IN THE FOURTH DISTRICT COURT OF APPEAL
FOR THE STATE OF FLORIDA

Claudia Bueno,

CASE NO: 4D08-2838

Appellant,

vs.

Ilene Workman,

Appellee.
_____/

On Final Appeal from the Fifteenth Judicial Circuit,
in and for Palm Beach County, Florida
Case No. 502006CA005516XXXXMB

INITIAL BRIEF OF APPELLANT

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STATEMENT OF CASE AND FACTS

Plaintiff/appellant Claudia Bueno was rear-ended by Defendant/appellee Ilene Workman ("defendant driver") while she was stopped at an intersection waiting for an ambulance to pass. (R Vol. I, 167). The impact was forceful enough to push Plaintiff's car into the middle of the intersection. (R Vol. I, 161-162, 167). The defendant driver claimed that she was stopped behind Plaintiff's car when she was rear-ended by a phantom vehicle that fled from the scene. (R Vol. II, 326-327, 330, 405-406). This version of events was recorded in a report completed by a Community Service Associate after the accident. (R Vol. I, 65-68; Vol. II, 303, 379). The defendant driver never saw the vehicle that allegedly rear-ended her. (R Vol. II 330, 351-352). Plaintiff's minor son, who had been a passenger in Plaintiff's vehicle, did not see any damage to the rear of the defendant driver's car immediately after the accident. (R Vol. I, 104-105).

Although her son suffered only short-term neck pain after the accident, Plaintiff experienced significant pain and injuries, ultimately requiring surgery. (R Vol. I, 108-109, 149; Vol. II, 221-225). She had significant pain in her neck and head, prompting her to seek treatment at a hospital. (R Vol. II, 149, 221-222). After the accident, Plaintiff had blurry vision, numbness in her fingers, and difficulty turning her head, as well as a broken tooth. (R Vol. II, 222-225). Plaintiff underwent surgery on her neck to resolve the injuries from the accident.

(R Vol. II, 378). As acknowledged by the defendant driver, Plaintiff claimed damages from the accident that "were far more than" the $100,000 limit of the defendant driver's liability insurance. (R Vol. III, 454).

Prior to suing the defendant driver in the instant action, Plaintiff's attorney issued a demand to GEICO under Plaintiff's uninsured/underinsured motorist ("UM") policy.[1] (R Vol. I, 44-46). The letter stated:

> On July 6, 2005, Claudia Bueno was a properly restrained driver who was in the turning lane at a stop light attempting to make a left on Boca Rio Road in the City of Boca Raton, Palm Beach County, Florida. An emergency vehicle was attempting to pass through the intersection and therefore Ms. Bueno came to a complete stop to wait for the EMS vehicle. An unidentified driver then slammed into the vehicle behind Ms. Bueno driv[en] by Ilene Workman forcing a collision between Ms. Workman and my client. The driver then sped away. Clearly Ms. Bueno has no liability whatsoever for this accident and therefore is entitled to her uninsured motorist benefits.

(R Vol. I, 44). Plaintiff's attorney then went on to describe in detail the injuries suffered by Plaintiff as a result of the accident:

> SUMMARY OF CLAUDIA BUENO'S MEDICAL TREATMENT
>
> Ms. Bueno presented herself immediately for treatment at the emergency room at West Boca Medical Center. The attending physician performed diagnostic tests and prescribed her medication for her cervical and head pain. Ms. Bueno also cracked a tooth from the impact of this accident. Ms. Bueno was then released with instructions to follow up with a physician for her neck and head.

[1] As indicated in the release, the UM policy was in the name of Plaintiff's husband, Francisco W. Uchoa. (R Vol. I, 51, 141).

