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Supreme Court of Texas.
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Petitioner,
v.
Teresa NICKERSON, Respondent.
No. 04-0427.

April 14, 2005

Appearances:

R. Brent Cooper, Cooper & Scully, P.C., Dallas, for petitioner.
Jesse L. Nickerson III, Nickerson Law Office, for respondent.

Before:

Chief Justice Wallace B. Jefferson, Priscilla R. Owen, David M. Medina, Paul W. Green, Nathan L. Hecht, Dale Wainwright, Phil Johnson, Scott A. Brister, Justices.

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SPEAKER: Oyez, oyez, oyez, the honorable, the Supreme Court of Texas. All persons having business before the honorable, the Supreme Court of Texas, are admonished to draw near and give their attention, for the Court is now sitting. God save the state of Texas and this honorable Court.

CHIEF JUSTICE JEFFERSON: Thank you, please be seated. Good morning. The Court has four matters of this oral submission docket. In the order of their appearances they are: Docket No. 04-0427 State Farm Mutual Automobile Insurance Company v. Teresa Nickerson from Lamar County in the Sixth Court of Appeals District, Docket Number 04-0514 State Farm Mutual Automobile Insurance Company v. Jimmie R. Norris from Limestone County in the Tenth Court of Appeals, Docket No. 04-0537 Lilith Brainard v. Trinity Universal Insurance Company from Gray County in the Seventh Court of Appeals District, and Docket No. 04-0570 GTE Mobilnet of Houston, Inc. v. the Chair King from Harris County in the 14th Court of Appeals District.

The Court has allotted 15 minutes per side in the first three matters and 20 minutes per side in the last. The court will take a brief recess between each argument. Justice Hecht is sitting in each of these matters, but he is currently at Federal Rules Advisory Committee meeting in Washington D.C. Justice O'Neill is not sitting in the first three matters and Justice Johnson is not sitting in 04-0537, the Brainard case. These proceedings are being recorded and the link to the arguments will be posted on the Court's website by the end of the day.

The Court is ready to hear argument in 04-0427 State Farm Mutual Automobile Insurance Company v. Teresa Nickerson.

SPEAKER: May it please the Court. Mr. Cooper will present argument for the petitioner. Petitioner has reserved three minutes for rebuttal.

ORAL ARGUMENT OF R. BRENT COOPER ON BEHALF OF THE PETITIONER

MR. COOPER: May it please the Court. The sole issue in this case is whether Chapter 38 of the Civil Practice and Remedies Code allows recovery of attorney's fees by an insurer prior to the time the uninsured motorist carrier has an obligation to pay the damage. Now the starting point we believe in this Court's analysis is under Chapter 38 and as this Court is well aware a few years ago in Grapevine Excavating v. Maryland Lloyds. This Court held a couple of things. One is this Court held that Chapter 38 does apply to insure its contracts. But number two importantly I think with respect to this case, this Court held that under Chapter 38, "in order to recover the attorney's fees that it was incumbent upon the insurer to show that there had been a breach of contract owned apart of the insurer." Now the question in this case is -- was the underlying suit won for breach of contract.

The uninsured motorist policy which was issued by State Farm in this case was the one that is prescribed by the Texas Department of Insurance. And essentially it requires that State Farm to pay damages which a covered person is -- and here are the key terms, "legally entitled to recover from the owner co-operator of an uninsured motor vehicle." Now in this case, the question is when was there a duty to pay on State Farm and in what point in time did Nickerson become legally entitled to recover damages from Christopher. And we believe the controlling case with respect to our case is this Court's decision in the Henson case. And there were three pronouncements from this Court in Henson which we feel controlled the disposition of this case. First, this Court in Henson -- and again Henson involved -- as the Court is well aware, prejudgment interest, not attorney's fees but the whole issue was when was there a duty to pay and when would there be a breach of contract.

