

W00A 017

IN THE SUPREME COURT OF FLORIDA

THOMAS JOHN CURTIN, a minor, by
and through his father and next
friend, THOMAS P. CURTIN, and
THOMAS P. CURTIN, Individually,

CASE NO. 65,387

Petitioners,

VS

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY, a foreign
corporation,

Respondents.

FILED
SID J. WHITE
JAN 31 1985
CLERK, SUPREME COURT
By *[Signature]*
Chief Deputy Clerk

RESPONDENTS' BRIEF ON THE MERITS

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

DEBORAH C. EDENS
MAHER, OVERCHUCK, LANGA
AND LOBB
A Professional Association
90 E. Livingston
Orlando, FL 32801
(305) 849-6510
Attorneys for Respondents

TABLE OF CONTENTS

Table of Cases Cited i

Prefatory Statement ii

Statement of the Case and Facts 1

Points on Appeal 2

Summary of Argument 3

Argument -

 Point I: THE FIFTH DISTRICT COURT OF APPEAL
 CORRECTLY INTERPRETED THE POLICY
 LANGUAGE AS WRITTEN BY STATE FARM
 TO FIND THAT THE CAR IN WHICH CURTIN
 WAS INJURED WAS "UNINSURED" WHERE
 STATE FARM DENIED LIABILITY; AND WAS
 CORRECT IN ITS INTERPRETATION OF THE
 POLICY OF THE UNINSURED MOTORIST
 STATUTE TO FIND THAT WHERE THERE WAS
 NO AVAILABLE COVERAGE ON THE CAR IN
 THE ACCIDENT; CURTIN WAS ENTITLED, AS
 A CLASS-ONE INSURED, TO COVERAGE FROM
 ONE OF THE OTHER TWO POLICIES WRITTEN
 BY STATE FARM. 5

 Point II: THE FIFTH DISTRICT COURT OF APPEAL DID
 NOT HOLD THAT THE OTHER TWO STATE FARM
 POLICIES COULD BE STACKED NOR WAS THAT
 ISSUE EVER ARGUED OR RAISED BY CURTIN;
 THEREFORE, THIS ISSUE IS UNFOUNDED. 16

Conclusion 17

Certificate of Service 18

TABLE OF CASES CITED

American Fire and Casualty Company v. Boyd,
357 So.2d 768 (Fla. 1st DCA 1978). 5,6,7,12

Auto-Owners Insurance Company v. Bennett,
2d DCA, Case No. 83-2249, December 12, 1984
[9 FLW 2643] 14

Boynnton v. Allstate Insurance Co.,
443 So.2d 427 (Fla. 5th DCA 1984). 11,12

Brown v. Progressive Mutual Insurance Company,
249 So.2d 429 (Fla. 1971). 11,12

Curtin v. State Farm Mutual Automobile Insurance Company,
449 So.2d 293 (Fla. 5th DCA 1984). 13,14

Hartford Accident and Indemnity Company v. Fonck,
344 So.2d 595 (Fla. 2d DCA 1977) 7

Johnson v. State Farm Fire and Casualty Company,
451 So.2d 898 (Fla. 1st DCA 1984) 13

Lee v. State Farm Mutual Automobile Insurance Company,
339 So.2d 670 (Fla. 2d DCA 1976) 7

Mullis v. State Farm Mutual Automobile Insurance Company,
252 So.2d 229 (Fla. 1971) 7,13,14

New Hampshire Insurance Group v. Harbach,
439 So.2d 1383 (Fla. 1983) 8,9

Porr v. State Farm Mutual Automobile Insurance Company,
452 So.2d 93 (Fla. 1st DCA 1984) 13

Reid v. State Farm Fire and Casualty Company,
352 So.2d 1172 (Fla. 1977) 5,8,12,13

State Farm Mutual Automobile Insurance Company v. Kuhn
374 So.2d 1079 (Fla. 3d DCA 1979). 9

State Farm Mutual Automobile Insurance Company v. Wimpee,
376 So.2d 20 (Fla. 2d DCA 1979). 9

