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IN THE SUPREME COURT OF FLORIDA

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY, etc.,

Petitioner,

vs

CASE NO. 65,387

THOMAS JOHN CURTIN, etc.

Respondents.
______________________________/

RESPONDENTS' BRIEF ON JURISDICTION

An Appeal from the Fifth District Court of Appeal
Case No. 82-599

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and
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PREFATORY STATEMENT

Petitioner is STATE FARM INSURANCE COMPANY, and will be referred to herein as it was below, the Defendant.

Respondents are THOMAS P. CURTIN and THOMAS JOHN CURTIN, the minor son of THOMAS P. CURTIN, and will be referred to herein as they were below, the Plaintiffs.

References to the Appendix are designated as (A____), followed by the appropriate page number referred to in the preceding paragraph.

STATEMENT OF THE FACTS AND CASE

Thomas John Curtin, the minor son of Thomas P. Curtin, was a resident of his father's household at the time of his accident in 1979. He was a passenger in a car owned by his father and negligently driven by a family friend, proximately causing serious injury to him.

The father had three separate liability insurance policies, all issued by Petitioner, on three different vehicles owned solely by him. All contained identical provisions regarding uninsured motorist coverage. While each policy provided there was no liability coverage for bodily injury to "any insured or any member of an insured's family residing in the insured's household," there was no such limitation regarding UM benefits. Petitioner neglects in his statement of facts to provide the key definition of an uninsured motor vehicle which the policy defines as:

1. * * * *

2. a land motor vehicle insured or bonded for bodily injury liability at the time of the accident but (Emphasis added)

a. * * * *
b. * * * *
c. The insuring company denies coverage or is or becomes insolvent; (Emphasis added)

* * * *

An [u]ninsured motor vehicle does not include a land motor vehicle:

1. insured under the liability coverage of this policy.

Petitioner misinterprets the holding of the Fifth District in referring to the opinion's specific contents. The opinion speaks for itself (A 1-8).

ARGUMENT

The instant case does not conflict with other cases. Petitioner cites several cases which it asserts to be in conflict but never dicusses why or how that has arisen. Such discussion is minimal because no conflict exists and close scrutiny would reveal same. Conflicts sufficient to invoke this Court's jurisdiction can arise only by one of two means:

(1) The announcement of a rule of law which conflicts with a rule previously announced by this Court or another district, or

(2) The application of a rule of law to provide a different result in a case which involves substantially the same facts of the prior case.

Mancini v. State, 312 So.2d 732 at 733 (Fla. 1975). Under this standard no jurisdiction exists for this Court to review the instant case.

POINT I

THE FIFTH DISTRICT'S DECISION DOES NOT CONFLICT WITH THIS COURT'S HOLDING IN REID V. STATE FARM FIRE AND CASUALTY CO., 352 SO.2D, 1172 (FLA. 1977).

The Fifth District did not deviate from this Court's decision in Reid v. State Farm Fire and Casualty Co., supra, in finding that there was no uninsured motorist coverage available from the policy covering the vehicle in the accident. The ruling also complied with the language of the policies herein which excluded from the definition of the uninsured motor vehicles, those vehicles insured under the liability portion of that particular policy.

The Reid decision is to be strictly applied. This Court in

Reid considered only one policy with provisions clearly containing a valid family exclusion clause. For this Court to have decided any differently in Reid would have been to negate that family exclusion clause; a clause which has been consistently upheld to avoid collusive claims.

Such is not the case herein. Instead of two sisters being involved in the accident as in Reid, in this case, the negligent driver of the family car was not even a family member. The Fifth District was correct in strictly applying Reid evidenced by its comment that to broadly apply Reid to all situatons would be to disallow coverage in the instance of a theif, felon or acquaintance. (A 5). This Court, in Reid took pains to point out:

> We recognize, as a general rule, that an insurer may not limit the applicability of uninsured motorist protection...We believe however, that the present case is factually distinguishable from previous cases and is an exception to the general rule. (Emphasis added) Id., at 1173, 1174.

Furthermore, in the instant case, there are two other available policies with language allowing uninsured motorist coverage. There were no other such policies in Reid. Where courts have considered multiple policies, as in Lee v. State Farm Mutual Automobile Ins. Co., 339 So.2d 670 (Fla. 2d DCA 1976), cert. denied, 348 So.2d 954 (Fla. 1977), they have reached decisions similar to the Fifth District's decision herein. Certiorari jurisdiction is thus not proper since no conflict exists.