In Henson, this Court said three things. One, it says "neither of these events, the claim itself or the filing of the suit triggers an obligation on the part of the uninsured motorist carrier to pay." This Court went on to say that when the jury found contraries on this case, the uninsured motorist get fault for the accident and found Henson damaged by her negligence. Henson became legally entitled to recover from insurers. That is the first point in time in which there was a legal entitlement to recover was when the jury found that the uninsured motorist was liable to the insurer Henson in that case. In fact --

JUSTICE WAINWRIGHT: Mr. Cooper, is the approach that you're asking this Court to follow different from UIM and UM coverages where insurance contracts compared to other contracts under Chapter 38?

MR. COOPER: Absolutely not, your Honor. Because with respect to all other contracts, in order to recover under Chapter 38 there must be an obligation to pay on that contract. You must be suing for a breach of contract before you can get attorney's fees. In here, we're saying that you should have been able to get attorney's fees with respect to uninsured motorist contract until there is a right to recover under the contract.

JUSTICE WAINWRIGHT: For contracts outside this context, as long as there's proper presentment and you get attorney's fees going back to

that date, even though there may be a later trial and whether the brief actually occurred with the amount of damages for that breaches --

MR. COOPER: But it --

JUSTICE WAINWRIGHT: -- here you're saying the attorney's fees shouldn't occur until after the jury verdict or the judgment.

MR. COOPER: Correct.

JUSTICE WAINWRIGHT: Why is that not different from other contracts? And if it is why should we follow a different rule here?

MR. COOPER: Well, first off we're not asking you to follow a different rule. We're asking the Court to follow what it said in Henson. But second in these other cases where you say there was presentment -- at the time of the presentment there was a mature claim and if you look at Chapter 38 --

JUSTICE WAINWRIGHT: So it's the issue of material claim or is it legal entitlement to pay?

MR. COOPER: Well, actually for the pay --

JUSTICE WAINWRIGHT: When a party presents a breach of contract claim and the amount I think they're owed, if there's a dispute there, it will be hard for us to say there's a legal entitlement to pay until after the trial or after a legal determination. Here you're saying there should be a verdict to our judgment and that's when the legal entitlement to pay your assets so --

MR. COOPER: Well --

JUSTICE WAINWRIGHT: -- so is it your claim or is it legal entitlement? What's the test?

MR. COOPER: Well, it depends upon the nature of the contract. For example, if I owe Mr. Nickerson here a hundred dollars and it was a note suit and that the note was past due and he sued me, there would be an entitlement to recover those attorney's fees because the claim is mature even though there was no legal entitlement to pay. That the issue of legal entitlement to pay is the condition precedent that the State Board of Insurance has placed in the uninsured motorist contracts in the state of Texas, and the court that the State Board of Insurance we believe as well as this Court has said that the obligation to pay that there is no right to receive payments until this condition has been met. And that is part of the terms of the contract that was entered into between the insured and the insurer in this case.

Also you go to Chapter 38.002 of the Civil Practice and Remedies Code which is the government statute which the suit was brought under. There are three elements. The first two really don't apply on this case -- well, they do apply but they're not in dispute. It's the third one which is in dispute which is "that to recover attorney's fees under this chapter it must be for payment for the just amount owed, which must not have intended before the expiration of the 30th day of the claim presented." And you look at the cases interpreting 38.002 particularly that the phrase "just amount owed in the courts, whether it's insurance, whether it's other context," have said that means there was a legal entitlement to those damages. For example --

JUSTICE BRISTER: So, legally entitled is the same as just amount owed?

MR. COOPER: There had been at least three courts of appeals who have said that that is the case. The Austin Court, the 14th Court, and the Eastland Court. They said that they are the same. That is that their all conditions preceded having satisfied and that there is a current legal obligation to receive those points.

JUSTICE BRISTER: That is correct --

MR. COOPER: Now if you look in this case following the Henson and

again the last holding in Henson -- Henson which I think is important is this Court said about the terms and the policy, no obligations to pay the claim existed under the UM policy until the jury established to the uninsured motorist liability. And the insurers pay the claim promptly after jury makes findings because no contractual duty was breached. Henson has no right to receive the benefits earlier than he in fact received them. So this Court in Henson said until the jury return to verdict there was no breach of contract.

