OA 4-12.85 047

IN THE SUPREME COURT OF FLORIDA

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner,

v. CASE NO. 65,656

SHERAN PORR, individually, and as Personal Representative of the Estate of Robert Ray Ward,

Respondent.

_____/

PETITIONER'S BRIEF ON MERITS

An Appeal from the First District Court of Appeal
Case No. AO-289

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INTRODUCTORY NOTE

The Petitioner, STATE FARM MUTUAL AUTOMOBILE MUTUAL INSURANCE COMPANY, is referred to in this Brief as "STATE FARM", the Respondent, SHERAN PORR, Individually, and as Personal Representative of the Estate of Robert Ray Ward, will be referred to as "PORR", and the decedent as "WARD". Reference to the Record on Appeal are designated at (R-___); and references to the Appendix are designated as (App.-___).

Uninsured Motorist Coverage is referred to in this Brief as UIM Coverage.

STATEMENT OF THE CASE AND FACTS APPLICABLE TO THE MERITS

A. Facts

Decedent WARD, minor son of the named insured, PORR, received fatal injuries as the result of an automobile accident occurring in August of 1981, while a passenger in a truck owned by PORR and negligently driven by Glen Spradling, a family friend. STATE FARM and PORR had three (3) separate insurance policies on three different vehicles, including the one involved in the accident. These policies had identical language which provided that 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." The three policies further provided for Uninsured Motorist Coverage for Bodily Injury which an insured is legally entitled to collect from the owner or driver of an uninsured motor vehicle. The bodily injury must be caused by accident arising out of the operation, maintenance or use of an uninsured motor vehicle (App. A,Pg 11&12 of Exhibits).

The three policies further provided that an uninsured motor vehicle means: "A land motor vehicle not insured or bonded for bodily injury liability at the time of the accident."(App. A-Exhibit A, Pg. 11).

The specific policy provisions of State Farm's three policies are:

> SECTION I--LIABILITY--COVERAGE A
>
> We will:
>
> 1. pay damages which an insured becomes legally liable to pay because of:
>
> a. bodily injury to others, and
>
> b. damage to or destruction of property including loss of its use,
>
> caused by accident resulting from the ownership, maintenance or use of <u>your</u> car;
>
> . . . .
>
> WHEN COVERAGE A DOES NOT APPLY
>
> THERE IS NO COVERAGE:
>
> . . . .
>
> 2. FOR ANY BODILY INJURY TO:
>
> . . . .
>
> c. ANY INSURED OR ANY MEMBER OF AN INSURED'S FAMILY RESIDING IN THE INSURED'S HOUSEHOLD
>
> . . . .
>
> SECTION III -- UNINSURED MOTOR VEHICLE -- COVERAGE U
>
> We will pay damages for bodily injury an insured is legally entitled to collect from the owner or driver of an uninsured motor vehicle. The bodily injury must be caused by accident arising out of the operation, maintenance or use of an uninsured motor vehicle.

Uninsured Motor Vehicle--means:

1. a land motor vehicle, the ownership, maintenance or use of which is:

   a. not insured or bonded for bodily injury liability at the time of the accident; or

   b. insured or bonded for bodily injury liability at the time of the accident; but

      (1) the limits of liability are less than required by the financial responsibility act of the state where your car is mainly garaged; or

      (2) the limits of liability are less than the limits of uninsured motor vehicle coverage that apply to the insured; or

      (3) the insuring company denies coverage or is or becomes insolvent; or

      . . . .

An Uninsured Motor Vehicle does not include a land motor vehicle:

1. insured under the liability coverage of this policy;

. . . .

B. Holding of District Court of Appeal, First District of Florida

On these facts that Court held (App. B):

1. That this case was on all fours with Curtin v. State Farm Mutual Automobile Insurance Company, 449 So 2d 293 (Fla 5 DCA 1984)

and consequently reversed the Lower Tribunal's Order which held that PORR could not recover UIM benefits because the vehicle in which WARD was a passenger was not an uninsured motor vehicle.

2. That it was not permissable for STATE FARM to deny UIM coverage on PORR's two policies other than the vehicle involved in the accident.