POINT II

THE FIFTH DISTRICT'S DECISION IS NOT IN DIRECT CONFLICT WITH THIS COURT'S DECISION IN NEW HAMPSHIRE INSURANCE GROUP V. HARBACH, 439 SO.2D 1383 (FLA. 1983).

This Court in Harbach based its decision on facts and policy language substantially different from those in this case. Petitioner alleges direct conflict but noticeably fails to draw any similarities between the facts of both cases. The significant differences between policy provisions and individual interests and roles results in no conflict occurring. Different rulings based on different facts do not give rise to conflict.

The key policy provision in Harbach excluded uninsured motorist coverage as it applied to injuries suffered by persons

> while occupying, or when struck by, any motor vehicle or trailer of any type owned by you or any family member which is not insured for this coverage under this policy. (emphasis added)

Id. at 1384. Thus, a family member injured in a family vehicle could only collect the UM coverage on that vehicle. A family having five cars and one pick-up, all of which were insured under separate, similar policies, could only collect the UM coverage from the policy on the pick-up if that was the vehicle involved in the accident. By its terms, the policy in Harbach expressly did not provide coverage on any family vehicles not insured under that particular policy.

In contrast, the policies herein do not specifically exclude from coverage other vehicles owned by the named insured or the family members residing therewith. The family member injured in the above pick-up would be entitled to recover UM benefits from

each of the policies on the other vehicles owned by the family. Thus, while the Plaintiff in Harbach may have been contractually limited from recovering such benefits, the Plaintiff herein is not, therefore, no conflict exists.

Likewise, under these facts, Section 627.4132, Fla. Stat., (1976 Supp.), would prohibit the type of recovery allowed by the Fifth District. The section consists of two parts addressing different issues. The first sentence indicates an insured is entitled to benefits based upon the coverage available to him, individually:

> [T]he policy shall provide that the insured or named insured is protected only to the extent of the coverage he has on the vehicle involved in the accident. (Emphasis added)

The use of the word "he" implies that different coverages may be available to insureds based upon differing policies or coverages individual to that person. Where the owner of the vehicle is injured in the accident, he is limited to the policy that he has on that vehicle. Non-owners are not so limited:

> However, if none of the insured's or named insured's vehicles is involved in the accident, coverage is available only to the extent of coverage on any one of the vehicles with applicable coverage.

This sentence also must be individually applied to insureds and named insureds. Where the injured party does not own the vehicles involved in the accident, this sentence permits a non-owner to recover under any one of the policies he has which might provide applicable coverage.

The language does not, and should not, limit the non-owner

to the insurance which may have been provided to him from the policy on the vehicle involved in the accident. Where there is no coverage on the vehicle or, as herein, where an exclusion exists, the effect of limiting the non-owner to the coverage from the vehicle involved in the accident is to deny him all insurance coverages including those from other policies for which individual premiums have been paid. It certainly could not have been legislative intent to deny a non-owner coverage under such circumstances thereby forcing him to hope that the owner of the vehicle in which he is riding has provided adequate coverage. Since the plaintiff was injured in an accident involving a non-owned vehicle, he, unlike the plaintiff in Harbach, should be entitled to recover from any one of the policies with applicable coverage.

In this regard, the cases are factually different. In Harbach, the plaintiff was the owner and operator of the vehicle he chose not to insure, in which he was subsequently injured. The same is also true of the plaintiffs in State Farm Automobile Insurance Company v. Kuhn, 374 So.2d 1079 (Fla. 3d DCA 1979); and State Farm Mutual Automobile Insurance Company v. Wimpee, 376 So.2d 20 (Fla. 2d DCA 1979). In contrast, the plaintiff herein was injured as a passenger in a car that he did not own and that he was not operating. These facts differ substantially from Harbach, thus entitling plaintiff to recover the insurance proceeds without creating conflict with said case.

The First District Court in its recent decisions of Johnson v. State Farm Fire and Casualty Company, 1st DCA, Case No. AU-378, May

31, 1984, 9 F.L.W. 1187; and Porr v. State Farm Mutual Automobile Insurance Company, 1st DCA, Case No. AO-289, May 30, 1984, 9 F.L.W. 1191, have followed the Fifth District decision. These decisions would be in accordance with the well settled rule of law that where terms of an insurance policy are capable of two or more constructions, the construction permitting recovery is to be given effect. Shelby Mutual Insurance Company of Shelby, Ohio v. Manchester, 276 So.2d 266 (Fla. 3d DCA 1979), cert. denied, 388 So.2d 1118 (Fla. 1980).

