SUPREME COURT OF LOUISIANA

No. 97-CD-2985

PROGRESSIVE SECURITY INSURANCE COMPANY
Versus
HONORABLE MURPHY J. FOSTER, IN HIS CAPACITY AS GOVERNOR OF LOUISIANA, ET AL

Consolidated With

LAFAC, INC.
Versus
HONORABLE RICHARD J. IEYOUB, IN HIS CAPACITY AS LOUISIANA ATTORNEY GENERAL, ET AL

JOHNSON, J., Dissenting

In finding that Act 1476 does not violate the plaintiffs' right to equal protection, the majority has failed to apply the *Sibley* equal protection analysis, which this court has established as the appropriate model for the citizens of this state. Instead, this court has applied the federal standard of equal protection analysis.

In *Sibley*, this court rejected and abandoned the United States Supreme Court's three-tiered approach to equal protection analysis in interpreting *La. Const. Art. I, § 3.* In *Sibley*, we found that the federal equal protection standard "is not an appropriate model for interpreting and applying the protection of equal laws pledged by our state constitution." *Sibley*, 477 So. 2d at 1104. Until the majority's decision in the instant case, this court has consistently acknowledged the *Sibley* equal protection analysis as the appropriate model for our state's citizens. *See Whitnell v. Silverman,* 95-0112 (La. 12/6/96); *Manuel v. State of Louisiana,* 95-2189 (La. 7/2/96); 692 So. 2d 338[1]; *La.*

[1] Also published at 677 So. 2d 116.

Associated Gen. Contractors v. State, 95-2105 (La. 3/8/96); 669 So. 2d 1185; *Moore v. RLCC Technologies, Inc.*, 95-2621 (La. 2/28/96); 668 So. 2d 1135, 1140; *Crier v. Whitecloud*, 496 So. 2d 305 (La. 1986); 686 So. 2d 23, *Rehearing denied, (*12/6/96); *La. Associated Gen. Contractors* provides the following:

> "[T]he crucial reality is that the state equality guarantee was not written solely to mimic the federal Equal Protection clause. Interpretation of the state provision solely or even primarily by reference to federal precedents is untrue both to the plain language of Section 3 and to the intentions of those who wrote it.... The textual differences between the state and federal provisions are self evident. It is also clear that the expanded language of § 3 of the Louisiana Declaration of Rights was intended to provide more extensive protection for equality interests than is available under the federal Equal Protection Clause." *La. Associated Gen. Contractors,* 669 So. 2d at 1197, *quoting, [citations omitted]*.

When a court fails to analyze a case pursuant to *Sibley*, significant determinations, such as which party bears the burden of proof and the applicable level of scrutiny, may be misapplied.

As we recognized in *Sibley, La. Const. Art. I, § 3* imposes limitations regarding classifications based on "birth, age, sex, culture, physical condition, or political ideas." Classifications based on any of these six enumerated grounds are a prima facie denial of equal protection. *Moore,* 668 So. 2d at 1140. The ordinary presumption that statutes are constitutional is inapplicable, and the person seeking to have the law upheld must prove the constitutionality of the law. *Moore*, 668 So. 2d at 1140. *See also,* Michael Lester Berry, Jr., *Equal Protection -- The Louisiana Experience in Departing From the Generally Accepted Federal Analysis,* 49 La. L. Rev. 903, 904 (1989). Accordingly, the burden of proof switches to the *proponent* of the law to demonstrate that the classification "substantially furthers a legitimate state purpose." *Sibley,* 477 So. 2d at 1109.