> On July 19, 2005, Ms. Bueno presented herself for a neurological evaluation with Albin Morariu, M.D. Dr. Morariu thoroughly examined Ms. Bueno and diagnosed her with post concussion syndrome; and cervical sprain with C7 radiculopathy; and lumbar sprain/strain. Due to Ms. Bueno's memory loss EEG testing was performed. The testing revealed abnormalities indicative of a post traumatic seizure disorder. Also, the BAEP testing revealed abnormalities indicative of bilateral brainstem lesions. Lastly, the SEPUE testing revealed abnormalities indicative of left sensory radiculopathy. Ms. Bueno would follow up with Dr. Morariu several times leading to him instructing her to undergo MRI testing.
>
> On July 22, 2005, Ms. Bueno underwent a MRI of the cervical spine. The MRI revealed a disc herniation at C5-6 with foraminal stenosis; and a disc herniation at C4-5; and a disc bulge at C6-7; and a straightening of the cervical spine suggestive of muscle spasm. The MRI of the brain revealed hypertensity of the T2 weighted images.
>
> Due to these findings Ms. Bueno was referred to a neurosurgeon named Douglas Martin, M.D., for a surgical evaluation. Upon review of her symptoms and diagnostic testing, Dr. Martin recommended an anterior cervical discectorny with implant at C56. Ms. Bueno would like to undergo this procedure but has no insurance to cover the costs. In addition, Ms. Bueno has no one to take care of her child since her family is in Brazil. However, Ms. Bueno has a follow up visit with Dr. Martin wherein they will discuss the procedure in depth and she will be scheduled for surgery.
>
> On January 11, 2006, Dr. Morariu provided a final evaluation of Ms. Bueno's injuries. According to his experience as a board certified neurologist, his treatment of Ms. Bueno, and her ongoing complaints, Dr. Morariu has ascribed her a partial permanent impairment rating of fourteen percent (14%) of the whole body in accordance with the AMA Guide for the Evaluation for Partial Permanent Impairment.

(R Vol. I, 45). He then summarized Plaintiff's damages:

SUMMARY OF CLAUDIA BUENO'S DAMAGES

As a result of the traffic crash caused by a hit and run driver, Claudia Bueno has incurred significant injuries that have required multiple doctor visits, frequent physical therapy and surgical intervention. The following summary does not include future medical costs that are certain to be incurred, but are estimated at $50,000.00 for the surgery alone.

Provider	Amount Incurred
1. West Boca Medical Center	$ 774 .31
2. ER Doctors	$ 299.00
3. Imaging Consultants	$50.00
4. Florida Open Imaging	$4,728.00
5. Florida Neurological Center	$5,615.00
6. Douglas Martin, MD.	$1,500.00
TOTAL	$12,966.31

(R Vol. I, 45-46). Plaintiff's attorney demanded the $30,000 policy limits of Plaintiff's UM policy, noting "the probability of a jury verdict in favor of [Plaintiff] exceeding all available coverage." (R Vol. I, 46). Thereafter, GEICO paid Plaintiff the policy limits as a "full and final settlement of all claims for death, injuries, loss or damage, known or unknown, [Plaintiff] may have had under the Uninsured and/or Underinsured Motorist coverage of [the] policy." (R Vol. I, 51, 144; Vol. II, 206-207). GEICO also settled any potential claim by Plaintiff's son for $5,000. (R Vol. I, 52, 144).

At this point, Plaintiff was not fully compensated for the damages she suffered as a result of the accident, having received only $30,000 when just her medical costs were expected to be in excess of $60,000 (and later amounted to

more than $80,000 (R Vol. II, 378)). (R Vol. I, 45-46). Plaintiff's attorney sought compensation from State Farm under the defendant driver's liability insurance policy. (R Vol. I, 53). He sent the company a letter explaining Plaintiff's justification for her theory that the defendant driver has liability for the accident:

> It is undisputed that you insured's vehicle slammed into the rear of my client. It appears very unlikely that another vehicle could have slammed into your insured with enough velocity to also force your insured into my client and then still have a drivable vehicle to make a speedy 'getaway.' There are no disinterested witnesses to support this 'phantom vehicle' theory. As such, it appears that the presumption of negligence of Ms. Workman for rear ending my client cannot be overcome. It is also curious that although your insured claims a phantom vehicle collided with her vehicle, she apparently could not identify the vehicle in any way to the officer, *i.e.*, make, color, model.