3. That the UIM coverage on the two vehicles which were not involved in the accident stacked.

4. That the vehicle involved in the accident was an uninsured motor vehicle since WARD could not recover under the liability portion of the policy which insured the vehicle which he was occupying.

The District Court was correct in the holding No. 1, but erred in the remaining holdings.

POINTS ON APPEAL

I. WHERE VEHICLE INSURED BY LIABILITY INSURANCE IS INVOLVED IN AN ACCIDENT, A HOUSEHOLD EXCLUSIONARY CLAUSE IN THAT POLICY WHICH EXCLUDES A SPECIFIC INSURED, DOES NOT RENDER THAT VEHICLE AN UNINSURED MOTOR VEHICLE SO AS TO PROVIDE UNINSURED MOTORIST COVERAGE UNDER THE PROVISION OF OTHER POLICIES OF INSURANCE ON AUTOMOBILES OWNED BY THE SAME INSURED, BUT NOT INVOLVED IN THE ACCIDENT.

II. SECTION 627.727, FLORIDA STATUTES, DOES NOT REQUIRE THAT UNINSURED MOTORIST COVERAGE BE PROVIDED TO AN INSURED UNDER THE PROVISIONS OF POLICIES OF INSURANCE PROVIDING SUCH COVERAGE TO AUTOMOBILES NOT INVOLVED IN THE ACCIDENT WHERE THE INSURED IS INVOLVED IN AN ACCIDENT COVERED BY LIABILITY INSURANCE ON THE AUTOMOBILE SO INVOLVED AND THAT LIABILITY POLICY EXCLUDES THAT INSURED UNDER A HOUSEHOLD EXCLUSION.

III. THE DISTRICT COURT OF APPEAL ERRED IN ITS OPINION HOLDING THAT THE TWO POLICIES OF UNINSURED MOTORIST INSURANCE COVERAGE ON AUTOMOBILES NOT INVOLVED IN THE ACCIDENT STACKED.

A R G U M E N T

POINT I

WHERE VEHICLE INSURED BY LIABILITY INSURANCE IS INVOLVED IN AN ACCIDENT, A HOUSEHOLD EXCLUSIONARY CLAUSE IN THAT POLICY WHICH EXCLUDES A SPECIFIC INSURED, DOES NOT RENDER THAT VEHICLE AN UNINSURED MOTOR VEHICLE SO AS TO PROVIDE UNINSURED MOTORIST COVERAGE UNDER THE PROVISION OF OTHER POLICIES OF INSURANCE ON AUTOMOBILES OWNED BY THE SAME INSURED, BUT NOT INVOLVED IN THE ACCIDENT.

In answering this question, the First District Court of Appeal simply adopted the reasoning of the Fifth District Court of Appeal in Curtin v. State Farm, 449 So. 2d 293 (Fla. 5 DCA 1984). Reference to the Curtin Opinion shows that the Fifth District Court felt that the vehicle occupied by WARD was an uninsured vehicle because STATE FARM had denied coverage. This construction of the policy language by the Fifth District is erroneous. Each of the vehicles was insured for liability, but liability on the occupied vehicle was excluded, and not denied.

1. We adopt the argument set forth in The Curtin Brief. The language of the policy is clear and unambiguous, does not need any construction, and should be given the definition contained in the policy, e.g. Midwest Mutual Insurance Co. v. Santiesteban, 287 So 2d 665 (Fla. 1973).

Having adopted the argument of the Curtin Brief, we herewith set forth the remaining exact language of that Brief:

"The District Court of Appeal's opinion ignores these maxims of contract construction. The driver of the automobile involved in the accident in this case was insured. The vehicle did not become uninsured because of an exclusion of the plaintiff. In Reid v. State Farm Fire & Casualty Co., 352 So. 2d 1172 (Fla. 1977), this Court states:

> 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). (Emphasis added)

The exclusion of a risk is not synonomous with denial of coverage.