In the instant case, the challenged Act 1476 prohibits uninsured motorists from recovering the first ten thousand $10,000 dollars of bodily injury, as well as the first ten thousand $10,000 dollars of property damages resulting from automobile accidents,

regardless of fault. Act 1476 creates two classes of individuals: one, a class of uninsured motorists suffering damages in excess of $10,000 for bodily injury and/or property damage resulting from an automobile accident; second, a class of uninsured motorists suffering damages less than $10,000 for bodily injury and/or property damage resulting from an automobile accident. Victims in the former class are allowed recovery for their damages for the amount in excess of the first $10,000 in damages for bodily injuries and/or property damage. However, individuals in the second class, those who happen to sustain bodily injuries and/or property damage in an amount less than $10,000, are *totally barred* from recovery. More pointedly, the single determinant of whether or not an uninsured motorist will be allowed *any* recovery for *bodily injuries* is the severity of the individual's injury. The extent of the physical condition of each injured uninsured motorist is the sole cause of his being assigned to one of the two classes. Therefore, Act 1476, on its face, is designed to impose different burdens on different classes of persons according to the magnitude of damage to their *physical condition*. *See Sibley*, 477 So. 2d at 1108.[2] Accordingly, the burden of proof switches to the *proponents* of Act 1476 to demonstrate that this classification based on physical condition "substantially furthers a legitimate state purpose." *Sibley*, 477 So. 2d at 1109.

In the instant case, the proponents' primary purported purpose for the enactment of Act 1476 is the reduction of automobile insurance premiums. A secondary purpose is to insure that motorists will maintain the minimum mandatory automobile liability

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[2] In *Sibley*, we held that statutory limitation against medical malpractice judgments in excess of $500,000 classifies individuals because of their *physical condition* in that victims with damages in excess of that amount are prevented from recovering for all of their damage while victims with damages less than that amount are allowed full recovery. *Sibley*, 477 So. 2d at 1108, 1109. *See also, Whitnell v. Silverman*, 95-0112 (La. 12/6/96); 686 So. 2d 23, 27, *Rehearing denied*, (La. 12/6/96).

insurance coverage as required by law. The State maintains that the Legislature passed Act 1476 because of concerns about the following:

> 1. The high percentage of motor vehicle accident claims of all lawsuits filed in Louisiana's state courts;
> 2. The positive effect of civil justice reforms toward reduction of the cost of motor vehicle insurance;
> 3. Legislation to reduce premium rates of motor vehicle insurance;
> 4. Compliance with the Motor Vehicle Safety Responsibility Law;
> 5. Correction of imbalances and abuses prevalent in Louisiana's current civil law and motor vehicle insurance systems; and
> 6. A direct cost savings to all citizens of the state of Louisiana.

The State maintains that Act 1476 is designed to address these concerns and accordingly, Act 1476 will decrease the number of lawsuits filed as a result of automobile accidents, thereby decreasing automobile insurance premiums.

In the instant case, the record reveals that there are several factors that contribute to the status and cost of automobile insurance premiums and civil litigation resulting from automobile accidents. *Reforming Automobile Insurance 1997, A Special Report* (hereinafter referred to as "Report 1") was prepared by the Louisiana Department of Insurance under the direction of the Commissioner of Insurance, Jim Brown, and submitted into evidence by defendants.[3] In Report 1, it is asserted that Louisiana policyholders must absorb cost increases brought about by the following factors:

> 1. The high number of uninsured/underinsured motorists (estimates run as high as 50% in some areas of the state);
> 2. The ages of our drivers (15-year-old unrestricted drivers);
> 3. The absence of mandatory driver's education;
> 4. The state-wide poor road conditions;
> 5. The poor condition of many of our automobiles, due in part to improper inspections in some stations;
> 6. The frequencies of fraud (numerous insolvencies and criminal referrals) and the questionable number of frivolous lawsuits (a greater number than the national average of all those injured in Louisiana traffic accidents use lawyers); there are 49 injury claims for every 100 property damage claims;
> 7. [Laxed] enforcement of drunk driving laws; and
> 8. Mixing driving with alcohol, and alcohol consumption by minors.

