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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 and THOMAS P. CURTIN,

Respondents.
_____/

PETITIONER'S REPLY BRIEF ON THE MERITS

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

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INTRODUCTORY NOTE

Petitioner, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, is referred to in this reply brief as "State Farm"; Respondents, JOHN P. CURTIN and THOMAS JOHN CURTIN, are referred to as "Curtin."

References to Appendix of Petitioner's initial brief are designated as (App.).

Uninsured motorist coverage is referred to in this brief as UIM coverage.

SUMMARY OF ARGUMENT

The arguments contained herein are summarized as follows:

1. The policies of insurance discussed in this brief do not provide UIM coverage under any construction of the terms of those insurance contracts.

2. Public policy of the State of Florida as expressed by the Legislature does not provide UIM coverages under policies of insurance on motor vehicles not involved in the accident. This argument is divided into the following subparts:

(a) The motor vehicle in which Curtin was riding was not an uninsured motor vehicle.

(b) The case of Mullis v. State Farm Mutual Automobile Insurance Company, 252 So.2d 229 (Fla. 1971) is not applicable to this case because:

(i) The accident occurred on December 26, 1979. At that time UIM coverage was available, if at all, only to the extent of coverage applicable to the motor vehicle involved in the accident. Curtin agrees with this in his argument contained on pages 9 and 10 of his brief if the named insured owner of the vehicle had been the one involved in the accident rather than the son member of the household!

(ii) Mullis, supra, is not applicable to this case no matter whether or not Section 627.4132, Florida Statutes (the "anti-stacking statute") was in effect. Mullis holds only that UIM coverage prescribed by the legislature statutorily requires that it provide the reciprocal or mutual equivalent of automobile liability prescribed by the Financial Responsibility Law. That latter law does not require that Curtin be covered under the provisions of that liability insurance policy insuring that automobile in which Curtin was riding as a passenger. Reid v. State Farm Fire and Casualty Co., 352 So.2d 1172 (Fla. 1977).

3. State Farm accepts Curtin's statement and position that the two policies of UIM insurance on the automobiles not involved in the accident do not stack. Unfortunately, the District Court's opinion on this case (App. B-6-7) states: "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. We reach this conclusion as a matter of interpretation of the language of the policies, and, secondarily, because this result is mandated by the public policy of section 627.727." State Farm's motion to clarify this portion of the opinion was denied by the 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 CLASSONE INSURED, TO COVERAGE FROM ONE OF THE OTHER TWO POLICIES WRITTEN BY STATE FARM.

Curtin expresses confusion as to why State Farm framed the points on appeal as it did in its initial brief. This was done because the District Court's opinion (App. B-7) holds: "We reach this conclusion as a matter of interpretation of the language of the policies and, secondarily, because this result is mandated by the public policy of section 627.727." Both of these conclusions are incorrect and should be separately considered.

A. A Matter of Interpretation

State Farm's position on this point is the same as contained in its first brief on the merits. That is that (1) an uninsured automobile was not involved in the accident and (2) that the definition of uninsured motor vehicle in the policies of insurance does not create UIM coverages under the terms of the policies of insurance applicable to automobiles not involved in the accident. Analysis of

Curtin's response to these positions of State Farm show:

1. On page 6 of Curtin's brief, Curtin states: "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 First 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."

The fallacy of Curtin's position is that (a) the automobile in which Curtin was riding is insured and (b) State Farm never denied liability coverage in this case. Liability coverage to Curtin did not have to be denied. Curtin under the terms of a valid exclusion applicable to the liability portion of the policy of insurance did not have that coverage available to him. Simply stated, there is no need to deny "something" to someone when that "something" never existed in the first place. See, LaMarche v. Shelby Mutual Insurance Co., 390 So.2d 325 (Fla. 1980). Curtin and the District Court of Appeal in this case agree that the exclusion of liability coverage to Curtin is correct and valid and also agree to the inapplicability of UIM coverage on that automobile involved in the accident.

2. On pages 8, 9, and 10 in his brief, Curtin states that Curtin (the son) can collect as a class one insured because the policies do not specifically exclude from coverage other vehicles owned by the named insured or residing family members. Curtin then co-mingles his argument on interpretation of the policy with a discussion of the uninsured motor vehicle statute and concludes that Curtin (the father and named insured) would not have UIM coverage available had he been the passenger rather than his son (Page 8, 9, 10 and 11 of Curtin's brief) in the automobile involved in the accident.

