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Supreme Court of Texas.
Lilith BRAINARD, et al., Petitioners, v. TRINITY UNIVERSAL INSURANCE
COMPANY,
Respondent.
No. 04-0537.

April 14, 2005

Appearances:
Bryan W. Scott, (argued), Houston, TX, for Petitioner.
Gregory R. Ave, (argued), Walters, Balido & Crain, L.L.P., Dallas,
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 did not participate in the
decision, Justice Scott A. Brister.

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CHIEF JUSTICE JEFFERSON: The Court is ready to hear argument in
04-0537 Lilith Brainard, et al. v. Trinity Universal Insurance
Company.

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

ORAL ARGUMENT OF BRYAN W. SCOTT ON BEHALF OF THE PETITIONER

MR. SCOTT: May it please the Court. First in our case it's little
different from the other two. This is the first part about it. We are
seeking prejudgment interest against the tortfeasor. And our original
pleading was against both, what was then the tortfeasor and to Trinity,
the insurance company, our uninsured coverage. We were seeking
prejudgment interest. In our petition, we asked for prejudgment
interest. We didn't say who it was against. And the one that went to
trial on. We also said we wanted all the damages, all the benefits, and
the general relief provision. In our petition, the Benavidez case has
ruled that according to the statutory interest, general relief is a
sufficient for your plead. And that's where we are in reference to
that.

Secondly, under the -- I have heard the arguments of good Counsel

on all these cases on these basically the same issues. Rather they have just to go for a general argument, I think I'd like to maybe approach some of the questions I've heard the panel ask. To me, this whole case just is to be decided on the interpretation of these statutes as determined by the public policy issued by both this Court, as authority and by the legislature. Those basic policies are very quickly and I know, of course, the court's familiar with all these but that is in Stracener this Court is to literally to protect the policy of the legislature. Secondly, it's to protect the insured. Therefore that's legally entitled to recover damages from the insurer. Then third, it's to provide an incentive to the defendant to settle the claims. And that it's to avoid a multiplicity of suits. When you apply those public principles to these new UIM coverages, the outcome becomes very clear. I would like to address, perhaps -- well, in our particular case, our situation is a little different in this sense. The Brainards sued the -- the tortfeasor, whose name is Premier, and asked then, and brought its UIM cover Trinity in. The liability issue is very clear. Very quickly, there was a 55,000 pound old work over reef. It was out in the field near Tampa, Texas, and somebody out in the field saw that the rim was nearly cracked all the way around, on the front of this -- this machine. They decided to go on in and tamper anyway. And when they did, the wheel came off, that machine went across the road and hit Mr. Brainard on the wrong side of the road, head on killing him of course instantly.

Mr. Brainard was a -- the patriarch then of an old ranching family in Amarillo. They are running a huge ranch, like 75,000 acres. These five -- in this case were all of their children. They wanted to have the protection of UIM as they understood it, as it is said in this policy. So, they bought 13 vehicles, this \$1,000,000 million coverage. When they -- assuming because of the tax problems as we all know that can come about with, with people in that kind of a situation. What happened was that they began this suit against the tortfeasor. We took three depositions of the people out in the field and the other side. The tortfeasor said, we give up, we'll pay our limits, a million dollars. And we made a stylers claim, Trinity agreed to that, we took the money down. Next, we said, Trinity, okay let's try to do this case. Can we do it some way? And they said, well, number one, we don't agree there's any liability. You see, at that time, already some of these cases had come out saying that there wasn't any obligation to pay attorney fees. So they didn't have anything to lose to deny liability.

JUSTICE: Let me -- Let me interrupt you there.

MR. SCOTT: Yes, Sir.

JUSTICE: The jury was informed of the million dollar payment?

MR. SCOTT: The million dollar payment? No.

JUSTICE: It's just a coincidence that they come back with the verdict of a \$1,010,000?

MR. SCOTT: That's correct. Uhm and they [inaudible] --

JUSTICE: -- And they knew the -- they knew that --

MR. SCOTT: -- and they weren't even informed there's an insurance company.

JUSTICE: So all the jury was told, this was Brainard v. the driver, Premier?