(R Vol. I, 53).

When efforts to collect from State Farm were unsuccessful, Plaintiff filed the instant negligence action against the defendant driver, seeking damages for injuries caused to herself and her minor son. (R Vol. I, 1-2). The defendant driver settled the case only as to the damages suffered by Plaintiff's son. (R Vol. I, 14).

The defendant driver moved to dismiss claiming that Plaintiff's negligence action should be barred by the doctrines of waiver and estoppel because Plaintiff was attempting to commit fraud on the court by recovering from the defendant driver when she had already recovered from her own UM carrier on the phantom vehicle theory. (R Vol. I, 30-38; Vol. III, 399-404). After a hearing, the Honorable Judge David E. French held "the Plaintiff is legally barred from two (2)

recoveries for the same claim, for the same loss, on the same set of facts. She has chosen and elected her remedy and collected on same. This factual setting justifies the application of the doctrine of waiver and estoppel." (R Vol. III, 418-419). The trial court dismissed Plaintiff's case with prejudice and entered final judgment in favor of the defendant driver, which Plaintiff timely appealed. (R Vol. III, 481-491, 443-445).

SUMMARY OF ARGUMENT

It was error for the trial court to dismiss Plaintiff's negligence action against the defendant driver on the grounds of waiver and estoppel because Plaintiff's settlement with her UM carrier did not prejudice the defendant driver in any way, or result in Plaintiff recovering for the same damages that she would be able to recover in the instant lawsuit against the defendant driver.

I. The doctrine of equitable estoppel does not bar Plaintiff's claim because the representation made in the demand letter to the UM carrier regarding the phantom vehicle is not directly contrary to the later-asserted position that the defendant driver is also liable for the accident; the defendant driver did not rely on that representation; and the defendant driver was not prejudiced because she never relied on that representation to her detriment.

II. The doctrine of judicial estoppel does not bar Plaintiff's claim for the same reasons that equitable estoppel does not. Additionally, the fact that the prior representation was not made during a judicial or quasi-judicial proceeding precludes application of judicial estoppel.

III. The doctrine of waiver does not bar Plaintiff's claim because there is no indication in the record that Plaintiff intended to relinquish her

right to sue the defendant driver for negligence as a result of first settling with her UM carrier.

IV. The Florida statutes specify that UM insurance does not provide the same coverage as liability insurance. Thus, by settling with her UM carrier, Plaintiff had not already recovered for damages caused by the defendant driver, which are covered by the defendant driver's liability policy.

ARGUMENT

THE TRIAL COURT ERRED IN DISMISSING PLAINTIFF'S CASE AGAINST THE DEFENDANT DRIVER BASED ON STATEMENTS PLAINTIFF'S ATTORNEY MADE IN A DEMAND LETTER TO HER UNDERINSURED MOTORIST CARRIER.

It was error for the trial court to dismiss Plaintiff's negligence action against the defendant driver on the grounds of waiver and estoppel because Plaintiff's settlement with her UM carrier did not prejudice the defendant driver in any way, or result in Plaintiff recovering for the same damages that she would be able to recover in the instant lawsuit against the defendant driver.

Because the propriety of the trial court's decision to dismiss Plaintiff's case involves pure questions of law, the Court should review its decision *de novo*. *See Aravena v. Miami-Dade County*, 928 So. 2d 1163, 1166 (Fla. 2006) (holding appellate review of an issue resolved by the trial court as a matter of law, based on the undisputed facts, is *de novo*); *Florida Dept. of Revenue v. Cummings*, 930 So. 2d 604, 607 (Fla. 2006) (noting "trial court's decision to dismiss a complaint based on a question of law [is reviewed] de novo").

