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Supreme Court of Texas.
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Petitioner,
v.
Jimmie R. NORRIS, Respondent.
No. 04-0514.

April 14, 2005

Appearances:
Michael L. Scanes, (argued), Scanes, Routh & James, Waco, TX, for
Petitioner.
Amy C. Thomas, (argued), The Law Offices of Amy Thomas, Mexia, TX,
for Respondent.

Before:

Chief Justice Wallace B. Jefferson, Justice Don R. Willett,
Justice Harriet O'Neill did not participate in the decision, Justice
David Medina, Justice Paul W. Green, Justice Nathan L. Hecht, Justice
Dale Wainwright, Justice Phil Johnson, Justice Scott A. Brister.

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CHIEF JUSTICE JEFFERSON: Please be seated. The Court is ready to
hear argument in 04-0514 State Farm Mutual Automobile Insurance Company
v. Jimmie R. Norris.

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

ORAL ARGUMENT OF MICHAEL L. SCANES ON BEHALF OF THE PETITIONER

MR. SCANES: May it please the Court. Two of the issues in this
underinsured motorist case are prejudgment interest and attorney's
fees. However, in my opinion, the dispositive issue in this case is how
you apply the credits to which the insurance company is entitled.

In this case, the jury found actual damages of \$51,200 and it was
stipulated no dispute that the insurance company was entitled to
credits in the amount of \$55,000 more than the damages and the trial
court properly rendered a take-nothing judgment. So, the question is
how do you apply the credits. Do you apply them first and then
calculate prejudgment interest or do you calculate prejudgment interest
first? We think the jurisprudence of this state, in all other
situations, is that you apply credits first. First, the prejudgment
interest statutes provide that prejudgment interest is calculated or

based on the judgment, not on the verdict, and you arrive at a judgment after applying the credits. There are several cases that hold consistent with the statute, including the Sisters of Charity v. Dunsmoore case, an Austin Court of Appeals case, a recent case Pringle v. Moon out Fort Worth two months ago, and the other cases is cited in our brief. And if you don't do that, if you apply or calculate prejudgment interest first, you are basically allowing a double recovery for the plaintiff insured. In this case, State Farm received the credit of \$50,000 for the limit of the tortfeasor's policy and also another \$5000 credit for PIP payments that were previously made. The insured is deemed to have received those right after the accident and, in fact, received most of those. So, if you award prejudgment interest on that, you're awarding money for something that they did not lose. That's a double recovery.

JUSTICE: Well, no. Money for something they've already been paying for. The double recovery is the use of the money. They've had to use that money for the tortfeasor's policy and [inaudible].

MR. SCANES: Yes, your Honor. Also, to apply the credits first is consistent with the -- this Court's decision with Strossner which says that credits apply if you deduct from the amount of actual damages. So, we think that's the dispositive issue in this case and the trial court ruled properly.

JUSTICE O'NEILL: We have the overlay of the Insurance Code here, as well. Assuming, we decide that you do -- you do apply credits first, should we take into account the actual timing of the credits?

MR. SCANES: I don't believe so. First of all, it's clear that the insurance company gets some credit to the amount of the tortfeasor's policy, and that's even the case if the insured sells for less than the limit. A lot times an insured would sell for less than limit and take their chances against the insurance company. At trial for this, they got an insurance company defendant. But they're deemed, since they have the credit, were deemed to have received that from the very beginning. That's a questionable rule, isn't it? It's easy to calculate, it's easy to apply; otherwise, if you look at the timing of the settlement or what they could actually settle with the tortfeasor, it's kinda chaos in trying to determine how much prejudgment interest is.

JUSTICE O'NEILL: What if there's a delay in the time that PIP benefits are paid? Or should you take that into account?

MR. SCANES: Usually not because ordinarily, when the bill is submitted to the carrier and the carrier pays and if there's -- I mean -- if they don't, you have another claim for unreasonable withholding of PIP benefits from the other provisions of the Insurance Code.

A second issue in this case, and I'm going to follow up the argument in the first case, is attorney's fees. I noticed there were a lot of questions about -- about valid claim and legal entitlement and things of that nature. I think that this underinsured motorist provision under the insurance contract is a hybrid of tort and contract. He got mental anguish and pain and suffering but I think, the right result which is very consistent with Hanson that there's no legal entitlement to the benefit until liability had been established. Legal minds can differ, like any other tort case, and especially for intent with damages such as pain or suffering. So, I believe you have a valid claim or legal entitlement once that liability is established.

JUSTICE: In the verdict?