State Farm agrees with Curtin that the senior Curtin would not have UIM coverage available had he been the passenger rather than his son because the policy provisions are clear in this case. For reasons next discussed, State Farm does not agree that the son is entitled to coverage because of the Florida Statutes applicable to this case.

3. In page 9 Curtin states that the policy of insurance is liberally construed to favor the insured and that therefore there is UIM coverage. This statement does not refer to any of the terms of the policies of insurance involved in this case. Curtin in fact avoids State Farm's brief on the matter of interpretation concerning the "negative definition" set forth in the District Court's opinion. That comment of the District Court is still not understandable.

B. A Matter of Public Policy

In State Farm's initial brief on this point it set forth the position that (a) this point should never have been reached in the first place because an uninsured motor vehicle was not involved in the accident and (b) Florida Statute 627.727 did not mandate that UIM coverage was available to Curtin in this case. State Farm stands firm on those positions.

Curtin, as did the District Court of Appeal, seemingly relies on this Court's opinion in Mullis v. State Farm, supra, construing the uninsured motor vehicle statute. Mullis, it is respectfully submitted, is not applicable to this case.

1. Mullis Is Not Applicable To This Accident Which Occurred On December 26, 1979. --

State Farm's argument is not refuted by Curtin in his brief. New Hampshire Insurance Group v. Harbach, 439 So.2d 1383 (Fla. 1983) is applicable to this case for the reasons set forth in State Farm's initial brief. Curtin in his brief, as previously discussed herein, concedes that the named insured/owner of the automobile involved in the accident would not have UIM coverage had he been the passenger rather than his son. Curtin then argues that Curtin the son has that coverage.

Curtin the son is an insured by definition in the policy pertaining to the vehicle involved in the accident. If he were not, this case could not have started in the first place. Harbach, supra, holds that Section 627.4132, Florida Statutes, had two purposes pertaining to UIM coverage:

(a) It limited an insured to coverage applicable to the policy covering the vehicle involved in the accident, and (b) it prohibited the stacking of coverages. Curtin's argument on this point is without merit.

2. Mullis Is Not Applicable To The Facts Of This Accident. --

The District Court's opinion in our case (App. B-5) states:

> State Farm's exclusion in Mullis for family-owned cars not insured under the policy claimed under is very similar to the exclusion from coverage argued for by State Farm under the Curtin policies: all family-owned vehicles which are insured under other policies. Such exceptions from coverage have been uniformly rejected or denied by the courts.

The District Court does not quote the exclusion referenced. That court could not -- there is no such exclusion in those policies.

There is indeed no reason to consider an exclusion in this case since an uninsured motor vehicle was not involved

in this case. Factually, Mullis involved a case where an insured was struck by an automobile and injured while riding a motorcycle not insured by either liability or UIM coverage insurance with the insurance company that had issued policies of insurance to the injured insured's father (with whom he resided) on automobiles not involved in the accident. The injured insured was defined as an insured under those policies of insurance. UIM coverage, however, was denied because of an exclusion in those policies excluding that UIM coverage if the insured was occupying a motor vehicle owned by the named insured or any resident of the same household, if such vehicle was not an insured automobile. This Honorable Court in a 4-3 opinion held that the public policy as prescribed by the Florida Legislature prohibited that exclusion. In so holding, this Court states, pages 237 and 238:

> In sum, our holding is that uninsured motorist coverage prescribed by Section 627.0851 is statutorily intended to provide the reciprocal or mutual equivalent of automobile liability coverage prescribed by the Financial Responsibility Law, i.e., to say coverage where an uninsured motorist negligently inflicts bodily injury or death upon a named insured, or any of his family relatives resident in his household, or any lawful occupants of the insured automobile covered in his automobile liability policy. To achieve this purpose, no policy exclusions contrary to the statute of any of the class of family insureds are permissible since uninsured motorist coverage is intended by

> the statute to be uniform and standard motor vehicle accident liability insurance for the protection of such insureds thereunder as "if the uninsured motorist had carried the minimum limits" of an automobile liability policy. (Emphasis added.)

Mullis is not applicable because:

1. The Financial Responsibility Law does not require that the liability coverage on the motor vehicle in which Curtin the son was riding be available to him. 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); Reid v. State Farm Fire and Casualty Co., supra. Accordingly, the requirement of Mullis that the Florida Legislature mandated that UIM coverage be the reciprocal or mutual equivalent of the liability coverage available to Curtin has not been violated. Under the Financial Responsibility Law Curtin is not entitled to collect under the liability provision of State Farm's policy and the equivalent coverage of UIM benefits to Curtin is equal thereto. If this is a harsh result (and it is not), the result and public policy is that set by the legislature, not requiring judicial interpretation or construction.