JUSTICE WAINWRIGHT: As I see, you're not asking for -- if I understand what you're arguing correctly, a different application of Chapter 38 for these types of contracts. You're saying you look at the language of the contract and then apply Chapter 38 to it. There must be under the language of the contract a legal entitlement to recover before a breach can occur.

MR. COOPER: That is correct. That's what the supporting element. We believe what it did hold in the Henson case, it is an addition to receive --

JUSTICE BRISTER: [inaudible] the attorneys?

MR. COOPER: I'm sorry?

JUSTICE BRISTER: In Henson, you got to address the attorney's fees.

MR. COOPER: That is absolutely correct. It address --

CHIEF JUSTICE JEFFERSON: And -- and Chapter 38 talks about presentment of the claim, right?

MR. COOPER: Well, Chapter 38.001 said "if a person may recover reasonable attorney's fees from an individual or corporation in addition to the amount of -- and the key terms are valid claim." That is you have a valid claim. You go to 38.002 it does address the presentment of the claim. It requires to be presented but it also says that "the payment for the just amount due must not have been made within 30 days after presentment of a claim for a just amount due." And again you look at cases under Chapter 38.002 that have determined just amount due to meet, you have a present right to receive the money. This Court has addressed in the past issues regarding conditions precedent. That the Lynch case -- this Court said that Lynch v. -- Dillon v. Lynch the court had promised to pay, it may subject to a condition precedent, no breach of contract occurs until the condition occurs. And following this Court's holding in Lynch, also in Henson, there was no obligation to pay until there had been a determination by the jury that Ms. Nickerson was legally entitled to recover from the uninsured motorist.

CHIEF JUSTICE JEFFERSON: Is there a way to read Chapter 38 as a legislative policy to encourage the prompt payment of claims so that once the claim is presented the -- it's resolved quickly by the company rather in delaying 'til after --

MR. COOPER: Well --

CHIEF JUSTICE JEFFERSON: -- drawn?

MR. COOPER: I don't think that legislative policy, your Honor, is expressed in Chapter 38 for this reason. If you don't check the 38.006, there are -- it says basically "if you can get attorney's fees under another section, you don't get it under Chapter 38." One of the other sections as referred to is Article 21.21 of the Insurance Code which this contract would be substituted. And within Article 21.21, there is a legislative intent regarding prompt payment of claims under Section 4, subsection 10, the prompt payment claims act that is -- and I'm sorry, it's not 21.21 any more -- it's Section 421 or 422 of the Insurer's Code. The legislature is trying to confuse us all by renumbering all the statutes even though they are the same. But I think

most of us know about Article 21.21. But, your Honor, I believe even if that was the case, there still is encouragement to pay the claims profit because once that determination has been made there is every incentive on the part of the insurance company to pay it within 30 days or the insurance company would be subject to payment of attorney's fees. So I think --

CHIEF JUSTICE JEFFERSON: What if --

MR. COOPER: -- if there is that legislative history it's there.

CHIEF JUSTICE JEFFERSON: What -- what -- under your -- under your argument, you wouldn't finally become legally obligated to pay if there is an appeal, right?

MR. COOPER: Well, this Court --

JUSTICE WAINWRIGHT: Or if the judgment is superseded?

MR. COOPER: This Court in any way depend frankly if the case was against the underinsured motorist which some of these cases are brought at, or if the uninsured motorist has settled and it is only brought against the uninsured motorist carrier. Now, this Court in Henson said it was the verdict that would trigger the obligation that there was a legal entitlement to review.

CHIEF JUSTICE JEFFERSON: Your logic would mean that were -- that was wrong, that limitation was wrong because there would not be. What if there's a reversal and rendition of appeal?

MR. COOPER: Well, if there was a reversal and rendition of appeal then obviously you wouldn't owe the money under the uninsured motorist.

CHIEF JUSTICE JEFFERSON: But why would you owe it after the verdict when -- what you're arguing here is there is no legal obligation to pay until a verdict. But isn't it true that there's not a final determination of that legal obligation until rather the deadline for filing -- protecting his appeal has passed or as a final determination by an appellant?

MR. COOPER: It would be subject to the appellant rights and partly that is correct, your Honor. That is correct.

CHIEF JUSTICE JEFFERSON: [inaudible] any further?

