WHICH LIABILITY AND DAMAGES ARE DETERMINED.

AND WHAT WE'VE GOT HERE AS A

PRACTICAL MATTER, AND I WILL SAY IT AGAIN BECAUSE IT'S THE PRACTICALITY, METROPOLITAN DOESN'T WANT TO BE SUED BY TEPPER AND BE THERE AS THE INSURANCE COMPANY. THAT'S NUMBER ONE. THEN WHAT HAPPENS IS METROPOLITAN TRIES TO SUE LUCAS. IT'S A BIG INSURANCE COMPANY AGAINST LUCAS WHEREAS IF EVERYBODY WAS IN THERE, WE'D KNOW EXACTLY WHAT WAS GOING ON. AND THAT IS THE PRACTICAL PART IS THE INSURANCE COMPANY, WHEN THEY'RE AN UNINSURED MOTORIST CARRIER, WANTS THE TORTFEASOR IN BUT DOESN'T WANT THEM THIS JUST IN WHEN THEY'RE, YOU KNOW, SUING IN THE OTHER DIRECTION. CORRECT?

>> CORRECT.

AND THE LEGISLATURE COULD HAVE DONE THAT, AND I'M SURE WE COULD COME UP WITH A BUNCH OF WAYS WE THINK THEY COULD BETTER ADDRESS THE SITUATION, BUT WE'RE TALKING ABOUT PUBLIC POLICY.

THE LEGISLATURE MADE THE DECISION THAT IT WANTS THE INSURANCE COMPANY TO SETTLE UP WITH ITS OWN INSURED WHO'S BEEN INJURED BEFORE IT TRIES TO GET MONEY BACK.

SO THE LEGISLATURE PROBABLY LOOKED AT A BUNCH OF DIFFERENT SCENARIOS, DECIDED THIS WAS THE WAY TO DO IT --

>> DO WE HAVE LEGISLATIVE HISTORY THAT SAYS THAT?

>> I'M SORRY?

>> DO WE HAVE LEGISLATIVE HISTORY THAT SAYS THAT'S WHAT THEY WANTED TO DO?

>> YES.

IN METRIX SOUTH V. ROSE, IT DISCUSSES THE '92 AMENDMENT AND PUTS IN THE HOUSE LEGISLATIVE HISTORY DISCUSSING WHAT THEY WERE ATTEMPTING TO DIMINISH, THAT IS TO PREVENT INSURANCE COMPANIES FROM USING SUBROGATION RIGHTS TO WITHHOLD MONEY FROM AN INJURED PERSON.

THEY HAD TO FRONT THE MONEY
[INAUDIBLE] AND THE SECOND PART
OF THAT IS THEY HAVE TO SETTLE
UP THE UM CLAIMS BEFORE THEY DO
THIS LAWSUIT TO ENFORCE
SUBROGATION.

BLESS YOU.

>> EXCUSE ME.

IS THERE ANY TENSION IN THE CASE
BETWEEN THE INTERESTS OF
ALLSTATE AND THEIR INSURED,
LUCAS?

>> NOT THAT I'M AWARE OF.

>> YOU THINK THEIR INTERESTS ARE
COMPLETELY LINED UP?

>> ALLSTATE IS HAVING US HERE TO
DO WHAT IS BEST FOR MS. LUCAS.
NUMBER ONE, SHE HAS BEEN ABLE TO
BE DISMISSED FROM THIS
LITIGATION THAT WAS FILED BY
MR. TEPPER, WE'D LIKE TO HAVE
THAT DECISION AFFIRMED, AND
NUMBER TWO IS THAT METROPOLITAN
IS ATTEMPTING TO BRING HER IN AS
A THIRD-PARTY CLAIMANT IN
SUBROGATION.

THE STATUTE SAYS IT'S NOT
ALLOWED TO DO THAT, SO ALLSTATE
WOULD LIKE HER TO HAVE THE
BENEFIT OF THE STATUTORY
LANGUAGE.

>> COUNSEL, I APPRECIATE YOUR
CANDOR BECAUSE ALL OF OUR
EXPERIENCES ARE NOT THE SAME,
AND SO YOU'RE ADDRESSING ISSUES
THAT MAYBE SOMEBODY ON THE COURT
IS INTERESTED IN.

I APPRECIATE YOUR CANDOR IN
APPROACHING US.