MR. SCOTT: That's correct. And I see a real distinction in this case where we're saying, our first-party contract carrier has opposed to a tortfeasor. If we assume the tortfeasor, they may have held off and determined when the liability is issued.

JUSTICE: Well, I don't want to interrupt you on your argument --

MR. SCOTT: It's all right.

JUSTICE: -- on how strong your liability was. But obviously, the insurance company was closer on its estimate of damages since in fact, the jury came back exactly -- exactly 1 percent above what you had already received?

MR. SCOTT: I disagree, and I'll tell you why. Cavnar says that prejudgment interests should be as damages. We -- if you take prejudgment interest, when we took the million dollars down, there was still \$90,000 owing on prejudgment interest as of that time that has never been paid. And we're entitled that is damages under the statute. One. Two, we --

JUSTICE: Actual damages that the insurance company was exactly 1 percent off of what your actual damages were?

MR. SCOTT: I consider prejudgment interest as actual damage.

JUSTICE: Perhaps you're the only one --

MR. SCOTT: -- like that. --

JUSTICE: -- in the state then --

MR. SCOTT: -- I heard what you're saying.

JUSTICE: Under any tort reform statute, anything else you're aware of where prejudgment interest is not something different in actual economic damages?

MR. SCOTT: Well, Sir. That may be in -- under some other law, but not these cases and not this statute. And if that's the subject. But in going forward with it on the amount of the damages, I will talk about if you apply those policies. Clearly, in order -- why shouldn't the tortfeasor, I mean the insurance company be encouraged to settle before the case was tried. After they denied liability, we took another 17 depositions. We appointed six expert witness and tried the case for a week. I promise you, the attorney's fee of \$100,000 in this case is, is in my opinion willfully low. The jurors who put -- that's what they determined. And that's what the court awarded. But we followed every part in 38001. There was the presentment. There was the denial of the claim. It was not paid. We've proved it to the court. There was a jury finding and a judgment on attorney fees. And yet it was still denied, because they're saying that it wasn't due until this jury verdict under some of the -- the court of appeals opinions. That makes no sense legally --

JUSTICE: Well, if they -- if they have been Premier's insurer, there would have been no attorney's fees? Prejudgment interest, yes. Attorney's fees, no.

MR. SCOTT: I agree with that. If -- if they had admitted liability and/or we were trying to get the tortfeasor. Either one.

JUSTICE: If Premier's insurer had denied liability even though it was staring them in the face, you would have -- they wouldn't have owed you attorney's fees because is a tort case. And you can't get attorney's fees in tort cases.

MR. SCOTT: That's correct, but neither did I pay a premium, . And I'll talk about that. In 2003, there was \$111 billion dollars paid by the citizens of the State of Texas, for automobile insurance.

JUSTICE: How was the insurer legally obligated to pay before there is a determination made in a contested case?

MR. SCOTT: The legally entitled is obviously after a final judgment, your Honor, Justice Jefferson. But if -- as any other contract case, if you follow these policies to encourage them to settle it, to give the insured all that he should know, and to stop the multiplicity of suits, somebody is going to suffer, either the insurance company or the individual. We pay the premiums. And we should

be entitled to the benefit of that doubt. They're the insurance company. We're not in here to look over the insurance company. They have a whole rack of adjusters and people to examine it. The blue sheets --

JUSTICE: But we also -- but we also have to look at the other side of it. The -- the company here has the right, if it wants, to submit this case to a jury. If they, if they disagree, the parties which often happen they disagree, the legal obligation doesn't arise until, at least there is a verdict, perhaps a final judgment and it, to go further down the line till the appellate remedies are distinguished. So why, I mean why should they have that obligation before they are -- they have their day in court?