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[3] *Defendants' Exhibit 2.*

Report 1 provides statistics regarding the impact several of these factors have on the number of automobile accidents in this state. Of the eight factors listed in Report 1 as the reasons policyholders pay higher insurance premiums, Report 1 maintains that one factor alone -- the youthful age of drivers, is a major contributing factor to the number of automobile accidents. For example, Report 1 states that although only 5% of licensed drivers are under the age of 19, nearly 12% of all crash deaths are teenagers. Report 1 further cites data by the *National Safety Council* in noting that sixteen-year-olds have 40 crashes per 100 licensed drivers each year, compared with a rate of nine crashes per 100 licensed drivers who are 45 to 54 years old.[4] Report 1 notes that "[d]ata compiled by the Louisiana Highway Safety Commission shows that only drivers over the age of 84 die more frequently in auto accidents than do those under the age of 20. The younger the driver the greater the likelihood that they will be involved in a fatal crash. **Young drivers, especially those in their teens, are far more likely to be seriously injured in crashes than any other drivers.**"[5]

The Louisiana Department of Insurance further notes in Report 1 that in addition to youthful drivers, drunk driving is another major contributor to automobile accidents. The Report states that accidents resulting from drunk driving costs innocent victims $26,000.[6] Relative to this factor, Report 1 states the following:

> "In 1994, 51% of traffic fatalities in Louisiana involved the use of alcohol, while alcohol contributed to 41% of traffic deaths nationwide. Twenty-four percent of drivers had blood alcohol contents of 0.10 or greater in this state, compared to 19% countrywide. Eight percent of the drivers had BAC between 0.01 and 0.09 in Louisiana, compared to 6% countrywide. Clearly, residents in Louisiana are exposed to greater inciden[ts] of traffic deaths involving alcohol than people living elsewhere. This adds to the escalation of insurance losses and, hence, high automobile insurance

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[4] *Defendants' Exhibit 2, p. 27.*

[5] *Defendants' Exhibit 2, p. 28.*

[6] Comparable crime cost per victim: Assault -- $19,000; Robbery -- $13,000; and Motor Vehicle Theft -- $4,000.

> premiums in this state. Louisiana recorded a 2.2% increase in traffic fatalities that involved the use of alcohol in 1995. The rate rose from 51% in 1994 to 53.2% in 1995, while the national average remained the same...." *Defendants' Exhibit 2, pp. 44-45.*

The State further notes that "Louisiana is the 5th highest state in the nation with alcohol related traffic fatalities at 53.2%."[7]

Although the State provides statistical evidence of the impact of several factors on the number of automobile accidents, *the record is silent as to statistical evidence* of the actuarial impact *uninsured motorists* have on the number of automobile accidents. The State in the instant case provides *no corroborating, statistical evidence, or results of studies* to support its position as it relates to uninsured motorists.[8]

More specifically and importantly, based on Report 1, if sixteen-year-olds are involved in 40% of automobile accidents, and drunk drivers comprise approximately 50% of traffic fatalities, how can disallowing uninsured motorists recovery for the first $10,000 in damages alone "*substantially*" further the legitimate state purpose of decreasing insurance premiums? Thus the State has neither statistical evidence, nor any kind of corroborating evidence whatsoever to support a finding that there is a substantial relationship between the group disadvantaged by the discriminatory

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[7] *Defendants' Exhibit 3, Appendix 3.*

[8] *Cf., Manuel v. State of Louisiana,* 95-2189 (La. 7/2/96); 692 So. 2d 338. In upholding the constitutionality of Act 639, which raised the minimum drinking age in this state from eighteen to twenty-on, this court relied on statistics and other corroborating evidence propounded by the proponents of the law. We stated:

> "These statistics compared the specific group disadvantaged by the discrimination with the general group of licensed drivers and established, among other things, that the disadvantaged group was involved in twice as many accidents per capita as the general group and that Louisiana ranked above forty-six other states in the percentage of alcohol-related fatalities involving drivers under twenty-one." *Manuel*, 692 So. 2d at 343. *See also, Manuel*, 677 So. 2d at 122 [published in duplicate].

classification of Act 1476 and the asserted governmental interest. Therefore, the State has failed to satisfy its burden of proving that the classification based on physical condition "substantially furthers a legitimate state purpose."

Thus, Act 1476 is contrary to equal protection of the laws under the analysis and principles established by this court in *Sibley*. Moreover, because Act 1476 fails to "substantially further a legitimate state purpose," I am of the opinion that the classification based on physical condition is arbitrary, capricious and unreasonable.

For the foregoing reasons, I respectfully dissent.