MR. SCANES: I think, like any other tort case, when you have a final judgment, appeal or no appeal when you have the final result. Now, the Court used the language verdict of Hanson but I'm not sure --

I think was kinda basically [inaudible] to the position that I think, the correct result would be final --

JUSTICE: And why not until after verdict -- resolving in the appeals?

MR. SCANES: That's -- that's what I mean. That's what I mean when I say final judgment.

JUSTICE: Oh, I thought you said appeal or not.

MR. SCANES: Well, sometimes they might appeal, sometimes they -- they don't --

JUSTICE: So, if there's a final judgment in the trial court but there is -- a notice of appeal is perfected, then you would say liability is not finally determined until the appellate resolution --

MR. SCANES: And that's --

JUSTICE: Years down the road.

MR. SCANES: And that's -- and in the near likely it can be a bad faith appeal or something. That's true for any case. I mean, you have the right to appear, and the insurance company has the right as well.

JUSTICE: And you just think we were using loose language when we said verdict in Hanson?

MR. SCANES: I don't wanna go that far but I think that would not necessary to the holding of the case. A third issue in this case is prejudgment interest and I don't think the Court needs to get there in this case because of the credit issue. But in the event the Court does, I think Hanson ought to be applied to my case. Now in Hanson, the Court held because underinsured insurers did not breach the contractual obligation to pay until tort liability is established, we conclude that prejudgment interest begins running from the date liability of the uninsured, underinsured motorist is established. So, we take that holding in Hanson and he knows it really a different question in Hanson because they're trying to add prejudgment interest on top of the benefit. I think we should apply it to situations which the damages are less than the limit of the policy. That way you avoid the double recovery problems I mentioned before. I think it's consistent with the wording of the statute and it's the most [inaudible] way to apply. And so, with that said, I believe the Court should reverse the appellate court decision and that the trial court's decisions are [inaudible] in our case was proper.

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

MR. SCANES: Thank you, your Honor.

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

SPEAKER: May it please the Court. Ms. Thomas will present argument for the respondent.

ORAL ARGUMENT OF AMY C. THOMAS ON BEHALF OF THE RESPONDENT

MS. THOMAS: May it please the Court. I'm here today. Actually, I've got issues in this case that were on the first case is attorney's fees and then we've got issues that underinsured letters which are different issues in the third case. And my luck, if I go third, then I could've had all the benefit of hearing the question in the arguments of the Counsel in this case. However, I think clearly the issue on the prejudgment interest has already been determined in the Hanson case. I think State Farm is certainly misinterpreting that case.

The key question in Hanson was whether or not an insured can get prejudgment interest on top of their policy limits. As you look at the language of the statute, the language of the policy, State Farm is entitled to pay all damages, all damages that Jimmie Norris was legally entitled to recover from the operator of an underinsured motorist. It doesn't say all actual damages. It doesn't say liquidated damages. It says all damages legally entitled to recover. Well, we could declare in Texas Law that a person who is injured, you get [inaudible] and we do have a grounded case cause it's a contract case with tort issues involved but the injured person's damages include prejudgment interest. That was decided in Cavner and in the Finance Code it says, "All judgment shall include prejudgment interest." So, in this case, his damages were determined by the verdict of the actual damages of \$51,200. Before you calculate credit or anything but state had Mr. Norris done, that judgment then against Mr. Johnston, the tortfeasor, he would have gotten the verdict of the 25,000 past pain and suffering and mental anguish, 13. That was about 13 each on impairment and past medical expenses. If that would have been against the tortfeasor, then his damages would clearly have included prejudgment interest. That's what --

JUSTICE O'NEILL: Do we call that crediting?

MS. THOMAS: Pardon?

JUSTICE O'NEILL: Could we -- could talk about the crediting for a moment?

MS. THOMAS: Sure.

JUSTICE O'NEILL: If -- let's say you'd proceeded to trial against Mr. Norris and he tendered his policy limits to 25,000 but you thought he had some more -- you had an opportunity to get a judgment against him. The judgment that would have been against, entered against Mr. Norris would have taken into account the \$25,000-credit before calculating prejudgment interest, wouldn't it have?

MS. THOMAS: I'm not sure if I followed the question but I think you still determine his amount of his damages.

JUSTICE O'NEILL: Lets -- let's just say --

MS. THOMAS: And then you do [inaudible] all the credit.

JUSTICE O'NEILL: The suit is against Mr. Norris. Let's say you say sue Mr. Norris

MS. THOMAS: You say Mr. Norris is --

JUSTICE O'NEILL: I'm sorry -- Mr. Norris is suing against the tortfeasor. The tortfeasor tenders his \$25,000-limits --

MS. THOMAS: All right.