MR. SCOTT: They don't have an obligation because they're not in an obligation until they're proven to be wrong. And that's in the court of law. Just like any other contract case, if they're proven to be wrong, they ought to pay the price. They're in a lot better shape than Mr. and Mrs. Brainard was to determine what was the legal damages, or legally entitled to, or the amount of liability. And if you don't do that, your Honor, if you go the other way and you say there's not any liability until the jury verdict, why a jury verdict, why not a final judgment? This case is a -- was -- this accident happened in 1999. This is 2005. And I promise you this case has been pushed as fast as we could push it. If you double that in order to do the other side, you're -- you're, you know, it's not ever going to happen. The size of a \$25,000 policy, it'll never happen. What you're fixing to do if you do that is do away with any you [inaudible], because insurance company just like in this case is going to deny clear liability. They're going to deny the prejudgment interest. I want to talk about -- about the recovery --

JUSTICE: -- Why -- why would they do that if there's a provision, under, to think that the insured can go against for unfair claim practices or later to defend the claim properly or --

MR. SCOTT: That's gonna again encourage multiplicity of suits. We'll then have to turn around and sue under 2120 or 2155 and still have this case. Why not encourage them to settle the case just like any other contract, back home at the beginning. And -- and I agree with, I would consider it a difference, in this case we're pursuing Trinity after we had taken down on the stylers claim against the regular tortfeasor. At that point they knew pretty well, there was liability and they could, we could argue about the damages. This all, this -- his state is filled with a huge industry of people who determine the value of these unliquidated damages. What's the difference between this and -- and a lost profit, or a loss of business, or a disfigurement claim particularly, or the own and all things that are unliquidated that are not agreed to. Everybody should be entitled and have the right to have their day in court. But if they're wrong, if the policy of this case is determined by the legislature, that policy should be followed. If that policy is followed as in this case, it's clear that they -- that we get attorney's fees and encourages to settle it. It's clear that we get a prejudgment interest as damages, otherwise they have a free ride. That's what they're going to do. Nothing.

JUSTICE: Counsel, you're making it sound awfully simple when we've got several courts of appeals that have said one thing and several courts of appeals that have said something different. It can't be that all awfully clear. Can it?

MR. SCOTT: It is to me.

JUSTICE: It is to you. [Laughter]

MR. SCOTT: Any further questions?

JUSTICE: I assume your relevant contract language is the same as in the other two cases that the insurers will pay damages which are covered, which a covered person is legally entitled to recover. Is that correct?

MR. SCOTT: Yes sir. Under the liberal construction of the Finance Code --

JUSTICE: I haven't asked -- I haven't asked a question yet.

MR. SCOTT: Well, I'm sorry. I thought you did. I apologize. Excuse me, Judge.

JUSTICE: Well I did ask a question. You answered it.

MR. SCOTT: All right.

JUSTICE: The next question is, when does a breach occur if the language is that the insurer must pay damages which a covered person is legally entitled to recover? Is that only when the insurer doesn't pay after there's a legal entitlement to recover? Is that when a breach occurs?

MR. SCOTT: The breach occurs the same as any other written contract. And it's, is finally determined by a court. It may be argued about whether it is in the beginning of the case. But what finally happens in the court and the trial will determine who's legally entitled and then only on the final judgment, not a jury verdict.

JUSTICE: Well, I don't know that we can apply such a blanket rule. The contracts are breached when their terms aren't followed. And contracts differ. This contract says, the insurer will pay damages to which a covered person is legally entitled to recover. It could have said, which a person, which a covered person presents for recovery. It says, legally entitled to a recovery. Isn't that important?

MR. SCOTT: Well, I think it's important in this sense, your Honor. If it said presented, that would give the -- the -- a blank check to the -- to the plaintiff. --

JUSTICE: I'm not sure if it wouldn't --

MR. SCOTT: -- Instead of a -- a legally entitled --

JUSTICE: -- I'm not sure if it would or it wouldn't. But the point is: Don't we have to enforce the contract that the parties entered? Regardless of which way this comes out?

MR. SCOTT: I think the contract has to be enforced. But it's just like any other written contract like a fire insurance claim. You don't know how much it is until you get through trying the case. Sometimes, you don't know liability because it claimed arson.

JUSTICE: But the parties couldn't agree that I have an obligation to pay when you present the claim?

MR. SCOTT: Well --

JUSTICE: Or the parties could agree, I have an obligation to pay, when there's a legal entitlement for you to recover. Those are different things, aren't they?

MR. SCOTT: Yes, they are. And what the legislature --

JUSTICE: -- We have to pay attention to that, in interpreting this contract between the parties.

