IN THE SUPREME COURT OF
THE STATE OF FLORIDA.

CASE NO. 51,427

DAWN MARIE REID, by her next friend, MARGARET HENSHALL,

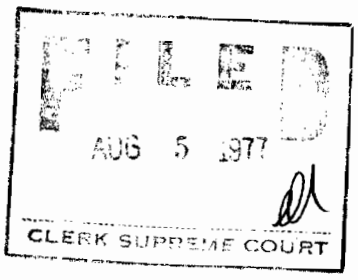
Petitioner,

vs.

STATE FARM FIRE AND CASUALTY COMPANY, a foreign corporation,

Respondent.

_____/



BRIEF OF RESPONDENT

ON MERITS

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INTRODUCTORY NOTE

References to the original record on appeal are indicated by use of the prefix "R___" in this brief.

STATEMENT OF THE CASE AND FACTS

The matter brought before this Honorable Court in the writ granting certiorari from the opinions of the District Court of Appeal, Fourth District, actually involves not one but two appeals. For clarity sake, these two appeals are discussed separately and, it is submitted, should be resolved separately:

FIRST APPEAL

STATEMENT OF THE CASE AND FACTS

In this first appeal, the District Court of Appeal, Fourth District, Case No. 76-619, properly held that Respondent's, State Farm's, household member exclusion was valid. In doing so, that District Court, for the first and only time, construed the Florida Automobile Reparations Reform Act and the Florida Financial Responsibility Act in the context of the household member exclusion and held that those acts did not prevent such an exclusion.

Because this is the only case in the State of Florida on this basis, it is respectfully submitted that this Court does not have jurisdiction of this case which was consolidated at the Fourth District for the purpose of argument.

Notwithstanding the above, it is also respectfully submitted that the decision of the Fourth District Court is correct. In reaching that conclusion, that court considered the following:

By requests for admissions (R3-4) Petitioner admits the following:

1. That at the time of the accident alleged in your Complaint, you resided with your father, Donald Reid, and the Defendant, Pamela Ann Reid, in the same household.

2. That at the time of the accident alleged, the policy of insurance described in your Complaint was a policy of insurance between your father, Donald Reid, and the Defendant, State Farm Mutual Automobile Insurance Company.

3. That at the time of the accident described in your Complaint, the automobile driven by Pamela Ann Reid was owned by your father, Donald Reid.

4. That at the time of the accident alleged in your Complaint, your father, Donald Reid, had given your sister, Pamela Ann Reid, permission to drive and operate said vehicle in which you were riding as a passenger.

The applicable policy provisions involved in this case are (R8-17A):

SECTION I - LIABILITY, MEDICAL PAYMENTS
AND PERSONAL INJURY PROTECTION
INSURING AGREEMENTS

COVERAGE A - BODILY INJURY LIABILITY

COVERAGE B - PROPERTY DAMAGE LIABILITY

To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of

(A) bodily injury sustained by other persons, and

(B) property damage, ...

caused by accident arising out of the ownership, maintenance or use, including loading or unloading, of the owned motor vehicle; and to defend, with attorneys selected by and compensated by the company, any suit against the insured alleging such bodily injury or property damage and seeking damages which are payable hereunder even if any of the allegations of the suit are groundless, false or fraudulent; but the company may make such investigation, negotiation and settlement of any claim or suit as it deems expedient.

EXCLUSIONS - SECTION I

THIS INSURANCE DOES NOT APPLY UNDER: ....

(h) COVERAGE A, TO BODILY INJURY OR ANY INSURED OR ANY MEMBER OF THE FAMILY OF AN INSURED RESIDING IN THE SAME HOUSEHOLD AS THE INSURED; ....

DEFINITIONS - SECTION I

....

Insured-the unqualified word "insured" includes

....

> (3) any other person while using the owned motor vehicle, PROVIDED THE OPERATION AND THE ACTUAL USE OF SUCH VEHICLE ARE WITH THE PERMISSION OF THE NAMED INSURED OR SUCH SPOUSE AND ARE WITHIN THE SCOPE OF SUCH PERMISSION, and

....