2. Neither the Financial Responsibility Law nor Section 627.727, Florida Statutes, can be interpreted or construed to support the holding that Curtin was a passenger in an uninsured motor vehicle at the time of the accident.

Mullis does not compel this result because of the court's construction of those statutes in that case. Factually, in Mullis the injured insured was involved in an accident with a motor vehicle driven by the owner of an uninsured motor vehicle. The insured in Mullis was not a passenger in the insured vehicle being driven with the consent and authority of the owner/insured (Curtin the father) and the insured (Curtin the son). State Farm did not bargain to insure by way of UIM coverage the negligent driving of any insured's permissive user. Clearly that permissive user is an insured for liability purposes. Had that permissive driver negligently injured a third party, State Farm would have been required to both defend and respond to damages up to the limit of its liability coverage on the automobile involved in the accident on behalf of that permissive user and both of the Curtins, father and son. The liability coverages afforded on those two automobiles insured by Curtin and not involved in such accident would not afford liability coverage. This is the bargain and contract between Curtin and State Farm. South Carolina Insurance Co. v. Heuer, 402 So.2d 4380 (Fla.App. 4th DCA 1981).contains language particularly applicable here concerning construction of insurance policies, at page 481:

> Among the most basic of these principles is that ambiguities found in the coverage provisions of a policy must be interpreted in favor of providing coverage. Stuyvesant Insurance Company v. Butler

314 So.2d 567 (Fla. 1975). It is equally true, however, that a court cannot alter the clear terms of a contract, and by doing so place the parties in a position different from that which they bargained for. General Accident F. & L. Assur. Corp. v. Liberty Mutual Insurance Company, 260 So.2d 249 (Fla. 4th DCA 1972).

> The terms of an insurance policy should be taken and understood in their ordinary sense and the policy should receive a reasonable, practical and sensible interpretation consistent with the intent of the parties--not a strained, forced or unrealistic construction. Id. at 253. (Emphasis added.)

As a final comment, Curtin's reliance on the following cases is not well taken: Lee v. State Farm Mutual Automobile Insurance Co., 339 So.2d 670 (Fla. 2d DCA 1976) cert. denied, 359 So.2d 1214 (Fla. 1978) was cited by this Court in Reid v. State Farm Fire and Casualty Co., supra. In considering Lee this Court states in Reid, page 1174:

> We have considered the recent case of Lee v. State Farm Mutual Automobile Insurance Co., 339 So.2d 670 (Fla. 2d DCA 1976). That decision may be distinguished factually from the present case because the "uninsured motor vehicle" which caused the injury in Lee was not the same vehicle as the "insured motor vehicle" named in the policy. Also, in Lee, the court was not dealing with a policy provision which provides that the term "uninsured motor vehicle" does not include the vehicle named in the policy as the "insured motor vehicle." However, even with these factual distinctions we recognize that there is an underlying conflict

> between the two cases. The court in Lee appears to say that all restrictions on uninsured motorist coverage, without exception, are against public policy and are void. On the other hand, we say that the particular restriction on uninsured motorist coverage in the present case is not against public policy and is not void. To hold otherwise in this case would completely nullify the family-household exclusion. (Emphasis added.)

Lee is not a case holding that an insured vehicle involved in an accident becomes an uninsured motor vehicle because of a household exclusion. Nor does this Honorable Court adopt with approval such holding -- contrary to Curtin's contention, pages 7 and 8 of their brief. In point of fact, the District Court by so holding in our case directly conflicts both factually and legally with the facts and legal principles set forth by this Court in Reid.

CONCLUSION

For the reasons contained in State Farm's first brief and this reply brief, State Farm again requests that this Honorable Court:

1. Reverse the District Court of Appeal's holdings and remand this case; and

2. Order the District Court of Appeal to reinstate the trial court's summary judgment for State Farm finding that UIM coverage is not available to Curtin under both or either of two policies of UIM insurance on automobiles not involved in the accident.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by mail this 13 day of February, 1985, to Maher, Overchuck, Langa and Lobb, P.A., 90 E. Livingston Street, Orlando, Florida, 32801.

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