ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY

MICHAEL CULLEN, et al. v. KOTY-LEAVITT INSURANCE AGENCY, INC., et al.,
CV-07-0402-PR

PARTIES AND COUNSEL:

Petitioners: Michael Cullen and his mother, Jana Coronado, ("Cullen"), represented by Thomas G. Cotter of Haralson, Miller, Pitt, Feldman & McAnally, PLC.

Respondent: Auto Owners Insurance Company, represented by Kevin Barrett and Jay R. Graif of Harper Christian Dichter Graif PC. [Note: Koty-Leavitt Insurance Agency, Inc. is not a party to this proceeding on petition for review.]

Amici Curiae: Amicus curiae briefs were filed by (1) The Arizona Center for Law in the Public Interest, represented by Timothy M. Hogan, and (2) The Arizona Trial Lawyers Association, represented by David L. Abney of Law Offices of Charles M. Brewer, Ltd.

FACTS:

Michael Cullen was injured in an accident while riding as a passenger in a vehicle owned by a friend. He filed a claim for benefits under the uninsured motorist ("UIM") provision of an insurance policy issued by Auto Owners Insurance Company that covered a vehicle used by his mother, Jana Coronado, and her family, including Cullen. The only named insured on the policy was "Sierrita Mining and Ranch Company". Sierrita Mining provided the vehicle to Coronado and her family for their exclusive use. The insurance policy did not refer to Cullen or Coronado at all.

After Auto Owners denied Cullen's claim, he and Coronado sued. They alleged that the company breached the insurance contract and acted in bad faith. They also alleged that Koty-Leavitt, the agency that sold the policy to Sierrita for a group of vehicles, had failed to use reasonable care in structuring the UIM policy.

Auto Owners moved to dismiss. It argued that Coronado was not a proper plaintiff because she had not suffered an injury from a vehicular accident, or made a claim under the policy. It also argued that, under the express terms of the policy, UIM benefits did not extend to Cullen, and he had no reasonable expectation of coverage.

The trial court granted Auto Owners' motion and, by stipulation, stayed the proceedings against Koty-Leavitt pending the outcome of an appeal. It dismissed Coronado's claims because she had not made a claim under the policy, and it found that no amendment to the complaint could cure that deficiency. It dismissed Cullen's claims because the facts alleged in the complaint did not lend themselves to a finding of coverage, that is, Cullen was not traveling in a vehicle covered under

the policy when he was injured, and the policy did not offer "portable" UIM coverage for Cullen. The court entered judgment for Auto Owners and awarded its attorney's fees.

The appellate court affirmed the trial court's entry of summary judgment.

It first held that the trial court did not erroneously limit its consideration to Rule 12(b)(6) grounds (failure to state a claim upon which relief can be granted). It noted that Cullen's briefs asserted facts that did not appear in the complaint or the insurance contract, and that the trial court expressly declined to treat Auto Owners' motion as a motion for summary judgment based on those facts. It said, since the insurance contract was central to the allegations of the complaint, a court could properly consider it with the motion to dismiss without converting the hearing to summary judgment proceedings. It explained:

> [A]lthough Cullen submitted additional affidavits and a statement of facts, it was within the trial court's discretion under Rule 12(b)(6) to disregard those materials and instead consider the sufficiency of his complaint, in light of the contract at issue; the court explicitly stated that it had done so. *See Garita Hotel Ltd. P'ship v. Ponce Fed. Bank, F.S.B.*, 958 F.2d 15, 18 (1ST Cir. 1992) [motion to dismiss does not become motion for summary judgment just because matters outside the pleadings are filed with the trial court].
> . . .

Next, the court found that the standard of review Cullen suggested it use in reviewing the trial court's ruling on the motion to dismiss was an inaccurate statement of the law. It identified that in *Mojave Disposal, Inc. v. City of Kingman*, 186 Ariz. 343, 346 , 922 P.2d 308, 311 (1996), the Arizona Supreme Court said it would "uphold dismissal [for failure to state a claim] only if the plaintiffs would not be entitled to relief under any facts susceptible of proof *in the statement of the claim*. (Emphasis added); *see also Dressler v. Morrison*, 212 Ariz. 279, ¶ 11, 130 P.3d 978, 980 (2006)." And the Court stated in *Doe ex rel. Doe v. State*, 200 Ariz. 174, ¶ 12, 24 P.3d 978, 980 (2006): "In reviewing the trial court's decision to dismiss for failure to state a claim, we assume as true the facts alleged in the complaint and affirm the dismissal only if, as a matter of law, the plaintiff would not be entitled to relief on any interpretation *of those facts*."

The appellate court found the proper standard articulated by this Court does not permit a trial or appellate court to speculate about hypothetical facts that might entitle the plaintiff to relief. The court also discussed the recent U.S. Supreme Court decision in *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955 (2007), a federal antitrust case in which the Court clarified that a complaint's factual allegations must be enough to raise a right to relief above the speculative level, and disapproved of a pleading standard that precluded dismissal unless the plaintiff's claim could not be proved by "any set of facts."

It found Cullen's interpretation of the standard of review at odds with the purpose of Rule 8(a), Arizona Rules of Civil Procedure, which (1) requires a short, plain statement of the claim showing the pleader is entitled to relief, and (2) gives the opponent fair notice of the nature and basis of the claim and indicates generally the type of litigation involved. Like the trial court, it too decided to disregard the numerous extraneous factual allegations in Cullen's briefs and considered only the facts contained in the complaint together with the terms of the insurance contract to reach

its decision that the policy did not provide Cullen with UIM coverage, nor did he have a reasonable expectation of coverage.

ISSUES:

"1. Should Rule 8(a), Ariz. R. Civ. P., be re-interpreted to overrule the notice pleading standard established by this Court?

"2. Is it the exclusive province of this Court, given its rule-making power and precedents, to change the notice pleading standard?

"3. Where a court acts as fact-finder on a motion to dismiss, may it disregard deposition testimony and a stipulation supplementing the allegations of the complaint?

DEFINITIONS:

Rule 8(a), Ariz. R. Civ. P., provides in pertinent part:

A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain:

1. A short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it.
2. A short and plain statement of the claim showing that the pleader is entitled to relief.
3. A demand for judgment for the relief the pleader seeks. . . . .

Rule 12(b)(6), Ariz. R. Civ. P., allows a defendant to raise a defense of "failure to state a claim upon which relief can be granted" in a motion that can be filed and judicially resolved before the defendant files an answer to a plaintiff's complaint.