MR. SCOTT: What the legislature did in this case was say legally entitled and then it said it to be liberally construed in favor of the insurer for him to give his money. And it also says that it's to preventive multiplicity of lawsuits. And following those two public policies as dictated by the legislature -- you heard all those facts like I was talking about earlier and got into it in great detail. And they're in a much better position to make that determination than a court would be on individual cases.

CHIEF JUSTICE JEFFERSON: Any further questions?

JUSTICE MEDINA: Yes. Thank you. What was your comment gonna be about the liberal construction of the Finance Code?

MR. SCOTT: The liberal construction of the Finance Code, your Honor, Justice Medina, is that it shall be legally entitled to recover as damages from owners and operators because of bodily injury, or property damage. They want you to restrict bodily injury and property damage to just exactly that. When it's to have a liberal construction in favor of the insurer to get everything he is entitled to, it's stated in the policy of the legislature. If you only had bodily injury, you wouldn't even have wrongful death. You wouldn't have a whole lot of other things. You can, but you have mental anguish or these other intangibles that are still legal damages in the state of Texas.

CHIEF JUSTICE JEFFERSON: Thank you, Counsel. The Court is ready to hear argument from the respondent.

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

ORAL ARGUMENT OF GREGORY R. AVE ON BEHALF OF THE RESPONDENT

MR. AVE: May it please the Court. With respect to the issue of prejudgment interest, we believe that this case presents essentially two issues. The broad issue is prejudgment insurance recoverable under Texas law, Cavnar-type prejudgment interest under a UIM policy. There's a second issue here, a more narrow issue: Is prejudgment interest recoverable under the facts of this case? I'd like to take the easy issue first, quickly. It's not recoverable in this case for essentially three simple reasons: the Brainard's didn't plead it as an element of damage allegedly caused to them by the tortfeasor --

JUSTICE: -- Why -- why does it have to be pled if you read the policy to include all damages that they're legally entitled to recover?

MR. AVE: Because -- simply because the contract may allow a party to recover or obligate an insurance company to pay certain amount. It does not allow a party to simply get damages that they don't plead. I believe the pleading rules of this state require you to file a pleading which gives fair notice of the nature of the damages you're seeking against your adversary.

The second issue, that prejudgment insurance isn't out here is because Trinity, to borrow from Justice Brister a little bit earlier, got it a little bit wrong. They offered \$50,000. And it turned out they owed \$5,000 in actual damages. Admittedly, they offered ten times the actual damages that were ultimately determined to be uninsured or uncompensated by personal injury protection.

The third issue of why prejudgment interest isn't recoverable here is the Brainard's insistence that this Court award them, just as they did in the trial court and in the Court of Appeals, \$263,000 in prejudgment interest for money they had in their pocket all along. The standard of review is abuse of discretion, to say that the trial court given those three facts abused discretion is simply wrong. That decision is unassailable.

Well, let's look at the broader, more, perhaps complex issue of prejudgment interest. Is it covered under a UIM policy in the State of Texas. And I think it's incumbent upon me, to share something that hasn't come up yet in any of the arguments we've heard, preceding this. And that's that if the -- if the court happens to take a look at the

standard personal auto policy approved by the State Board of Insurance which is now used in Texas, it has been changed slightly, as it relates to this issue. In the liability portion of the policy, the State Board of Insurance has now decided to say and add the sentence that says, damages included prejudgment interest. There's no such sentence in our policy. And there's no such sentence added to the UIM carrier under the New Standard personal auto policy.

JUSTICE O'NEILL: If they had gone to judgment against the tortfeasor in this case, the judgment would have include prejudgment interest. Would it not?

MR. AVE: Yes, it would have your Honor.

JUSTICE O'NEILL: And wouldn't it be liable up to the policy limits

--

MR. AVE: No, we wouldn't.

JUSTICE: -- of judgment?

MR. AVE: No we would not, your Honor.

JUSTICE: Why not?