JUSTICE WAINWRIGHT: Yeah, just to follow up. I'll take it if you agree with the Chief's last comment. But that still begs the question. Agreeing with his last comment undermines your argument that legal entitlement to pay is the linchpin because there is no legal entitlement to pay if the judgment is superseded on appeal.

MR. COOPER: Well --

JUSTICE WAINWRIGHT: Or legal obligation to pay, I should say.

MR. COOPER: Well, this Court again for the purposes of prejudgment interest -- and I think the same rule could be engrafted with respect to the attorney's fees has said that it was the verdict, for example in the Henson case, which triggered the legal obligation to pay and triggered the prejudgment interest running. Obviously, if the --

JUSTICE WAINWRIGHT: Can you make sense of that though in light of your argument or should we just disregard the reasoning and follow that case?

MR. COOPER: No, I -- I think it could be reconciled. Again --

JUSTICE WAINWRIGHT: How?

MR. COOPER: Okay. For this reason that the insurer has met their burden of showing the legal entitlement -- granted it can be superseded. However, if the insurer should err after that point in time alleged to go ahead and feel and exercise their appellant's rights they would run the exposure to attorney's fees and they would -- I think the court in the Henson, if you follow Henson, would still run the risk of being exposed to prejudgment interest after that point in time.

CHIEF JUSTICE JEFFERSON: Any further questions? Thank you, Counsel.

MR. COOPER: Okay.

CHIEF JUSTICE JEFFERSON: The Court is ready to hear argument from the respondents.

SPEAKER: May it please the Court. Mr. Nickerson will present argument for the respondent.

ORAL ARGUMENT OF JESSE L. NICKERSON ON BEHALF OF THE RESPONDENT

MR. NICKERSON: Good morning, your Honors. I know there's no way that any lawyer [inaudible] has got a fool of a client. I hope it doesn't apply to spouses or I'm not gonna be eating breakfast for 20 years. I kinda feel somewhat like the lawyer who walks into the courtroom and the other side introduces a six-inch stack of medical records, pulls out one sentence and represents as [inaudible] all there is to this six inches medical record. Well, that's not usually the truth and I don't think the representation by Mr. Cooper in this case is either. The appellant Mr. Flash Henderson in this case is distinguishable from this case. Number one, attorney's fees were not an issue, but number two much of the Henson decision relating to a jury verdict being returned was based upon that the court consider the argument of counsel in their briefs to end up being a stipulation and that the case float from that. And it really doesn't address the issue before court and it really had nothing do with it.

In supported of that. There is one case that was not in the briefs that was decided. I think a week following the appellee's brief in this case, and that's Henrich Teacher who cited in 2004 Westlaw of 241-33-11 which was decided on October 28, 2004 and the umbrella court in which the Henson case originated considered some of the issues and a mandamus action again. And the court said that in response to the insurer's argument that a claim under UIM was not right and did not approve until such time as a third party tortfeasor's liability and the amount of damages had been established by a trial. The court did consider Henson to control the issue than before in response to that claim. The court went further and said that whatever the merits of the insurer's argument in that case had then foreclosed by the Supreme Court. And it's Matlock decision which is quoted in the brief and the Franco decision. In Matlock, this Court held in upholding a Texas County Court decision that neither 501-1 of the insurance code nor the policy provisions of the standard test of automobile policy required a UIM claimant to obtain a judgment against the third tortfeasor prior to obtaining a judgment against the insurer in response to State Farm's argument at that time that a judgment against the insurer motorist was a condition precedent to the insurer's action against the insurer. State Farm is back before this Court --

JUSTICE BRISTER: But -- but you got units even if you don't sue the uninsured coverage. You've got to prove negligence.

MR. NICKERSON: If that is what to happen, they misconstrue these things. It is a contract case, just because the jury is asking --

JUSTICE BRISTER: I didn't ask -- I didn't ask a contract question.

MR. NICKERSON: I'm sorry.

JUSTICE BRISTER: I didn't ask a contract question.

MR. NICKERSON: But it wasn't in dispute. All the issues that are

under dispute are submitted to the jury and a lot of stipulation they entered into that all the requirements of 38.002 were certainly related to, what else can you ask for?