I. Plaintiff's lawsuit against the defendant driver is not barred by the doctrine of equitable estoppel.

The doctrine of equitable estoppel does not bar Plaintiff's case against the defendant driver because: 1) the representation made by Plaintiff's attorney in the demand letter to her UM carrier is not contrary to the allegations made in this

lawsuit; 2) the defendant driver did not rely on the representations made in the demand letter; and 3) the defendant driver did not make a detrimental change in her position based on the representations made in the demand letter.

The doctrine of equitable estoppel "arises when one party lulls another party into a disadvantageous legal position." *Florida Dept. of Health & Rehab. Servs. v. S.A.P*, 835 So. 2d 1091, 1096 (Fla. 2002). "'"Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights . . . against another person, who has in good faith relied upon such conduct and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right, either of property, or of contract or of remedy.'" *Id*. at 1096-97 (quoting *Major League Baseball v. Morsani*, 790 So. 2d 1071, 1076 (Fla. 2001)). "The doctrine of estoppel is applicable in all cases where one, by word, act or conduct, willfully caused another to believe in the existence of a certain state of things, and thereby induces him to act on this belief injuriously to himself, or to alter his own previous condition to his injury." *Id*. at 1097 (quoting *Morsani*, 790 So. 2d at 1076).

"'Equitable estoppel presupposes a legal shortcoming in a party's case that is directly attributable to the opposing party's misconduct. The doctrine bars the wrongdoer from asserting that shortcoming and profiting from his or her own misconduct. Equitable estoppel thus functions as a shield, not a sword, and

operates against the wrongdoer, not the victim.'" *Id*. (quoting *Morsani*, 790 So. 2d at 1077).

"The elements of equitable estoppel are (1) a representation as to a material fact that is contrary to a later-asserted position, (2) reliance on that representation, and (3) a change in position detrimental to the party claiming estoppel, caused by the representation and reliance thereon." *State v. Harris*, 881 So. 2d 1079, 1084 (Fla. 2004) (citing *State Dep't of Revenue v. Anderson*, 403 So. 2d 397, 400 (Fla. 1981)). None of these elements is satisfied in this case.

A. The representation of Plaintiff's attorney in the demand letter to her UM carrier is not contrary to the allegations in her lawsuit against the defendant driver.

Although the letter submitted to GEICO by Plaintiff's attorney presented the phantom vehicle theory, the import of the letter was that Plaintiff suffered serious and extensive injuries in the accident that would lead to a jury verdict in excess of available insurance coverage. UM insurance provides coverage "over and above, but [does] not duplicate, the benefits available to an insured under any . . . personal injury protection benefits [or] under any motor vehicle liability insurance coverage . . . and such coverage shall cover the difference, if any, between the sum of such benefits and the damages sustained, up to the maximum amount of such coverage . . . ." § 627.727(1), Fla. Stat. The amount of UM coverage "shall not be reduced by a setoff against any coverage, including liability insurance." *Id.* Thus,

regardless of whether the defendant driver is completely, partially, or not at all liable for the accident, Plaintiff was still entitled to recover under the UM policy because there was not sufficient liability coverage available to compensate Plaintiff for her injuries. Plaintiff's attorney was not taking an inconsistent position when later suing the defendant driver—he was zealously advocating for the interests of his client who had not been fully recompensed for the injuries she suffered in the accident. The possible liability of the driver of a phantom vehicle does not mean that the defendant driver cannot also be at fault for the accident and Plaintiff's injuries.

Nor can the attorney's letter be viewed as an admission by the Plaintiff because Plaintiff did not write the letter and section 90.408, Florida Statutes, excludes offers to compromise from evidence. *See Sea Cabin, Inc. v. Scott, Burk, Royce & Harris, P.A.*, 496 So. 2d 163, 164 (Fla. 4th DCA 1986) (finding "it was error for the trial court to admit a letter from appellants' counsel to another party suggesting that the other party was responsible for appellants' damages and proposing a settlement of appellants' claim against that party); *Mortgage Guarantee Ins. Corp. v. Stewart*, 427 So. 2d 776, 780 (Fla. 3d DCA 1983) (noting "settlements or offers of settlement have never been considered admissions against interest binding on the parties making them").