JUSTICE O'NEILL: -- in front. And Mr. Norris says, "I think you're worth more than that. I'm gonna go ahead and get a judgment against you." So, you go ahead and get a judgment against the tortfeasor. That judgment would have credited the \$25,000 before it calculated the prejudgment interest on the damages. Wouldn't it?

MS. THOMAS: I think so. And I think that in your question to previous Counsel about the timing I think that probably is something that needs to be decided is when were these payments made to the injured party. Mr. Norris -- if he gets the 25,000 that we got for direct or did he get -- I mean, actually it was more than that, or did he get it after he had to go to a lawsuit and sit in court for four years. So, I think, you still do look at the timing of when the payments are made but first, the chief question under any UIM policy and underinsured motorist policy is, what is the injured party's damages? You get that question first, and that damages have to include prejudgment interest because the [inaudible], the Finance Code, etc.

And then if you look at the contract it says, "Then any payment that they have made on PIP," and that's the part that if I had gotten the \$56,000, I wouldn't be having these problems cause I'd be over with the 50,000 [inaudible] tortfeasor limits plus the 5,000. Fortunately for me, I got in a gray window of between 50 and 55 so that's probably why we're here today. But having -- it's been determined when the PIP payment -- it's the credits. You determine the damages, and then you do the offsets and that's when you get the offset and the damages have to include prejudgment interest. That's clearly the law.

If you're gonna say from now on, and I'm your insured motorist, is not gonna be entitled a prejudgment interest, then we're really changing what injured parties are entitled to recover by law and that's what this contract says. We're gonna pay you. State Farm sold to Mr. Norris a policy. It said, "We're gonna pay all the damages you're legally entitled to recover because of an underinsured motorist." And then it said, the PIP language, "Any payment made shall be applied toward a settlement or judgment that person receives under a coverage."

Well, that's what he did. He got the judgment -- the verdict which should have included the verdicts from the jury and the trial court should have added what was required by law with prejudgment interest and then the State Farm gets its credits because any payment shall be applied towards the settlement or judgment that person receives. So, I think you have to foresee that this judgment was against Mr. Johnston, the tortfeasor. That would obviously include prejudgment interest. We're not here trying to get more than our underinsured motorist which was what's doing in the Hanson case and I think that's what -- even in this Hanson case, this Court stated, "And the insurers did not dispute but had the trial court awarded prejudgment interest against the tort defendants.

The insurers will be obligated to pay the entire judgment including that portion awarded for prejudgment interest to the extent of policy limits." That's what I'm asking this Court to do is to have State Farm pay the judgment that was the verdict of damages against Mr. Johnson, the tortfeasor. The insurer would be obligated to pay the entire judgment, including that portion for prejudgment interest included after the policy limits.

And I think that's it for Hanson. And in the Hanson case when they -- they say, "Well you just don't get prejudgment interest in the UIM cases, that's when you're try to get more than the policy. And in this case, what happened in Hanson case, the trial court, there were damages at 133,842. That was more than a 20,000 for the tortfeasor and State Farm immediately gave the 45. And the Hanson defendant, Hanson tied up with [inaudible], "Now you owe me prejudgment interest on top of that 45 of that uninsured motorist limits. He was taking more to the extent the policy provided. So, I think that's where we're different.

I think the question is clearly, you get, and actually in the Nickerson case, which was the first case, that case was actual damages plus prejudgment interests less offsets exceed the policy limits of 300,000. Well, in this case, Mr. Norris was clearly injured by an underinsured driver. His damages were 51,200 before any prejudgment interest. If the tortfeasor was 50, he is underinsured. Let's get him his prejudgment interest, then we will give him his credits, give State Farm any credits that they're to which they are legally entitled to.

And I do think they probably, the timing of those should be considered in calculating the judgment which the trial court could easily do; it would be after a jury verdict is heard. I don't think this is double recovery. What if this -- in reality, is this Court, all

the courts, see uninsured motorists and uninsured motorists' the same. Well, if this had been an uninsured motorist, Mr. Norris would have clearly been able to go ahead and sue the uninsured motorist, get all of his damages, including prejudgment interests and then have the credit. If there is no credit, then he would get his prejudgment interest, and he didn't have any money at all in his pocket. It's just not a double recovery.