STATEMENT OF THE CASE AND FACTS

Normally, the respondent should be able to rely on the Statement of the Case and Facts of the Petitioner as each representation by Petitioner should be cited by reference to the Record on Appeal or Appendix for support. CURTIN can live with the bias in emphasis which STATE FARM uses throughout its statement, yet CURTIN is forced to direct attention to STATE FARM's rendition of the holding of the Fifth District Court of Appeal. Besides the fact that the Opinion speaks for itself, Petitioner slants the true intent of the Court's Opinion. (App. 1-8)

The Opinion does not provide for stacking of coverages on the other two available policies, but rather states that CURTIN was covered under the other two policies: nowhere does the Fifth District Court of Appeal state that CURTIN is entitled to recover from or stack both. (App. 1-8) Contrarily, CURTIN in his briefs and argument before the Fifth District Court of Appeal specifically stated that benefits from only one of the other policies was sought.

POINTS ON APPEAL

CURTIN respectfully attempts to respond in this Brief in the order and to the points on appeal initiated by STATE FARM, yet CURTIN, in all honesty, cannot separate the first two points outlined by STATE FARM. Instead, for clarity and continuity, CURTIN combines both the argument that the Fifth District Court of Appeal correctly interpreted the policy language (whether the vehicle was "uninsured") and that the policy of the UM statute enunciated by this Court was followed in reaching this decision.

- I. THE FIFTH DISTRICT COURT OF APPEAL CORRECTLY INTERPRETED THE POLICY LANGUAGE AS WRITTEN BY STATE FARM TO FIND THAT THE CAR IN WHICH CURTIN WAS INJURED WAS "UNINSURED" WHERE STATE FARM DENIED LIABILITY: AND WAS CORRECT IN ITS INTERPRETATION OF THE POLICY OF THE UNINSURED MOTORIST STATUTE TO FIND THAT WHERE THERE WAS NO AVAILABLE COVERAGE ON THE CAR IN THE ACCIDENT; CURTIN WAS ENTITLED, AS A CLASS-ONE INSURED, TO COVERAGE FROM ONE OF THE OTHER TWO POLICIES WRITTEN BY STATE FARM.

- II. THE FIFTH DISTRICT COURT OF APPEAL DID NOT HOLD THAT THE OTHER TWO STATE FARM POLICIES COULD BE STACKED NOR WAS THAT ISSUE EVER ARGUED OR RAISED BY CURTIN; THEREFORE, THIS ISSUE IS UNFOUNDED.

SUMMARY OF ARGUMENT

CURTIN opines that the Fifth District Court of Appeal reached a correct decision in this case, based upon long standing public policy of this State as established by this Court -- that is, Florida's UM legislation is intended to provide maximum UM protection to the motorists of this State. The CURTIN ruling does not invade nor conflict with any decision of this Court, nor of its sister courts. In fact, recent decisions by the first and second districts support the reasoning of the Fifth District in the decision arrived at in this case.

STATE FARM has fallen victim to its own policy language in this case. The Fifth District Court of Appeal has followed established law to interpret the clear and unambiguous language contained in the policies in favor of the insured, who, in this case, did all one reasonably could to protect himself and his family.

There is no "stacking" issue in this case. The Fifth District Court of Appeal holds CURTIN is covered by two other policies but does not in any manner state that recovery under both policies is appropriate or allowable. CURTIN has always sought recovery from only one of the other two policies.

For these reasons as illustrated in more detail in the

Argument, CURTIN respectfully requests that this Honorable Court affirm the decision of the Fifth District Court of Appeal.

ARGUMENT

POINT I

THE FIFTH DISTRICT COURT OF APPEAL CORRECTLY INTERPRETED THE POLICY LANGUAGE AS WRITTEN BY STATE FARM TO FIND THAT THE CAR IN WHICH CURTIN WAS INJURED WAS "UNINSURED" WHERE STATE FARM DENIED LIABILITY; AND WAS CORRECT IN ITS INTERPRETATION OF THE POLICY OF THE UNINSURED MOTORIST STATUTE TO FIND THAT WHERE THERE WAS NO AVAILABLE COVERAGE ON THE CAR IN THE ACCIDENT; CURTIN WAS ENTITLED, AS A CLASS-ONE INSURED, TO COVERAGE FROM ONE OF THE OTHER TWO POLICIES WRITTEN BY STATE FARM.