By reason of the foregoing, the household member exclusion contained in the policy is clearly applicable to the Petitioner.

SECOND APPEAL

STATEMENT OF THE CASE AND FACTS

This appeal concerns the language of Respondent's policy of insurance with Petitioner's father as it pertains to uninsured motorist coverage. That language simply states that the term uninsured motor vehicle does not include vehicles defined as insured motor vehicles.

Petitioner was a passenger in her father's car driven by her sister at the time of the accident. Both Petitioner and her sister resided in their father's household at the time of the accident. The car was driven by her sister at that time with the permission of the father.

The applicable provisions of that aforesaid policy of insurance are (R1-17) as follows:

> "Section III-UNINSURED MOTOR VEHICLE COVERAGE INSURING AGREEMENTS
>
> COVERAGE U-DAMAGES FOR BODILY INJURY CAUSED BY UNINSURED MOTOR VEHICLES
>
> To pay all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle because of bodily injury sustained by the insured, caused by accident and arising out of the ownership, maintenance or use of such uninsured motor vehicle provided, for the purposes of this coverage, determination as to whether the insured or such representative is legally entitled to recover such damages, and if so the amount thereof, shall be made by agreement between the insured or such representative and the company or, if they fail to agree, by arbitration.
>
> * * *

DEFINITIONS-SECTION III

The definitions of Automobile, Bodily Injury, Newly Acquired Automobile, Occupying, Owned Motor Vehicle, Person, Relative, Resident and Temporary Substitute Automobile under Section I apply to Section III and under Section III:

* * *

Insured Motor Vehicle-means:

(1) an owned motor vehicle provided the use thereof is by such first named insured or resident spouse or any other person to whom such first named insured or resident spouse has given permission to use such vehicle if the use is within the scope of such permission, or

* * *

Uninsured Motor Vehicle-means:

(1) a land motor vehicle with respect to the ownership, maintenance or use of which there is in at least the amounts specified by the financial responsibility law of the state in which the described motor vehicle is principally garaged, no bodily injury liability bond or insurance policy applicable at the time of the accident with respect to any person or organization legally responsible for the use of such vehicle, or with respect to which there is a bodily injury liability bond or insurance policy applicable at the time of the accident but the company writing the same denies that there is any coverage thereunder or is or becomes insolvent;

* * *

but the term uninsured motor vehicle shall not include:
(i) a vehicle defined herein as an insured motor vehicle;
(ii) a land motor vehicle furnished for the regular use of the named insured or any resident of the same household; .... ."

On these facts, the Fourth District Court quite properly held in this appeal as follows:

> "We hold that the family car in this case is not an uninsured motor vehicle. It is insured and it does not become uninsured because liability coverage may not be available to a particular individual. Taylor v. Safeco Insurance Co., 298 So.2d 202 (Fla. 1st DCA 1974); Centennial Insurance Co. v. Wallace, 330 So.2d 815 (Fla. 3d DCA 1976)."

Respondent believes that this court lacks jurisdiction of this appeal since there is no conflict with any other opinion of this court or other District Courts of Appeal. It is further submitted that if there is a conflict, the District Court's opinion in our case is correct.

POINTS INVOLVED

FIRST APPEAL

I. THE POINT INVOLVED IN THE FIRST APPEAL IS WHETHER OR NOT THE FOURTH DISTRICT COURT OF APPEAL ERRED IN HOLDING THAT THE FLORIDA FINANCIAL RESPONSIBILITY LAW PROHIBITS THE FAMILY-HOUSEHOLD EXCLUSION IN RESPONDENT'S POLICY.

SECOND APPEAL

II. THE POINT INVOLVED IN THE SECOND APPEAL IS, ASSUMING THAT THE FOURTH DISTRICT COURT WAS CORRECT IN HOLDING THERE WAS NO PRIMARY (PUBLIC LIABILITY COVERAGE AS TO THE PETITIONER BY REASON OF AN EXCLUSION (WHICH IS THE ISSUE IN PETITIONER'S FIRST APPEAL IN THIS SAME CASE) WAS THE UNINSURED MOTORIST PROVISION OF THE POLICY IN QUESTION APPLICABLE SO THAT THE PETITIONER WAS ENTITLED TO UNINSURED MOTORIST COVERAGE?