Furthermore, GEICO's decision to settle Plaintiff's claim under the UM policy does not mean that it did so because it believed that the phantom driver was at fault for the accident, much less *solely* at fault for the accident. A settlement does not necessarily mean that an adversary's claim is well-founded, it just means that the settling party found settlement to be in its best interests for any number of reasons. *See Mutual Ben. Health & Acc. Ass'n v. Bunting*, 133 Fla. 646, 658 (Fla. 1938).

B. The defendant driver did not rely on the representation made in the demand letter to Plaintiff's UM carrier.

"There can be no estoppel when the party seeking the estoppel was aware of the true facts and thus was not misled by the other party's conduct." *Winans v. Weber*, 979 So. 2d 269, 275 (Fla. 2d DCA 2007) (citations omitted). The trial court held that Plaintiff is estopped from suing the defendant driver because Plaintiff presented the defendant driver's version of events surrounding the accident to her UM carrier. The defendant driver did not *rely* on Plaintiff's representation to her insurance company, nor could she because the representation was actually her own. Without the essential element of reliance, the doctrine of equitable estoppel cannot be used to bar Plaintiff's claim. *See Harris v. National Judgment Recovery Agency, Inc.*, 819 So. 2d 850, 855 (Fla. 4th DCA 2002)

(holding equitable estoppel doctrine applies only when party "acting in reliance on [prior inconsistent] representation [has] changed his position to his detriment").

Directly on point is *Hammock v. Kent*, 592 So. 2d 765 (Fla. 1st DCA 1992). There, the plaintiff was a passenger in a vehicle driven by Driver A, and owned by his employer, that was hit by a vehicle driven by Driver B. The plaintiff first made a demand under the UM policy of Driver A's employer, stating that Driver B was totally at fault for the accident. The carrier did not settle, so the plaintiff sued Driver B and the carrier and ultimately collected the policy limits of Driver B's liability coverage and $20,000 under the UM policy. The plaintiff then sued Driver A for negligence. Driver A obtained summary judgment on the ground of estoppel (presumably the insurance carrier that issued the liability policy was the same carrier that issued the UM policy), and the first district reversed, reasoning:

> [T]he record before this court [does not] contain an affirmative indication that [the insurance carrier] relied upon [plaintiff's] representation in the demand letter, that [Driver B] was totally at fault, when it changed its position from an assertion that no UM coverage was available to a concession that UM coverage was available, but not in the amount sought by the plaintiffs. Absent proof of the element of reliance, an estoppel was not established for summary judgment purposes.

Id. at 766.

Because neither State Farm nor the defendant driver relied on the representations made to GEICO in the letter demanding benefits under the UM policy, the doctrine of equitable estoppel cannot apply to bar Plaintiff's claim.

C. The defendant driver did not make a detrimental change in position in reliance on the representation made in the demand letter to Plaintiff's UM carrier.

Equitable estoppel is also not proper in this case because the defendant driver was not prejudiced by Plaintiff's representation to her UM carrier. Plaintiff's settlement with her UM carrier and the reasons therefore had no affect on the defendant driver. *See Hughes v. Enterprise Leasing Co.*, 831 So. 2d 1240, 1241 (Fla. 1st DCA 2002) ("a defendant cannot set-off against a judgment any amounts paid to a plaintiff as UM benefits") (citing *Int'l Sales-Rentals Leasing Co. v. Nearhoof*, 263 So. 2d 569, 571 (Fla. 1972)).