The important factor in this case and the one which STATE FARM attempts to obscure is that there are three separate liability insurance policies, all issued by STATE FARM, on three different vehicles owned by CURTIN (Thomas P. Curtin, named insured), which contained identical provisions regarding UM coverage. (App. 1) Thomas John, the minor son of the named insured, was a resident of his father's household at the time of the accident and was therefore a "class-one insured" under his father's policies. (App. 1,4) CURTIN conceded at the trial court and on appeal that he was barred from any recovery under the policy insuring the automobile in the accident due to the family exclusion provision of the liability portion of that policy. (App. 2) This kind of exclusion has been upheld by this Court in Reid v. State Farm Fire & Casualty Co., 352 So.2d. 1172 (Fla. 1977).

The Fifth District Court of Appeal noted that Reid does not answer the question in this case as to whether the other two insurance policies on CURTIN's other vehicles provide coverage. Therefore, with the particular facts of this case in mind, the Fifth District considered the policy language in a STATE FARM policy. Under the STATE FARM policies, a motor vehicle is considered uninsured if it is "not insured or bonded for bodily injury liability at the time of the accident" or if such a policy exists but its insurer "denies coverage." (App. 2)

The decision of the Fifth District can be upheld upon the simple premise that STATE FARM denied coverage under the policy insuring the vehicle in the accident. The fact that STATE FARM denies coverage based upon a valid exclusion does not make that denial any less real. Furthermore, even STATE FARM cannot argue that there is no available insurance coverage under the policy insuring the vehicle in the accident. Section 627.727, Florida Statutes, in particular, states that UM benefits shall "be excess over but shall not duplicate benefits available" to an insured from a liability policy or from the tort-feasor.

The Fifth District Court of Appeal correctly noted that to extend this Court's rationale in Reid as STATE FARM would argue, would go beyond this Court's clear intention in deciding Reid. Reid was a family-exclusion situation. The policy

decision behind the ruling was prevention of potentially "collusive" law suits. Here, the driver of the car was not even a family member. As pointed out by the Fifth District, what about the thief and felon? (App. 5) To allow STATE FARM to widen the intention of the Court's holding in Reid is to allow the formation of a large class of motorists to be excluded from UM coverage which is clearly prohibited by this Court. Mullis, infra.

Correctly, the Fifth District accepted the reasoning of the decision in Lee v. State Farm Mutual Automobile Insurance Company, 339 So.2d 670 (Fla. 2d DCA 1976), cert. denied, 348 So.2d 954 (Fla. 1977). This Court in Reid declined to hold conflict with Lee because in Lee there was more than one policy involved. This Court quoted with approval the principle of Lee as discussed in Hartford Accident & Indemnity Company v. Fonck, 344 So.2d 595 (Fla. 2d DCA 1977), cert. denied, 359 So.2d 1214 (Fla. 1978):

The teenager (in Lee) was permitted to recover under the uninsured motorist provision of his father's policy after his brother's liability carrier denied coverage under the household exclusion. In Lee this court was dealing with two separate policies. There, the teenager's father had purchased the uninsured motorist protection for himself and his family, and we held the son must be afforded that protection. Fonck, supra, as cited in Reid at 1174, and Curtin, (App. 6) (emphasis added in Curtin).

This Court, in approving the decisions of Lee and Fonck clearly accepted that cases would arrive outside the narrow Reid factual

situation where a vehicle excluded under coverage for bodily injury could not be "uninsured" for purposes of UM coverage under that same policy. The Fifth District has made the logical and correct extension of this Court's ruling in Reid.

The decision by the Fifth District in this case in no way conflicts with the decision of this Court in New Hampshire Insurance Group v. Harbach, 439 So.2d 1383 (Fla. 1983), because the facts and policy language of each are substantially different. The key policy provision in Harbach excluded UM 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 under Harbach could only collect the UM coverage on that vehicle.

In contrast, the policies in this case do not specifically exclude from coverage other vehicles owned by the named insured or the family members residing therewith. A family member residing with the named insured who was injured in a particular vehicle, would be entitled to recover UM benefits as a "Class-One" insured under one of the other policies on the other vehicles owned by the named insured or other family member. Thus, while the plaintiff in Harbach may have been clearly, contractually limited from recovering such benefits,

CURTIN was not so clearly limited by policy language. Therefore, the interpretation by the Fifth District Court of Appeal to be liberally construed to the favor of the insured is correct.