With respect to the second issue, and I think also the Menix case, in which this Court denied the petition for review, the insured was entitled to pay prejudgment interests to the extent it did not exceed UIM policy limit. So all Mr. Norris is requesting this Court to do is follow that language that is in the Hanson case and, as well as, by denying the UIM in the Menix case. Attorney's fees, the first case, I guess it was State Farm v. Nickerson. That was the State Farm's attorney who said, "Well, they've got a statutory remedy." That doesn't mean that's the only remedy I have. Insured people are just like anybody else. They go out and buy a contract and they have a contract. If I want to pursue my attorney's fees under a contract rather than go 2155 of the Insurance Code, rather than going into some statutory, I'm not, State Farm Insurance Company should mandate what theory of recovery that an insured person is going to seek and I think this is just like any other contract case. All contracts have a gray area. There is a gray area; I think most parties usually disagree as to whether or not there's even been a breach, and I know Justice Brister, I believe, had asked about, you know, unliquidated damages but I think even in a contractual case, although you don't really have the pure pain and suffering mental anguish, to conduct a breach of a business case where there's loss of profits. That's always a gray area. I mean, it's always up to the jury to decide and I think that --

JUSTICE: No, no, no, no, no, no. Lost -- lost profits, you gotta have a track record or something close to it so we can calculate pretty precisely. You can't just give your opinion "I think I wanna get --"

MS. THOMAS: Well, I don't mean that --

JUSTICE: -- I think I'm gonna make millions.

MS. THOMAS: But there's -- there's usually expert opinions four, five, six people to get up there and the jury usually comes in.

JUSTICE: But they've gotta some basis. There's no expert on mental anguish.

MS. THOMAS: Right --

JUSTICE: And, in fact, there's no way to say what the right answer is except when a jury finds it.

MS. THOMAS: That's -- that's true. Unfortunately, in contract cases, [inaudible], the other party doesn't always apply that.

JUSTICE: But it is -- it is the -- it is the case. It is the result of your argument when an insured guesses what the mental anguish damages are going to be. If that's below what the jury ultimately decides, the insurance company has to pay attorney's fees. If it's above what the jury ultimately decides, the insured doesn't have to pay attorney's fees. So it's a one way ratchet.

MS. THOMAS: Well, I respectfully disagree. I don't think when you normally do that, you attribute certain amounts to different elements -

JUSTICE: But your client -- your clients has not offered to pay attorney's fees. If it turns, you know, if this was before trial and they had offered 60,000. No, I'm entitled to -- you know, if your policy was bigger, "No, I'm entitled 80." If the jury comes back and

says, "Pay 60," the insured's not gonna pay any attorney's fees cause they wasted going to this trial.

MS. THOMAS: I guess they wouldn't be unless the State Farm countersues them for attorney's fees based on the contract period.

JUSTICE: But they haven't breached the contract. They don't have to pay anything.

MS. THOMAS: Well, that's true. And you know what, the key in these cases is in the Insurance Code. It's the insurance company's burden to prove that they're uninsured. So, all of this, in this case, and I think it has to be facts-specific and I think if the jury awards attorney's fees, it should -- should be. In this case, we had State Farm who just took the position, you know, "He's not injured. He's -- he's just complaining about nothing. It's a low impact case. He didn't get injured." Well, we had records from three and four doctors, orthopedics, two neurosurgeons, physical therapists and all State Farm did was present a claims manager with a marketing degree and says, "Well, we just don't think he's hurt."

JUSTICE: Did you claim a bad faith claim, as well?

MS. THOMAS: No, I didn't.

JUSTICE: If you would have won and you had one -- if, in fact, it was that reasonably clear to a reasonable insurer, you would have one, right?

MS. THOMAS: I could possibly do that and that would be another statutory right but I still think Chapter 38, that this contract is no different than any other contract and I think if we say, "No, we're gonna have a determination and a judgment and a verdict and then if they don't pay, then you can come back and seek for attorney's fees. We could possibly have three lawsuits stemming from one case. One against the tortfeasor, one against the underinsured carrier, and then the third one and I think and it's -- I think it's a fact-specific situation that if, you know, if the jury doesn't think attorney's fees should be awarded, they don't award them. In this case, they saw State Farm get up but the clients' manager that had nothing to support his opinion. I would, "Why is [inaudible] what Dr. Becker and Dr. Lewis said?" And I think in that incident, they saw a breach of contract that should award Mr. Norris's attorney's fees under Chapter 38. And I do believe that. I see my time is up. So --

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

MS. THOMAS: Okay. Thank you.

REBUTTAL ARGUMENT OF MICHAEL L. SCANES ON BEHALF OF THE PETITIONER

MR. SCANES: My first point of rebuttal is on the credit issue. How much was Mr. Norris' claim worth. Jury said it was worth \$51,200. State Farm guessed right. The plaintiff lost the case, the damage for less than credit. Yet they want prejudgment interest and attorney's fees. That makes no sense.