MR. AVE: Well, as this Court pointed out in Ambury in Footnote 5, it has never been the holding of this Court that prejudgment interest constitutes damages because of bodily injury. And again, what is the -- this cuts to the question that Justice Johnson was getting at in this notion of, what is damages because of bodily injury? Or if we look at our policy in section B, the limits of insurance which it says, the maximum we will get paid is the stated amount for bodily injury.

JUSTICE O'NEILL: Then he is legally obligated to pay because of bodily injury?

MR. AVE: That is correct.

JUSTICE O'NEILL: And legally obligated to pay usually includes prejudgment interest.

MR. AVE: It is an incidental damage amount or incidental sum which is awarded in conjunction with a -- a judgment against a tortfeasor. That is absolutely correct. But in our opinion, it is not damages because of bodily injury. This Court in Randell, 1972, this Court in Briggs, 1972, this Court in Stracener in 1989 says, what UIM compensates for is actual damages. Actual damages does not include prejudgment interest. That's an explicit holding of the First Court of Appeals, I believe in 1992 in the Insurers binding case. That's an incidental amount. Surely yes, you are entitled to it against the tortfeasor on a judgment you obtained against the tortfeasor. But that doesn't mean it's the actual damages that you recover because of bodily injury. And I think that that takes us Justice Owen exactly to the analysis that is required to look at. We don't think that the contract language covers prejudgment interest. We think on its face, it does not. But if we pull back the curtain we'll get prejudgment interest. Cavnar is an important piece of the puzzle. Though we got to look it ... We got to look further back. We got to go back to the 1800s. We have to look at the Hyde and Himer case. We got to look at the Whiteman's case because it is exactly what the Supreme Court focused in on Cavnar. What is prejudgment interest for you? Well, time and time again, the Court has identified it as a form of penalty for unlawful detention of money. That, that has become a, characterize it differently in the modern cases. Let me read to the Court from Wajenson. That's 40 Southwest 11. Interest may be assessed as damages when necessary to indemnify the party for an injury inflicted by his adversary. Stepping forward into 1978, the Fil Petroleum v. the Stahl case, which again is the key to Cavnar, which is really with regards] to Cavnar. The dependent is liable for any interest on the delayed

payments of an element of equitable principle. It [inaudible] ought not to be able to use someone else's money as it pleases for ten years, thereby enjoying a very considerable benefit, and then paying nothing for the use of that money. And more recently, a CNH nationwide decision. And I'm reading from page 327 in that court's decision. In operation if -- if being prejudgment interest would penalize only a defendant who is adjudged to be a tortfeasor and who did not make an adequate and timely offer settlements to the plaintiff. So this idea of prejudgment interest, has it. It's very reach, in it's notion of penalty. Also in Johnson & Higgin is repeated --

JUSTICE: And you have, haven't ... haven't we interpreted at least the former version of the Finance Code, to permit recovery on prejudgment interest on the future death?

MR. AVE: That was the holding of CNH Nationwide.

JUSTICE: How is that consistent with what you are?

MR. AVE: Well, the -- the legislature undid that as I understand it. Because they didn't agree with it and -- and to quote the acts in Justice Hecht's dissent in CNH Nationwide. It makes little sense to award prejudgment interest against a defendant, for some it has been determinate not to legally owe yet. That's exactly what we have with you now. That's exactly what the holding of this Court is in Henson. It is a sum you do not yet legally owe. Again, the idea here is embodied in this notion of penalty, saying concept of punitive damages. It makes no sense to penalize the UIM carrier or this person who has a, in essence a conflict with the -- the tortfeasor for the tortfeasor's wrongful detention of money. Just as it makes no sense to impose penalty damages on a UIM carrier for the tortfeasor's conduct. Both are punitive. What's the other public policy argument that's identified by this Court for equitable prejudgment interest? And I -- and I assume that remind the court that we keep referring to the Finance Code. This is not a tort action. This is a hybrid case. But it does exist and predicated on the existence of a contract. The prejudgment interest statute doesn't get the plaintiff anywhere because there is no judgment here in a tort action. But even if there were, let's look at the other identified public policy justification for prejudgment interest is, according to Cavnar, CNH Nationwide, Johnson & Higgins and the other precedents of this Court, It is to encourage settlements. I believe as Justice Ada puts it, it's to expedite settlements and it's to expedite settlements in trials.