POINT III

THE FIFTH DISTRICT'S DECISION DOES NOT PROVIDE FOR STACKING OF THE OTHER TWO AVAILABLE POLICIES AND THEREFORE DOES NOT CONFLICT WITH OTHER COURT'S DECISIONS.

The Petitioner seeks to create conflict by misinterpreting the following language of the Fifth District's decision so as to make it appear to permit stacking:

> For the reasons stated in this opinion, we hold that the Appellant was covered under the uninsured motorist provisions of State Farm's policies on Curtin's vehicles other than the one involved in this accident.

The plaintiff was covered under the policies on the two Curtin vehicles not involved in the accident. Coverage and entitlement to collect, however, are different issues. Although plaintiff may becovered by both policies issued to the same named insured, Appellant never sought and the Fifth District certainly never stated that respondents were entitled to recover from both policies (A 10,15). Section 627.4132, Fla. Stat. (1976 Supp.) makes it clear that plaintiff is entitled to collect from only one of the policies with the same named insured and, hence, plaintiff never

even sought to stack the policies in this case.

POINT IV

THE FIFTH DISTRICT DECISION IS CORRECT - CONFLICT JURISDICTION SHOULD NOT BE ACCEPTED.

This Court should not accept jurisdiction. The decision of the Fifth District comports with both law and justice. Thomas P. Curtin purchased insurance, both liability and UM, on each of his vehicles. He did everything one reasonably could do to protect both his family and the public. Yet, having accepted his premiums and profited therefrom, the insurance company would now have the courts deny this family all coverage. It certainly could not have been the legislature's intent, even in passing Section 627.4132, Fla. Stat. (1976 Supp.) to reach that result under the facts herein. Mr. Curtin's son was seriously injured while riding in a family vehicle due to the negligence of a friend that was the cause of the accident, not the fact that the son was in a family vehicle. The friend had no liability coverage with which to compensate the son. UM benefits, therefore, should be available.

An insurance company can protect itself through the language it uses in writing its policies. The insured, in contrast, can only protect himself through the purchase of coverage in reliance on the language of his policies. There was nothing in these policies to indicate to the Curtin family that UM coverage on other family vehicles was not available under these facts. Despite its failure to clearly write the policies, the insurance company would now have the Court's hold that the Curtin family was protected against the

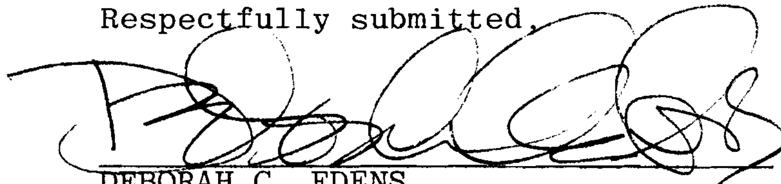
negligence of the whole world -- strangers and friends alike -- except when a friend drove their car and injured them. It is this type of gap in UM coverage that the Courts have traditionally abhorred. Mullis v. State Farm Mutual Automobile Ins. Co., 252 So.2d 229 (Fla. 1971).

CONCLUSION

Petitioner has failed to demonstrate express and direct conflict between the instant decisions and any other Florida Appellate decision. The Fifth District did not misapply prior Florida law to substantially different facts so as to arrive at a rule of law at variance with the intent of the prior rule of law; nor did the Court ignore a prior appellate rule of law in a case involving similar facts.

This Court has no jurisdiction under Article V, Section 3(b)(3) of the Florida Constitution to review the District Court's decision and the Petition to review the decision should be denied.

Respectfully submitted,



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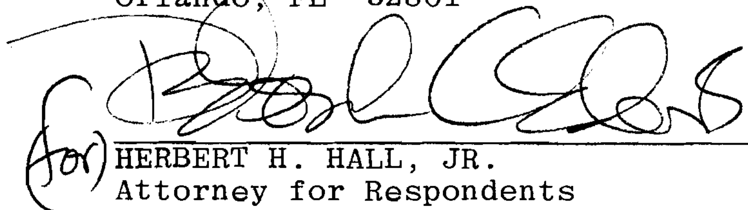

(for) HERBERT H. HALL, JR.
Attorney for Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Respondents' Brief on Jurisdiction, with attached Appendix, has been furnished James O. Driscoll, Esquire, Attorney for Petitioner, at Driscoll, Langston & Kane, 3222 Corrine Drive, Orlando, Florida, by U. S. Mail, this 2nd day of July, 1984.

DEBORAH C. EDENS