JUSTICE: They won a liability, though.

MR. SCANES: Yes, but their damages were less.

JUSTICE: Right.

MR. SCANES: Than the amount of the credit.

JUSTICE: So they won one, lost one. You think they lose.

MR. SCANES: To win they have to win both.

JUSTICE: I see. They have to be two and 0 to win.

MR. SCANES: I believe so, your Honor.

JUSTICE: Why?

MR. SCANES: Because if they come back and fine a thousand dollars in damages and the credit's a 55,000 that's a loss and on up the line until you get to \$55,000. No money is owed under the policy unless they are underinsured. This is -- this is underinsured coverage. That's what it is.

JUSTICE O'NEILL: She raised an interesting question. How would -- what with the insurance company's liability -- how would this work if it was an uninsured?

MR. SCANES: Well, if it was an uninsured case, there'd be no credit for tortfeasor's policy because there is no insurance there and -- and all the cases that I've handled, it's strictly a case by the plaintiff insured against the insurance company. They usually don't sue someone who don't have insurance because they can't pay.

JUSTICE O'NEILL: Well, what's -- was -- what are the jury issues in that totally uninsured motorist case?

MR. SCANES: The -- the issues are, like in any patent jury-charged car wreck case, liability and damages.

JUSTICE O'NEILL: And so, do you owe 20 [inaudible] in those cases -- in that case if it turns out they weren't, in fact, uninsured?

MR. SCANES: That is a different question than underinsured. And it might depend. I can get the same question about the valid claim and legal entitlement. It's at a different question in the uninsured case as opposed to the underinsured case?

JUSTICE O'NEILL: And why is that?

MR. SCANES: I'm asking. I'm still arising the question. I believe, in most underinsured motorists cases that I -- I'm just going with my personal experience. Ordinarily, you don't have all these issues, is it less than the credit or not. The question is strictly what is the value of the claim and we're gonna offer it. In a lot of cases, the insurance company makes an offer and the plaintiff just refuses it.

JUSTICE: So doesn't that beg the question, isn't the question, "What are the damages"?

MR. SCANES: Yes.

JUSTICE: And so, as I understand, you have to pay the sums that the insured is legally entitled to recover as damages. The sums they're entitled to recover as damages. And I think that's -- that's if you define damages in -- in that context, there are damages for underinsured, there are damages for uninsured. The damages should be the damage, shouldn't they?

MR. SCANES: I believe that's a good point. The statute reads that damages to which they are entitled to recover because of bodily injury --

JUSTICE: At some points, they're entitled to recover damages. Entitled to recover the sums --

MR. SCANES: Because of bodily injury --

JUSTICE: And then they include the word damages in the statute.

MR. SCANES: Right. With -- and it says that the full reading of the statute is "Damages to which they are entitled to recover because of bodily injury," --

JUSTICE: Right.

MR. SCANES: That does not mean all sum. It does not mean punitive damages. It does not mean like this tortfeasor, you could --

JUSTICE: Right.

MR. SCANES: It does not mean you can cover things you haven't

lost.

JUSTICE: So, we're limiting it to bodily injury?

MR. SCANES: Yes.

JUSTICE: The question is what damages emanate from the bodily injury?

MR. SCANES: I agree.

JUSTICE: Okay. So we -- we have to find damages the same way in uninsured or underinsured, don't we? To be consistent?

MR. SCANES: Maybe so, maybe so.

JUSTICE: So, we have to decide whether the prejudgment interest is damages regardless of uninsured or underinsured and apply -- and to be consistent, do we not?

MR. SCANES: Perhaps. Good question. May I respond further to that

--

JUSTICE: Yes. Yes.

MR. SCANES: There's a lot of case law that talks about prejudgment interest as being interest *eo nomini*, whatever that means, or interests as damages. There are some old cases that say it was -- it's punitive. Because you've taken someone else's money and used it. There is recent cases, ever since *Cavnar*, I believe, that essentially state that it's compensation for the loss of use of the money. And so, if you are to include it in damages, to me, it'd be in that context. It's not defined in the policy. Now, in -- in my case, which is the underinsured motorist case, there is no loss of use of money. How in the world can you award it? They've deemed to have received it.

JUSTICE: Well, yeah, we understand that. We're trying to reconcile underinsured and uninsured, which in your case is only underinsured.

MR. SCANES: Yes.

JUSTICE: We understand that.

CHIEF JUSTICE JEFFERSON: Any further questions? Thank you, Counselor. The case is submitted and the Court will take a brief recess.

SPEAKER: All rise.

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