JUSTICE MEDINA: Well, wouldn't awarding him attorney's fees here expedite the insurance, carrier then to move rather than to stall, to try resolve these claims?

MR. AVE: I -- I do believe that the, Justice Medina, the award of attorney's fees should ever be looked at as some type of incentive to create settlement. I believe that is State Farm in the initial argument and Nickerson pointed out. There are other ways for that to be remedied. And prejudgment interest, potentially could be and it said, I will make that distinction. In other words, the attorney's fees are awarded in by statute only. They can never be awarded unless there's a statute enabling their award. They are only awarded where there is a just amount of a -- where there is no condition precedent to a contractual obligation to pay. But if I could adjust your, use your question to go to prejudgment interest as an incentive to settle. That incentive idea in the law as expressed in Cavnar in the subsequent cases, works perfectly in the direct action of claimant against adversary, the tortfeasor. How does that work here? Well actually, it takes that incentive issue and completely puts it on its head. Because

the prejudgment interest is recoverable for the wrongful detention of money by the tortfeasor. And as was pointed out, I believe by Justice Owen or Justice Wainwright, the UIM carrier can't control with the tortfeasor or when the claimant settles with the tortfeasor. Then all of a sudden, a huge incentive to delay settlement is created. The longer they wait to settle their claim against the tortfeasor, what happens? The prejudgment interest clock runs. So, exactly the objective of this Court is expressed in *Cavnar*, to settle, is 100 percent definitive. The prejudgment interest is used or applied in this case. Again, that goes to the very nature of what UIM is. The UIM coverage is a hybrid type of claim. It is to enable you to recover certain damages that you could have recovered against the tortfeasor. It is a hybrid claim at its very nature. It is not -- cannot be thought of as a simple wholesale or blanket extension of whatever damage you might put a link on the tortfeasor for. We're standing here to write the check. That's not what the UM is about. That's not what its purpose is. There -- there's a lot of -- I believe all the sides of this issue grapple with what is UIM, and what's its purpose. There have been some laudable broad statements in the law. It says what it is and what it's not. We believe that, that the Court of -- the El Paso Court of the Appeals in 1992 in the case called *Casualty Reciprocal Insurance Exchange v. Demot*, 130 Southwest 3rd, 740, put it past in the court in deciding and relying on this Court's decision in *Francis*.

The -- the purpose of UIM protection is to protect the insurer against negligent financially irresponsible motorists by allowing the insured to claim damages for bodily injury. It isn't for allowing this recovery, all other types of incidental damages because those damages, like prejudgment interest, like attorney's fees have a very separate and distinct purpose and policy behind them, which is not present in this context and in fact which accomplishes or defeats the very opposite of the purpose which is outlined for the purposes of those issues. Again, prejudgment interest I believe is the focal point of our case. The issue of attorney's fees is also present in our case, but I am willing to repeat a lot of the arguments which have been made already today to this Court, which are *Henson* is simply inconsistent with that motion, and with all due respect, this Court will have to reverse *Henson*, if it is going to say that there is not a condition precedent to coverage prior to a legal adjudication of liability and damages. But nevertheless, you can get attorney's fees because there is -- because they went to the exercise of having approved their liability and damages as with respect to the tortfeasor.

And one last statement I'd like to offer in response to the question that came up with respect to *Norris*. The issue with respect to prejudgment interest and attorney's fees as it exists in this case happens to be in a underinsured motorist context. The answer to that question is the same whether you're talking about the uninsured or underinsured contexts. Policy language is the exact same. The answer is the exact same. And the justifications for the answer being exactly as the *Amarillo* Court of Appeals concluded is the same. That was a just result, awarding the *Brainards* \$263,000 in prejudgment interest, on money they had all in their pocket virtually the entire time against the UIM carrier is not.

JUSTICE: Thank you, Counsel.

REBUTTAL ARGUMENT OF BRYAN W. SCOTT ON BEHALF OF THE RESPONDENT

MR. SCOTT: A quick rebuttal. First, I never knew a plaintiff [inaudible] who wouldn't settle a case because the damages were unliquidated because it was gonna try to get interest. And secondly, you can't operate a law very longer. And then secondly, even in that case, there is an exemption in the statute that says that they could come in and say, the prejudgment interest should stop. So that's protective.