ARGUMENT

I. THE POINT INVOLVED IN THE FIRST APPEAL IS WHEHTER OR NOT THE FOURTH DISTRICT COURT OF APPEAL ERRED IN HOLDING THAT THE FLORIDA FINANCIAL RESPONSIBILITY LAW PROHIBITS THE FAMILY-HOUSEHOLD EXCLUSION IN RESPONDENT'S POLICY.

In Newman v. National Indemnity Company, 245 So.2d 118, (Fla. 1971) the District Court of Appeal, Third District, in upholding the validity of a "family-household" exclusion clause similar to the one in our case held that such a clause extended to an omnibus insured. That court states, pages 119, 120:

> "We have examined the arguments, briefs and record before us. We express the view that the rule to be applied in this case is as follows: The named insured (Louis Green) or a member of the family of the named insured residing in the household of the named insured (Hortense Green) may not recover on the policy containing such an exclusionary clause although the car was driven by a third party who was an additional insured under the policy (plaintiff's decedent Edward Newman)."

See also Zipperer v. State Farm Mutual Automobile Insurance Company, 254 F2d 853 (1958 CA5 Fla.) where the court holds that insurance companies have the right to exclude certain risks unless there are statutory provisions to the contrary. In this last cited case, the Federal Court in applying Florida law held a household exclusion such as the one in our case to be valid.

The "Financial Responsibility Law of 1955" 324.011, F.S.A. has as indicated been in effect since 1955 and the sections applicable to the above cited cases and to our case have remained virtually unchanged since that time. In this regard, the applicable sections of that law are Section 324.031 which provides:

> "The operator or owner of a vehicle may prove his financial responsibility by:
>
> (1) Furnishing satisfactory evidence of holding a motor vehicle liability policy as defined in §324.021(8) and §324.151, or
>
> (2) Posting with the department a satisfactory bond of surety company authorized to do business in this state, conditioned for payment of the amount specified in §324.021(7), or
>
> (3) Furnishing a certificate of the department showing a deposit of cash or securities in accordance with §324.161, or
>
> (4) Furnishing a certificate of self-insurance issued by the department in accordance with §324.171."

The applicable portion of §324.051 provides:

> "(2)(a) Thirty days after receipt of notice of any accident involving a motor vehicle within this state which has resulted in bodily injury or death to any person, or total damage to two hundred dollars or more to property, the department shall suspend the licenses of the operators and all registrations of the owners of the vehicles involved in such accident and in case of a nonresident owner or operator, shall suspend such nonresident's operating privilege in this state, unless such operator or owner shall prior to the expiration of such thirty days be found by the department to be exempt from the operation of this chapter, based upon evidence in its files satisfactory to the department that:
>
> ....

> 6. Such operator or owner has deposited with the department of insurance security to conform with §324.061 and has complied with one of the provisions of §324.031, or"
>
> ....

It is clear from reading the above that contrary to Petitioner's contention (page 4 of her brief) Florida does not have a compulsory insurance law. On the contrary, under the provisions of §324.031 F.S.A., supra, insurance is one of four methods of complying with that law. The "Florida Automobile Reparations Reform Act" chapter 627 F.S.A. does not change the financial responsibility law. This so called "no fault insurance law" in fact recognizes that there are methods other than "insurance" that may be utilized by a motorist. This is clearly shown in §627.733 "Required Security" Subsection 3(a)(b) which recognizes such other methods.

Petitioner further seems to say that §324.151 is applicable to this case. This is not so! The policy in question was never, prior to the accident mentioned in the pleadings, furnished as proof of financial responsibility in compliance with §324.031 quoted, supra. The applicable portion of §324.151(2) provides:

> "(2) The provisions of this section shall not be applicable to any automobile liability policy unless and until it is furnished as proof of financial responsibility for the future pursuant to §324.031, and then only from and after the date said policy is so furnished." (emphasis ours)

Clearly neither the financial responsibility law of Florida nor the above cases prohibits the policy exclusion in State Farm's policy. The quotes from Couch on Insurance, second edition, are accordingly not in point. They all involve statutes of states having compulsory financial responsibility acts. Nor does the case of Mullis v. State Farm Mutual Automobile Insurance Company, 252 So.2d 229 (Fla. 1971) (Petitioner's brief page 7). That last cited case involved a policy certified after an insured's first accident. That is not the case here.