Furthermore, the facts of each case are drastically different. In Harbach, the plaintiff was the owner and operator of the vehicle he chose not to insure and in which he was subsequently injured. The same is also true of those cases relied on by STATE FARM such as, 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, Thomas John Curtin 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 CURTIN to recover the insurance proceeds without creating any conflict with this Court's prior decision.

Likewise, under these facts, Section 627.4132, Florida Statutes, (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 CURTIN 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 reaching the decision that the vehicle in which CURTIN was injured was "uninsured," the Fifth District Court of Appeal relied on its previous decision in Boynton v. Allstate Insurance Company, 443 So.2d 427 (Fla. 5th DCA 1984) (Supreme Court jurisdiction accepted, Case No. 65,838, oral argument heard October, 1984). In Boynton, the court relied on this Court's opinion in Brown v. Progressive Mutual Insurance Company, 249 So.2d 429 (Fla. 1971) in which this Court stressed that the UM statute is "designed for the protection of injured persons," and that its purpose is "...to protect persons who are injured or damaged by other motorists who in turn are not insured and cannot make whole the injured party". Brown, supra, at 430.

This Court held in Brown that the question to be answered in deciding whether a person is entitled to UM protection is "...whether the offending motorist has insurance available for the protection of the injured party..." Id. The UM statute policies thereunder are clearly meant to be interpreted for the benefit of the injured party and not for the benefit of insurance companies and tort-feasors.

The importance of this Court's ruling in Brown cannot be

minimized by the fact that Brown dealt with a "hit and run" clause of a UM policy. This Court made it eminently clear that the purpose of the UM statute was to provide relief to injured motorists on the highways of this State where there was no liability insurance available. Nothing in the Brown decision or later decisions by this Court indicate that the Brown ruling is to be narrowly construed.

In Boynton, the Fifth District Court of Appeal further supported its opinion by the decision in American Fire and Casualty Company v. Boyd, 357 So.2d 768 (Fla. 1st DCA 1978). There, the accident was caused by a driver who had a policy of liability insurance which was inapplicable because it excluded coverage for insureds traveling under military orders, which was the case at the time of the accident. The court held that although the driver had procured a policy of insurance to cover his vehicle, the policy offered no coverage under the facts of the accident, and was therefore "uninsured" within the meaning of that term as used under Florida Statutes, Section 627.727.

Both Boyd and Brown interpreted situations to allow for UM coverage where clearly there was no liability coverage afforded. Those decisions have not been receded from by this Court. It was in Reid, supra, that this Court refused to find that the valid family exclusion under the liability portion of the same

policy did not equate to finding the vehicle "uninsured" for the purpose of allowing recovery under the UM portion of that same policy. Even this Court in Reid, as discussed previously, noted that it was dealing with a special exception: the family exclusion and ONE policy.

Since the decision in Curtin v. State Farm Mutual Automobile Insurance Company, 449 So.2d 293 (Fla. 5th DCA 1984), the First and Second District Courts of Appeal have followed the basic reasoning of Curtin to find available coverage for the insured. In Porr v. State Farm Mutual Automobile Insurance Company, 452 So.2d 93 (Fla. 1st DCA 1984), and Johnson v. State Farm Fire and Casualty Company, 451 So.2d 898 (Fla. 1st DCA 1984), the First District Court of Appeal expressly followed the Curtin reasoning.

In Johnson, the Court interpreted policy language in a State Farm policy which is virtually identical to that in this case. Johnson, supra at 899. The Court held that the vehicle which was involved in the accident was an "uninsured" vehicle because State Farm had "denied" coverage and because a contrary interpretation would violate the intent of Florida's Uninsured Motorist Statute, Section 627.727, Florida Statutes (1983), which is to allow every insured...to recover for the damages he or she would have been able to recover if the offending motorist had maintained a policy of liability insurance." Id. at 900, citing, Mullis v. State Farm Mutual Automobile Insurance Company, 252 So.2d 229 (Fla. 1971).