JUSTICE: But what's the purpose of underinsured motor insurance?

MR. SCOTT: Two purposes: to give the guy out there on the street the ability to buy a policy that will cover him in the even the guy that hits him doesn't have enough insurance. Exactly what we have. And he can pay a premium, a big premium sometimes to have that right stated in that contract.

JUSTICE: And how is that different from under -- from an uninsured motorist?

MR. SCOTT: Virtually none. Except this wouldn't even -- underinsured is that the guy has a little -- has some insurance and not enough.

JUSTICE O'NEILL: Let me ask you some questions about situations where the insured's suit against the tortfeasor actually does go to judgment?

MR. SCOTT: Okay.

JUSTICE O'NEILL: And then it becomes clearer that you're, there is underinsurance?

MR. SCOTT: Okay.

JUSTICE O'NEILL: I'm looking back at what this Court wrote in Johnson & Higgins v. Kenneco, and what we were talking about in that case and also in Cavnar, we were talking about. We fashioned common law prejudgment interest for two reasons: to encourage settlement and to expedite both settlements and trials by reducing incentives, incentives for defendants to delay?

MR. SCOTT: Yes, Ma'am.

JUSTICE O'NEILL: How does that apply to an insurance company who can't pay until that -- until that case against the tortfeasor is resolved?

MR. SCOTT: I think that's a very valid question. Let me answer it this way, if a may. That the -- as in our case until the tortfeasor ... okay, when the tortfeasor pays, in this case, they paid their money and they were out of, now revealing only with our own UIM --

JUSTICE O'NEILL: No, I'm not talking about your situation. I'm talking about my hypothetical?

MR. SCOTT: Okay. And --

JUSTICE O'NEILL: How do those incentives apply? Why are you charging prejudgment interest to the UMI carriers who're sitting out here while the tortfeasor's lawsuit is going on while the bill under the UMI is mounting and the carrier has, is totally powerless to do anything about that?

MR. SCOTT: That's correct. And if that would be the, the choice then it would also go to whether or not it was underinsured. And one of the purposes of this policy and the premium paid is to pay for that risk, because damages as defined by the Finance Code include prejudgment interest. And so, it's a part of the damages, not just the use of money.

JUSTICE O'NEILL: Well, we -- I'm talking about the incentives that we pointed out?

MR. SCOTT: Yes.

JUSTICE O'NEILL: Those incentives applied to two people in the tortfeasor case?

MR. SCOTT: And ultimately --

JUSTICE O'NEILL: But in the case of perverse incentive to the plaintiff in the tortfeasor case, vis-à-vis it's UIM coverage because the point of a certified continuance is it doesn't get the case to trial for six or seven years.

MR. SCOTT: Yes.

JUSTICE O'NEILL: That's all at the -- the expense of its UMI coverage?

MR. SCOTT: That's -- Yes, that, that's correct. And in that situation, I don't think they would probably owe attorney fees. I doubt if they would because they wouldn't, they -- they paid the money when the case was over, the case against the tortfeasor. And they weren't denying it themselves. And -- and what you were saying that -- it would be correct. They would have no way to handle that because they weren't being the tortfeasor.

JUSTICE O'NEILL: Should they be liable for the prejudgment interest?

MR. SCOTT: Absolutely. It's part of the damages. It's what they're legally entitled to of the, the tort, the statement -- I mean the plaintiff is entitled to get that, absolutely. And I want to make one other comment if I can on the, on the double recovery. Can I do that?

CHIEF JUSTICE JEFFERSON: If you will do it briefly.

MR. SCOTT: Very briefly. On the double recovery, they're trying to make a claim on equity, not under the statute of an offset. They've not pled forth -- they've not run into the equities of what's right and wrong in this case. And it's not -- it's the same statutory rate is as determined by as to the damages by the legislature. Thank you.

CHIEF JUSTICE JEFFERSON: Thank you, Counsel. The cause is being submitted. And the Court will take another brief recess.

SPEAKER: All rise.

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