JUSTICE BRISTER: Let me ask you if the damages in this case were primarily for plain and middle language, right?

MR. NICKERSON: No.

JUSTICE BRISTER: The jury wrote in 41,000 "that we give legal effect to that," but they did that next to the medical, right?

MR. NICKERSON: I can't remember that. That seems [inaudible], your Honor. I don't agree to what the Court is saying --

JUSTICE BRISTER: Well, what was the most of \$225,000?

MR. NICKERSON: Disability that lasted over ten years. In fact there's [inaudible] to that.

JUSTICE BRISTER: Disability in the sense of lost earning capacity or in the sense of re-injury [inaudible] --

MR. NICKERSON: My time is up.

JUSTICE BRISTER: That's where I started. So it's -- as I began it's mostly pain and suffering, are you aware of any contract claim for which you get pain and suffering damages?

MR. NICKERSON: At UIM point.

JUSTICE BRISTER: This is the only contract claim for which one gets a completely amorphous unliquidated damage amount. So it's a little harder to pay off than any other contract claim, is it not?

MR. NICKERSON: Not any different than any other issues --

JUSTICE BRISTER: Name one other contract claim. You don't -- you don't get mental anguish from your property or casually from your property insurer for your PIP for any other first party. This is the only contract claim where one gets completely unliquidated pain and anguish, right?

MR. NICKERSON: I agree, of course.

JUSTICE BRISTER: So it's a little harder to know how to pay it off, is it not?

MR. NICKERSON: Insurance companies evaluate pain and suffering claim everyday under the liability portions of the policy. It seems strange to me that you have this policy on my [inaudible] from State Farm. It has provision for liability that you investigated but you don't have time for investigation from the liability portion and we went over the UIM portion. When you're in the same company, it doesn't make sense not to do this especially when the language is somewhat similar and the real part is the UIM is just an extension of what damages are recovered under liability.

JUSTICE BRISTER: So the way you see this, somebody is in the car accident. They've got, let say \$20,000 in loss in car damages, economic damages, lost earning capacity, and lost property damage, medical expenses. But they asked for \$100,000 -- or which -- what's the rule of the thumb, three times actually so they asked for another \$60,000 for emotional anguish. Unless the insurance company in all cases pays that, they will pay attorney's fees on anything over \$20,000?

MR. NICKERSON: Only if the insurance company is wrong and refuses to pay the just amount due. If they --

JUSTICE BRISTER: Right. So -- so they offer 25 --

MR. NICKERSON: If they're wrong, they're wrong. When they're right, they're right.

JUSTICE BRISTER: But if -- but on the other hand if the policy holder is wrong, they pay no attorney's fees.

MR. NICKERSON: That's correct, your Honor.

JUSTICE BRISTER: So what's gonna be the effect of this rule? All

UM is more expensive. So if you people can get not just unliquidated damages but attorney's fees as well with no risk to themselves.

MR. NICKERSON: Well, if -- if this Court decides that in the future that on liability policy that either party cannot recover from pain and suffering --

JUSTICE BRISTER: Well in --

MR. NICKERSON: -- but that's not what you say --

JUSTICE BRISTER: In liability policy -- in liability policy, you don't have a conflict with your client. Here you do.

MR. NICKERSON: With [inaudible] client?

JUSTICE BRISTER: Your own client. I mean here you're -- you're on opposite sides of this UM case in every time. The carrier is representing the person you're suing in effect.

MR. NICKERSON: That's in fact what it is. But in this case, I'm not only representing a person on that claim on the uninsured motorist but complaining also that uninsured -- underinsured motorist under a liability portion of this policy which also has [inaudible] with State Farm.

JUSTICE BRISTER: And it's a little different from the normal bad phase situation in that before we get to UM, the carriers usually paid off its own insured for PIP property damage, at least some amount of the actual economic damages.

MR. NICKERSON: I -- I don't know what would be wrong.

JUSTICE OWEN: We've got to construe the statute though for all uninsured motorist carriers, not for the peculiar situation where State Farm has to be on both sides.