>> THANK YOU, I APPRECIATE THAT.

>> AND WITH THAT YOU'VE EXCEEDED
YOUR TIME ALSO.

WE'LL GIVE YOU JUST A MINUTE TO
WRAP UP.

>> THANK YOU, YOUR HONOR.

I JUST HAVE TWO POINTS.

TO JUSTICE ANSTEAD'S QUESTION,
ALLSTATE HAS NO INTEREST IN
MS. LUCAS BEING INVOLVED IN A
LAWSUIT AGAINST TEPPER AND
LUCAS.

WHY WOULD THEY WANT TO BE THERE
JUST TO LESSEN THEIR INSURED'S
PERSONAL LIABILITY?

THEY WOULD NOT.

JUSTICE LEWIS, AS A PRACTICAL MATTER IF YOU DO NOT REVERSE THE FIFTH DISTRICT COURT OF APPEALS, HERE'S WHAT WILL HAPPEN IN THIS CASE.

THIS CASE WILL PROCEED TO TRIAL AGAINST METROPOLITAN ONLY IN FLAGLER COUNTY, LIKELY NEXT YEAR AND 2010.

ABSENT AN APPEAL THEN METROPOLITAN WILL HAVE TO FILE A SEPARATE LAWSUIT AGAINST MS. LUCAS.

THE FIRST DEFENSE WILL LIKELY BE RAISED AS STATUTE OF LIMITATION, WE'VE BANTERED THAT.

BUT MORE IMPORTANTLY, THE NEXT DEFENSE THAT'S GOING TO BE RAISED, THEY'RE GOING TO SAY THE AMOUNT OF THE MONEY THE JURY DETERMINED TEPPER SHOULD RECEIVE IS NOT BINDING ON THEM, SO THEY'RE GOING TO WANT TO TRY THAT CASE ALL OVER AGAIN.

>> I THOUGHT COUNSEL STOOD AND REPRESENTED THE COURT THAT THE STATUTE OF LIMITATIONS IS UNDERSTANDING AND INTERPRETATION IS THAT THAT RIGHT DID NOT EXIST UNTIL THE UM BENEFITS WERE FINALIZED.

THAT STATEMENT WAS MADE HERE, WAS IT NOT?

>> I CAN'T IMAGINE THAT IT'S BINDING --

>> WELL, IT'S OPINION, I GUESS IT WOULD BE BINDING ON EVERYONE.

>> MORE IMPORTANTLY, COUNSEL FOR MS. LUCAS IS GOING TO HAVE TO SAY WE DON'T AGREE WITH WHAT THAT PRIOR JURY DID, WE NEED ANOTHER JURY TO DETERMINE THAT, AND WE'RE GOING TO HAVE TO TRY THIS CASE TWICE.

WHY TRY IT ONCE --

>> BECAUSE THEY THINK, BECAUSE ALLSTATE IS SAYING WE THINK WE'LL DO BETTER WITH A JURY IN FLAGLER COUNTY WHEN METROPOLITAN IS THE ONE SUING.

WE THINK WE'LL BE ABLE TO GET A SMALLER DAMAGE VERDICT FOR HER. THAT'S WHAT THEY'RE SAYING.

>> I'M INCLINED TO AGREE WITH YOU.

>> WELL, THEN IT IS IN MS. LUCAS'S INTEREST.

>> WHERE DOES THAT LEAVE US?

>> SOUNDS LIKE YOUR BEEF IS WITH THE LEGISLATURE.

>> WHAT THIS COURT ALWAYS SAYS IS WE SHOULD END THESE CHARADES. THAT'S WHAT YOU SAID, AND THAT'S WHAT YOU SAID, JUSTICE QUINCE AND JUSTICE WELLS.

WE SHOULD TELL THE JURY THIS IS A UIM CASE, THESE PEOPLE ARE RESPONSIBLE, AND IF METROPOLITAN HAS TO PAY ANYTHING, GUESS WHAT? THEY HAVE TO GET IT FROM MS. LUCAS.

>> WITH THAT, YOU HAVE NOW EXCEEDED YOUR ADDITIONAL TIME.

>> I WAS JUST GETTING WOUND UP, BUT THANK YOU, YOUR HONOR.

>> WE KNOW THAT.

[LAUGHTER]

THE COURT WILL BE IN RECESS FOR TEN MINUTES.

>> PLEASE RISE.