And the defendant driver took no change in position based on Plaintiff's representations to GEICO. The fact is, the Plaintiff could not possibly know whether the driver of the phantom vehicle is the only person at fault for the accident, much less whether there was even a phantom vehicle involved. If the Court reverses the trial court's order of dismissal and remands this case for trial, the defendant driver will have the opportunity to prove the liability of the driver of the phantom vehicle, which she raised as an affirmative defense.[2] (R Vol. I, 5). This is the same opportunity the defendant driver would have had if Plaintiff had sued her first, and then sought coverage under the UM policy. With no prejudice to the defendant driver, there can be no application of the equitable estoppel

[2] *See* §768.81, Fla. Stat.; *Fabre v. Marin*, 623 So. 2d 1182 (Fla. 1993).

doctrine. *See Harris*, 819 So. at 855 (holding equitable estoppel doctrine applies only when party "acting in reliance on [prior inconsistent] representation [has] changed his position to his detriment").

II. Plaintiff's lawsuit against the defendant driver is not barred by the doctrine of judicial estoppel.

The doctrine of judicial estoppel does not bar Plaintiff's claim for the same reasons that equitable estoppel does not. Additionally, the fact that the prior representation was not made during a judicial or quasi-judicial proceeding precludes application of judicial estoppel.

"'Judicial estoppel is an equitable doctrine that is used to prevent litigants from taking totally inconsistent positions in separate judicial, including quasi-judicial, proceedings.'" *Blumberg v. USAA Cas. Ins. Co.*, 790 So. 2d 1061, 1066 (Fla. 2001) (quoting *Smith v. Avatar Properties, Inc.*, 714 So. 2d 1103, 1107 (Fla. 5th DCA 1998)). "Judicial estoppel bars a party who successfully takes a position in a prior judicial proceeding from proceeding with a conflicting position in a subsequent action to the prejudice of the adverse party." *Keyes Co. v. Bankers Real Estate Partners, Inc.*, 881 So. 2d 605, 606 (Fla. 3d DCA 2004) (citing *Blumberg*, 790 So. 2d at 1066). The Florida Supreme Court has explained the doctrine of judicial estoppel as follows:

> A claim made or position taken in a former action or judicial proceeding will, in general, estop the party to make an inconsistent

> claim or to take a conflicting position in a subsequent action or judicial proceeding to the prejudice of the adverse party.
>
> In order to work an estoppel, the position assumed in the former trial must have been successfully maintained. In proceedings terminating in a judgment, the positions must be clearly inconsistent, the parties must be the same and the same questions must be involved. So, the party claiming the estoppel must have been misled and have changed his position; and an estoppel is not raised by conduct of one party to a suit, unless by reason thereof the other party has been so placed as to make it to act in reliance upon it unjust to him to allow that first party to subsequently change his position. There can be no estoppel where both parties are equally in possession of all the facts pertaining to the matter relied on as an estoppel; where the conduct relied on to create the estoppel was caused by the act of the party claiming the estoppel, or where the positions taken involved solely a question of law.

Blumberg at 1066 (quoting *Chase & Co. v. Little*, 156 So. 609, 610 (Fla. 1934)).

The doctrine of judicial estoppel does not apply to bar Plaintiff's claim of negligence against the defendant driver for the same reasons that the doctrine of equitable estoppel does not: Plaintiff has not taken inconsistent positions; the defendant driver was not misled by the representation made to the UM carrier; and the defendant driver did not rely on that representation or change her position because of that representation.

Additionally, the doctrine of judicial estoppel does not apply because Plaintiff's demand to the UM carrier was not a prior judicial or quasi-judicial proceeding. In fact, the representation was made in an offer to compromise, which is often not even admissible in a judicial proceeding. *See* § 90.408, Fla. Stat.

Thus, the trial court's order of dismissal cannot be affirmed on the ground that Plaintiff was judicially estopped from suing the defendant driver for negligence.

III. Plaintiff did not waive her claim against the defendant driver.

The doctrine of waiver does not bar Plaintiff's claim against the defendant driver because there is no indication in the record that Plaintiff ever intended to relinquish her right to sue the defendant driver for negligence when she settled with her UM carrier.