MR. NICKERSON: Well, I think the Court has. As I mentioned in Franco and the Matlock --

JUSTICE OWEN: But you always said in Matlock is you didn't have to go to judgment against the tortfeasor. You can settle with the tortfeasor, but we were very clear at Henson that before the UM obligation kicks into effect, you have to go to court and establish if there's a dispute. You have to go in the court and establish liability and the amount of damages before there is any obligation to pay under UIM.

MR. NICKERSON: I don't believe -- your case of judgment is unlikely, your Honor. But if -- if you got the tort every time and get a judgment to go to the second step of the contract, we're going back to do this all over again and in fact that was gonna happen in this case. If the attorney's fees are reversed, what happened in this case is State Farm gets -- a judgment is rendered in State Farm. And they pay \$190,000 approximately of the \$300,000 judgment within 30 days. And they wait until the day of the argument for the Court of Appeals and pay the remaining \$110 to get up to \$300,000. That's a -- well over a year.

JUSTICE OWEN: Well, they may have some exposure from the date of judgment until the date they actually paid an attorney's fees. But assuming that he had pain within 30 days --

MR. NICKERSON: Well, assuming that the Henson case was based upon the stipulation that the Court considered to be as a result of the briefs in that case which is what a brief like to me, there are times that you're lately entitled and which to recover amounts under a UIM claim is when the accident happens. The rest of it is just showing the insurer -- I mean the UIM carrier how much the -- wherever there's liability which can either be done by judgment and it can either be done by agreement of the party or it can be done by an investigation. It complies with their duties under 21.55. Under 21.55, they've got a

duty to investigate within so many days on receipt of the claim and got so many days to accept rejected claim and got so many days --

JUSTICE OWEN: So if that would -- if we had accepted it, we would -- Henson would have come out in different way. We accepted your argument. Henson would have come out in different way because we -- they have the duty to investigate. In Henson we said no. Prejudgment interest doesn't occur until they don't pay within 30 days after --

MR. NICKERSON: That's our interpretation letter and, you know, I think the case is limited to its facts because on how the court arrived on its decision. You know, it's amazingly you have Franco or the Matlock decision and you've got several Courts of Appeals that go wonder actually following the Matlock decision and the Franco decision. And you've got another set of Court of Appeals --

JUSTICE OWEN: That their apples and oranges always said in Matlock you don't have to -- you don't have to waive. You can go ahead and settle the tortfeasor if you don't have any money. You don't have to get a judgment against the tortfeasor, that doesn't mean that you do not have to establish in a court of law the tortfeasor's liability.

MR. NICKERSON: But the Franco decision does say what the insurer has to do. And that is to show what the liability is and what the damages are. But the Court didn't say "to show what the damages are," that you have to show a certain debt or some [inaudible] that is more like an unliquidated claim in which you show another facts for the insurer to determine what the damages are from the facts or like an unliquidated damages are.

CHIEF JUSTICE JEFFERSON: Where does Texas under -- what's the [inaudible] UM and the responsibility for attorney's fees?

MR. NICKERSON: I'm not [inaudible].

JUSTICE WAINWRIGHT: 38.001 says a valid claim uses that term. What is a valid claimee if the insurance company, to use your example earlier, does its investigation comes up with what amount for economic and noneconomic damages and the plaintiff comes up with the different number? Which one is the valid claim and the valid amount or the just amount of --

MR. NICKERSON: Well, you may not be able to figure out what's the dispute between those two is -- lighter if the dispute continues but --

JUSTICE WAINWRIGHT: Well, if we get a jury determination that advances the ball quite a long way down the road that's --

MR. NICKERSON: It was until then and you must roll like about 21.55 in Matlock [inaudible] common law the duty to investigate under Dallas v. Universe on a common law duty to investigate and that's what about 21.21 as far as the UIM claims ago.

JUSTICE WAINWRIGHT: Well, I don't know if I agree or not, but I'm just talking about Chapter 38. We'll get to 21.55 later if we need to.