This court should, if not discharging the writ for lack of jurisdiction, accordingly affirm the holding of the Fourth District Court and follow those holdings of the courts so well summarized in 46 ALR 3d, 1024 Automobile Insurance - Injury to Insured where it is stated:

> II. Validity and construction
>
> §3. Validity of provision in absence of statute
>
> "All of the cases in this annotation support the general rule that, in the absence of a statutory prohibition to the contrary, provisions excluding from coverage members of the insured's family or household are valid and effective to protect the insurer against claims for injuries to persons who fall within the specified classes."

This latter quoted statement follows the holding in the case of Newman v. National Indemnity Company, and Zipperer v. State Farm Mutual Automobile Insurance Company, both of which are cited supra.

II. THE POINT INVOLVED IN THE SECOND APPEAL IS, ASSUMING THAT THE FOURTH DISTRICT COURT WAS CORRECT IN HOLDING THERE WAS NO PRIMARY (PUBLIC LIABILITY) COVERAGE AS TO THE PETITIONER BY REASON OF AN EXCLUSION (WHICH IS THE ISSUE IN PETITIONER'S FIRST APPEAL IN THIS SAME CASE) WAS THE UNINSURED MOTORIST PROVISION OF THE POLICY IN QUESTION APPLICABLE SO THAT THE PETITIONER WAS ENTITLED TO UNINSURED MOTORIST COVERAGE?

In this appeal the decision of the District Court of Appeal, Fourth District, is in accord with the opinions of both the First District and the Third District Courts in matters similar.

The District Court of Appeal, First District, held in the case of Taylor v. Safeco Insurance Company, 298 So.2d 202 (Fla. App. 1974), cert dismissed, 310 So.2d (1974), that an automobile owner's uninsured motor vehicle liability insurance coverage under §627.727, Florida Statutes, was not available to a bailee passenger in the automobile who is killed in an accident as the result of negligence of the vehicle's driver to whom the bailee had entrusted the car. In so holding that court states, page 203:

> "Section 627.727, Florida Statutes, F.S.A., the uninsured motor vehicle coverage statute prohibits the issuance of automobile liability coverage ". . . unless coverage is provided therein or supplemental thereto . . . for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles . . . " While it is true that Taylor, the bailee, was occupying Henry's automobile and, thus, would be classed as a person insured under the definition of that term in the uninsured motor vehicle coverage of Henry's policy, Henry's automobile in which Taylor was riding and which was being driven by Earl was not an uninsured vehicle. Henry's policy covering the vehicle included the insurance coverage required by Florida law."

Likewise, in Centennial Insurance Co. v. Wallace, 330 So.2d 815, (Fla. App. 1976) cert dismissed (1976), the District Court of Appeal, Third District, held that where a winch truck was self-insured by its owner, the truck was not an uninsured vehicle within a policy of insurance, excluding from the definition of uninsured vehicle an automobile owner by a self-insurer within the meaning of the financial responsibility act. In its holding that court states, page 817:

> "In interpreting an automobile insurance policy the courts have followed the definitions given in the policy itself. Dorrell v. State Fire and Casualty Company, Fla. App. 1969, 221 So.2d 5 and cases cited therein. Appellant's policy excludes from the definition of an uninsured vehicle " an automobile which is owned by a self-insurer within the meaning of any motor vehicle financial responsibility law . . .," and all parties concede that the winch truck was self-insured by FPL. Thus, the truck is not an uninsured vehicle under the terms of appellant's policy."
>
> "We must also reject appellee's argument that because FPL is immune from liability by virtue of workmen's compensation laws (§440.11), the winch truck is an uninsured vehicle. Where a vehicle is covered to the extent of the law, it is not an uninsured vehicle simply because coverage may not be available to the injured party under the circumstances." (Emphasis ours)