The Second District Court of Appeal, on a Motion for Rehearing in Auto-Owners Insurance Company v. Bennett, 2d DCA, Case No. 83-2249, December 12, 1984 [9 FLW 2643], affirmed the trial court in upholding the father's claim for UM coverage under the father's policy for the death of his son. In Bennett, the son was killed in an auto accident while riding in a vehicle owned by a third-party who was underinsured. Bennett does not involve the same factual situation as Curtin, but the case is argued for the reason that this Court's ruling in Mullis, supra, remains intact and exclusions from uninsured motorist coverage are legally impermissible. In Bennett, where the deceased son had owned a vehicle which was insured, under the father's insurance policy, the son was a "class-one" insured because he was a resident relative. Even though under the father's policy there was a conflict as to whether the son was covered (because under one provision he owned his own automobile and was excluded, and yet under the other, he was a resident, relative and included for coverage), the Second District Court of Appeal refused to allow an exclusion of this class of insureds and interpreted a conflict in the policy to be in favor of the insured. Bennett, at [9 FLW 2643].

CURTIN believes that the Fifth District Court of Appeal's finding that the vehicle in question here was "uninsured" is

clearly supported by the law, and promotes the purpose of uninsured motorist protection. CURTIN purchased UM protection for himself and his family, and when injured through the fault of another, and having no liability coverage available to him, should be entitled to receive the UM benefits which he purchased. Any other interpretation would be contrary to the broad uninsured motorist protection scheme envisioned by the Legislature and would violate the public policy of this State.

POINT II

THE FIFTH DISTRICT COURT OF APPEAL DID NOT HOLD THAT THE OTHER TWO STATE FARM POLICIES COULD BE STACKED FOR WAS THAT ISSUE EVER ARGUED OR RAISED BY CURTIN; THEREFORE, THIS ISSUE IS UNFOUNDED.

The Fifth District Court of Appeal was correct in reasoning that "appellant was covered under the uninsured motorist provision of State Farm's policy on Curtin's vehicles other than the ones involved in this accident." (App. 6) (emphasis added) The court held that CURTIN was covered under the policies on the two other CURTIN vehicles not involved in the accident. Coverage and entitlement to collect, however, are different issues. Although CURTIN may be covered by both policies issued to the same named insured, CURTIN has never sought and the Fifth District Court of Appeal never stated that CURTIN was entitled to recover from both policies.

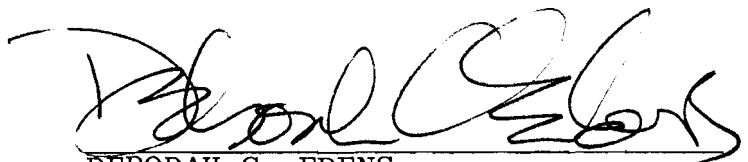
Section 627.4132, Florida Statutes (1976 Supp.) makes it abundantly clear that CURTIN is entitled to collect from only one of the policies with the same named insured and, hence, CURTIN never even sought to stack the policies in this case. For STATE FARM to raise this as a point on appeal is to create issue where none exists.

CONCLUSION

For the reasons set forth above, CURTIN respectfully urges this Court to affirm the decision of the Fifth District Court of Appeal.

Respectfully submitted this 29th ^{de} day of January, 1985.

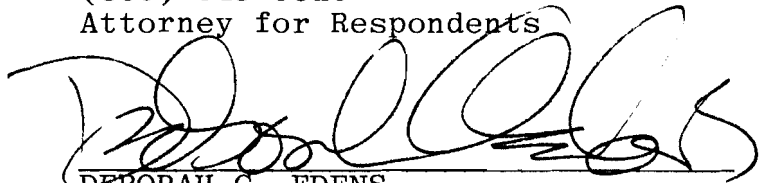
MAHER, OVERCHUCK, LANGA AND LOBB
A Professional Association
90 E. Livingston
Orlando, FL 32801
(305) 849-6510
Attorneys for Respondent/Plaintiff


DEBORAH C. EDENS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Respondents' Brief on the Merits has been this date furnished JAMES O. DRISCOLL, 3222 Corrine Drive, Orlando, FL 32803, by U. S. Mail, this 29th day of January, 1985.

DEBORAH C. EDENS
MAHER, OVERCHUCK, LANGA AND
LOBB
A Professional Association
90 E. Livingston
Orlando, FL 32801
(305) 849-6510
Attorney for Respondents



DEBORAH C. EDENS