MR. NICKERSON: If the legislature --

JUSTICE BRISTER: But it's valid claim being under 38.001

MR. NICKERSON: A valid claim --

JUSTICE BRISTER: If the parties disagree on the amounts and they're going to when you have a trial. That's why you have a trial. You're saying there should be an obligation that kicks in at the time the party injured says "this is the amount they believe they are owed." Is that what you're saying?

MR. NICKERSON: I think as when the claim approves this when the accident happened you got a contract as this Court will do in the event of this situation that you were injured by an underinsured motorist.

JUSTICE BRISTER: And in this type of a breach contract claim is, as you're just discussing with my colleague, we don't have just

economic damages. There are noneconomic damages. It's inherently difficult to determine in a commercial contract, we're talking about economic damages which were easier to determine. It could not be a reason why -- could that be a reason why Chapter 38 and a contract unlike UIM where the obligation pay only kicks in at a certain time under the contract terms --

MR. NICKERSON: Uh huh.

JUSTICE BRISTER: -- only involves damages that are easier to determine as opposed to this situation where the damages are unliquidated and harder to determine before we can get to what is a valid claim under 38.001. Why is that reasoning not accessible --

MR. NICKERSON: But this Court in Franco has said that the valid claim is the unliquidated damages situation.

JUSTICE BRISTER: I'm sorry?

MR. NICKERSON: In the Franco case, this Court said that it is more akin to the unliquidated claim and it is the strict interpretation of only a liquidated claim.

JUSTICE BRISTER: Well, let's put Franco to the side, does it make sense? Let me ask you what makes sense?

MR. NICKERSON: Well, there's a lot of things that I'm saying that makes sense but that is --

JUSTICE BRISTER: But that part of our job is --

JUSTICE BRISTER: -- that's right, is to make sense.

MR. NICKERSON: Straight it all out.

JUSTICE BRISTER: And not just in your case but in the --

MR. NICKERSON: That's right. That's why I'm over here for her to straight it all out.

JUSTICE BRISTER: That's what your job is today.

MR. NICKERSON: Yes.

JUSTICE BRISTER: -- makes sense. I need to -- I don't know if I agree or disagree with your characterization of these other cases, just I'm asking you how does it make sense?

MR. NICKERSON: How does it make sense? it makes sense for somebody to pay a premium to an insurance company and the insurance company says, "Here is what I'm selling. I'm selling you the same dollar, and you act [inaudible] easy way and I'm gonna sell it to you to any amount that you wanna pay for it. And in this case, I have paid for \$800,000 instead of \$10,000 or 50,000 or whatever but that was the agreement was and it says that if -- I wish to continue any way -- it says -- that contract says, here is what we're gonna do in return for your money. We're going to pay you anything what you said. An underinsured motorist can't cover if he go out and then we're gonna conduct an investigation under 21.55 and 21.21, a duty to investigate under Dallas v. -- Universe v. Dallas. It is under footnote four or five that says we're gonna investigate this and determine whatever our insurer is liable. We've got a right to control his defense. We're gonna make that decision for him. We're gonna decide whether he's liable or not. Based upon on what you tell us or what we decided and they do that. And then we get down to, okay, under the UIM and not also be decided and we owe a lot more of money than what we wanted to pay out. That's why it don't make sense --

JUSTICE OWEN: Let me --

MR. NICKERSON: -- following a contract.

JUSTICE WAINWRIGHT: Even in describing what you just described, you use the term if liable at least twice. Isn't that key determining if it's liable and in what amount?

JUSTICE: But after the determination is made -- attorney claims

investigation, correct?

MR. NICKERSON: That's correct.

JUSTICE: And all the issues whether or not the settlement is reasonable to party control [inaudible].

MR. NICKERSON: Anybody takes a risk. If the plaintiff claims it's unreasonable [inaudible] --

JUSTICE OWEN: Well here's -- help me with this. Here's -- I'm having trouble with this because this is a UM claim. And let's suppose under your analysis it seems to me that the insured -- you're still in litigation with the third party tortfeasor, you haven't settled. You've got a lawsuit ongoing, but under your theory I can go to my insurance company and say, "Look, I'm gonna beat this guy and I'm gonna show that he's uninsured." He's damaged me a million dollar, he's only got \$300,000 for the coverage. So you pay me a million now before we ever go to trial. You've gotta do to investigate, you've gotta do to evaluate, and you've gotta do to decide whether you think he is uninsured or not in paying -- include that he is and pay me the money. So under your theory, the insurer's company can be liable under the UIM policy. Well, even before there's ever a judgment in an ongoing case against the third party.