"'[W]aiver' [i]s the voluntary and intentional relinquishment of a known right or conduct which implies the voluntary and intentional relinquishment of a known right." *Raymond James Financial Servs., Inc. v. Saldukas*, 896 So. 2d 707, 711 (Fla. 2005). "The elements that must be established to prove waiver are the existence at the time of the waiver of a right, privilege, or advantage; the actual or constructive knowledge thereof; and an intention to relinquish that right, privilege, or advantage." *Winans v. Weber*, 979 So. 2d 269 (Fla. 2d DCA 2007) (citing *Arbogast v. Bryan*, 393 So. 2d 606, 608 (Fla. 4th DCA 1981)).

Although the trial court found that the doctrine of waiver bars the Plaintiff's negligence action against the defendant driver, there is nothing in the record to indicate that Plaintiff intended to relinquish her right to sue the defendant driver. As previously discussed, recovering under the defendant driver's liability policy and recovering under the UM policy were not mutually exclusive options. There is

no reason that Plaintiff should be viewed as having intended to waive the possibility of recovering under the liability policy just because she was able to recover under the UM policy first. *See Cooley v. Rahilly*, 200 So. 2d 258, 259 (Fla. 4th DCA 1967) ("[W]here the law affords several distinct, but not inconsistent remedies, a mere election to pursue one remedy does not operate as a waiver to pursue the other remedy.").

IV. Plaintiff's recovery against the defendant driver in a negligence action would not result in a double recovery for her damages.

The Florida statutes specify that UM insurance does not provide the same coverage as liability insurance. Thus, by settling with her UM carrier, Plaintiff did not already recover for damages caused by the defendant driver, which are covered by the defendant driver's liability policy.

The election of remedies doctrine prevents a party from obtaining double recovery for a single wrong. *Ehrman v. Mann*, 979 So. 2d 1011, 1012 (Fla. 4th DCA 2008). This Court has explained:

> If the two remedies are inconsistent or mutually exclusive, so that one implies negation of the underlying facts necessary for the other, then the mere choice of one remedy and, certainly, the pursuit of one remedy to judgment, operates as an election. *See United Companies Fin. Corp. v. Bergelson*, 573 So. 2d 887, 888 (Fla. 4th DCA 1990). However, if the remedies are concurrent or cumulative, and logically can coexist on the same facts, the doctrine of election does not apply until the injured party has received full satisfaction for his or her injuries. Or, if the remedies address different and distinct rights or redress different wrongs, the doctrine of election has no application.

Liddle v. A.F. Dozer, Inc., 777 So. 2d 421, 422 (Fla. 4th DCA 2000) (quoting *Goldstein v. Serio*, 566 So. 2d 1338, 1339 (Fla. 4th DCA 1990)).

As previously demonstrated, obtaining recovery under the defendant driver's liability policy and obtaining recovery under the available UM policy are not mutually exclusive remedies. UM coverage does not duplicate liability coverage. *See* §627.727(1), Fla. Stat. And both the defendant driver and phantom driver could be at fault and liable for the accident and Plaintiff's damages. Thus, Plaintiff should be permitted to seek recovery of remedies for the actions of both. *See Klondike, Inc. v. Blair*, 211 So. 2d 41, 43 (Fla. 4th DCA 1968) ("For one proceeding to be a bar to another for inconsistency, the remedies must proceed from opposite and irreconcilable claims of right and must be so inconsistent that a party could not logically assume to follow one without renouncing the other.").

CONCLUSION

The trial court erred when dismissing Plaintiff's negligence action against the defendant driver. The Court should reverse and remand for trial.

Respectfully submitted this 3rd day of December, 2008.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that Appellant's Initial Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2) in that the Initial Brief being submitted is in Times New Roman 14-point font.

/s/ Jodi Page
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