At the time of the accident, the Petitioner in our case was riding in the vehicle defined as the insured vehicle. The Respondent's policy is crystal clear that the insured motor vehicle is not an uninsured motor vehicle. In that regard, the policy of insurance in our case provides:

DEFINITIONS-SECTION III

....

but the term uninsured motor vehicle shall not include:
(i) a vehicle defined herein as an insured motor vehicle;

Petitioner's position under this point involves two main thrusts: (A) That Respondent's policy is ambiguous and (B) that Respondent's applicable provisions of insurance are contrary to Florida Statutes.

A) The Provisions of Respondent's Policy of Insurance Are Not Ambiguous.

Petitioner indicates that the Respondent's policy provisions are ambiguous by citing Lee v. State Farm Mutual Automobile Insurance Co., 339 So.2d 670 (Fla. App. 1976). They are not. The policy provisions defining "insured motor vehicle: and "uninsured motor vehicle" are clear and unambiguous. Petitioner under the terms and definitions of our policy was not riding in an uninsured motor vehicle.

In Midwest Mutual Insurance Company v. Santiesteban, 287 So.2d 665 (Fla. 1973), this Court stated:

> "...that an unambiguous contract of insurance does not require construction, and must be given effect as written". (page 667)

This last stated maximum of construction is applicable to our case and should be applied. It, therefore, follows that the case of Lee v. State Farm Mutual Automobile Insurance Company, supra, is not in point. In this last cited case, the District

Court of Appeal, Second District, held a policy provision not similar to the one involved in our case to be ambiguous. The facts in that case are not in point in that the vehicle in which the person claiming uninsured motorist coverage was riding was not the insured vehicle. Also the portion of Lee stating all exclusions and restrictions on unusual motorist coverage are against public policy is incorrect and in fact unnecessary in the opinion. In other words, that pronouncement of the Court of Appeal, Second District is dicta.

B) The Provisions of Respondent's Policy of Insurance Are Not Contrary to the Provisions of Florida Statute §627.727.

Appellant cites subsection (2)(b) of the Florida Statute §627.727 for the proposition that the legislature intended for there to be uninsured motorist coverage in the situation in this case. That said section provides:

> "(2) For the purpose of this coverage, the term 'uninsured motor vehicle' shall, subject to the terms and conditions of such coverage, be deemed to include an insured motor vehicle when the liability insurer thereof:
>
> (b) Has provided limits of bodily injury liability for its insured which are less than the limits applicable to the injured person provided under his uninsured motorist's coverage."

The situation covered by that last cited statute is to make available and create "underinsured motorist coverage". That section does not contemplate the situation in our case and a fortiori, does not render the policy provisions before this court contrary to its terms.

Respondent on that score is not asking that this court construe a statute to decide the intent of the legislature. The request made is to ask that this court legislate (as she did the District Court) to cover a situation not covered by the legislature. That such action by courts is neither legally correct from a statutory construction nor from a constitutional standpoint is too well established to require citation.

The case of Lee v. State Farm Mutual Automobile Insurance Company, as discussed, supra, does not hold contra to our conclusion. In the first place, the statement in Lee that restrictions are legally impermissible was not necessary to the opinion and is dicta; and in the second place, the policy provision in that case held to be ambiguous is an exclusion and that case does not concern an insured motor vehicle.

CONCLUSION

For the reasons contained in this brief and the brief in opposition to jurisdiction, Respondent respectfully submits:

(1) That this Honorable Court does not have jurisdiction of either of the two appeals and opinions rendered herein by the Fourth District Court of Appeal.

(2) That this Court decline Petitioner's reqeust that (a) this court create an ambiguity in Respondent's policy where none exists; or (b) legislate to create a coverage where none has been created by the legislature. This court, like the District Court in its opinion, should do neither.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the foregoing brief has been furnished by mail to the Clerk of the Supreme Court, Supreme Court Building, Tallahassee, Florida 32304 and to S. Victor Tipton, Esquire, P. O. Box 1288, Orlando, Florida 32802, this 3rd day of August, 1977.

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