MR. NICKERSON: I was assuming that getting a judgment is the only way to determine that. If the UIM carrier can agree that there's a liability report --

JUSTICE OWEN: But let's say there've been -- but the clipped side of that is he's only got \$25,000 worth of insurance. He's clearly judgment-free. He settled with -- in which the UIM carrier can't control whether its insurance settles with the third party or in what amount --

MR. NICKERSON: In this case --

JUSTICE OWEN: -- It settled at \$25,000. And then you're saying then you have to accept the insurance word for it on what the damages would be if they've gone to trial against the third party?

MR. NICKERSON: I'm never saying the insurance company except the word of an insurer in 30 years. They may ask the insurer for information --

JUSTICE OWEN: Let's see if we --

MR. NICKERSON: -- should be for valid terms --

JUSTICE OWEN: It's clearly the opposite to the same way that you settled or whether you're still pursuing forfeit. Or your theory is an insurance company has absolute stand of loan obligation regardless of the state of the proceedings of his attorney --

MR. NICKERSON: Because they entered it into the contract. That's what they said they would do in return for your money. You pay on your money then I said "no, that's not what we said we would do."

CHIEF JUSTICE JEFFERSON: Are there any further questions? Thank you, Counsel.

MR. NICKERSON: Thank you, your Honor.

JUSTICE BRISTER: Mr. Cooper if you -- no question, your economic medical expenses are \$100,000. If you have a first party coverage that supplies up to \$100,000. You've got to pay without lawsuit damages, attorney's fees, and prejudgment interest if you don't pay. Are you -- under your theory or you better of, -- you still gotta \$100,000 in hospital expenses, but if it's UM you're gonna have to allow it to collect it. No attorney's fees, no prejudgment interest runs until after judgment. Doesn't that give the insurer an incentive not to do anything?

REBUTTAL ARGUMENT OF R. BRENT COOPER ON BEHALF OF THE PETITIONER

MR. COOPER: No, your Honor, for this reason. Let's assume it's a \$100,000 unit policy. You've got \$100,000 medicals. Medicals alone exceed the unit policy. You still have Article 21.21 out there. If you connect that thing or you can get attorney's fees or 21.55 which is now 422 or whatever it is. If there is a situation where the damages are clearly owed, there is another remedy for the insurer and that's under 21.21 or 21.55. In this case, the Department of Insurance prescribed this form for a reason because, Justice Brister, as you said we have economic damages. It is very difficult in certain cases determining what are -- what is the amount it's owed? And you think about it under Mr. Nickerson's scenario. Let's assume if it was a \$300,000 unit policy and you had \$5,000 in medicals and that was it. But they wanted the whole \$300,000 and the insurance company says which we don't see that that's reasonable in light of the evidence. But according to his theory, he made a demand. He's made a presentment. You go to trial and let's say if, you know, you've got experts in the whole -- the whole nine yards and they racked up \$75,000 in attorney's fees and the jury awards them \$5,000. Well, the insurance company was right but since there's been a presentment, he could still get the \$75,000 under his theory because the insurance company exercised their right which is conferred under the policy to have a legal determination of the case --

JUSTICE BRISTER: Alternatively, the jury says, "well, it's just an insurance company. This -- the defendant, let's do give them \$300,000." Your argument is you don't get attorney's fees as well because even though it turns out the \$300,000 demand was reasonable, it was not clear that -- clearly -- we weren't clearly liable for it before the jury verdict.

MR. COOPER: What I'm saying is under Chapter 38, you would not get your attorney's fees if there is an [inaudible] case. There are other statutes out there to provide relief to insurance. It's just not under Chapter 38, its 21.55 or it's 20.20.

CHIEF JUSTICE JEFFERSON: No other questions. Thank you, Counsel. The case is submitted and the Court will now take a brief recess.

SPEAKER: All rise.

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