2. The District Court of Appeal's opinion espouses a contract interpretation that is without precedent in any authority found by State Farm. That interpretation by the District Court is that since an uninsured motor vehicle is not the automobile covered under the liability provision of the same policy of insurance, other automobile policies having UIM coverage apply. That Court's reasoning to reach

this conclusion is as follows: "One plausible inference from this negative definition is that an 'uninsured motor vehicle' may be one insured under other policies." This is incorrect because each policy issued by State Farm in this case is a separate contract of insurance and should be construed as written. There is no precedent for the interpretation of "negative definition" urged by the majority opinion of the District Court of Appeal. In doing so, another maxim of contract and insurance law is overlooked by the District Court of Appeal's opinion. That is, that ambiguities in insurance policies are not to be created by strained interpretations of clear language.

This Honorable Court states that maxim thusly in Bradley v. Associates Discount Corp., 58 So.2d 857 (Fla. 1952), at pages 858-859:

> We cannot stretch the rule of strict construction of insurance contracts in favor of an insured to mean that where language is plain and unambiguous it may be given added meaning.

In our case the definition is not a "negative definition." It is a clear statement that the automobile insured under the liability provision of the policy is not to be considered an uninsured motor vehicle. This provision has nothing to do with other contracts of insurance.

PORR could have insured her other automobiles with other liability and UIM insurers, for example.

ARGUMENT

POINT II

SECTION 627.727, FLORIDA STATUTES, DOES NOT REQUIRE THAT UNINSURED MOTORIST COVERAGE BE PROVIDED TO AN INSURED UNDER THE PROVISIONS OF POLICIES OF INSURANCE PROVIDING SUCH COVERAGE TO AUTOMOBILES NOT INVOLVED IN THE ACCIDENT WHERE THE INSURED IS INVOLVED IN AN ACCIDENT COVERED BY LIABILITY INSURANCE ON THE AUTOMOBILE SO INVOLVED AND THAT LIABILITY POLICY EXCLUDES THAT INSURED UNDER A HOUSEHOLD EXCLUSION.

In finding that 627.727 requires coverage on two automobile policies insuring automobiles not involved in the accident, the District Court of Appeal's opinion assumes that the plaintiff had an accident involving an uninsured motor vehicle. For the reasons set forth, supra, it is respectfully submitted that that is an erroneous conclusion by the District Court of Appeal; and nothing in Section 627.727, Florida Statutes, compels that court's conclusion. By holding that UIM coverage is mandated by F.S. 627.727 on policies insuring vehicles not involved in the accident, the District Court of Appeal misconstrued the law as correctly stated in this Court's opinion in New Hampshire Group v. Harbach, 439 So.2d 1383 (Fla. 1983), by holding (1) that State Farm's exclusion creates a class of vehicles exception to uninsured motorist coverage condemned by Florida courts, and (2) that uninsured motorist coverage is available on two vehicles not involved in the accident. In Harbach this Court holds at page 1385:

> We conclude that section 627.4132, as written when this action arose, had two purposes. First, the statute limited an insured to the coverage contained in the policy covering the vehicle involved in the accident. Second, the statute prohibited the stacking of coverages. We concur with the reasoning of the Second District Court of Appeal in Wimpee. Section 627.4132, Florida Statutes (Supp. 1976), provides that an "insured is protected only to the extent of the coverage he has on the vehicle involved in the accident." As the court in Wimpee said, "(w)e are unable to interpret this other than to provide for no coverage when the insured has no coverage on the vehicle involved in the accident." 376 So.2d at 21. We also agree with the Wimpee court's conclusion that Mullis does not control in this circumstance because it was based on section 627.727, Florida Statutes (1971), the uninsured motorist statute. The Third District Court of Appeal came to the same conclusion in State Farm Mutual Automobile Insurance Co. v. Kuhn, 374 So.2d 1079 (Fla. 3d DCA 1979). (Emphasis added)

Harbach clearly holds (1) that the class of vehicle excluded from coverage in our case is not prohibited by the statute, and (2) that uninsured motorist coverage is applicable only to the motor vehicle involved in the accident.

In summary, the conclusion of the District Court of Appeal opinion is wrong because:

1. An uninsured motor vehicle was not involved in the accident. This is clear because the automobile occupied by WARD had $15,000.00 liability coverage provided by the liability insurer. Nor can PORR stack policies in this

case to create an underinsured motorist case since the named insured on all policies is the same. South Carolina Insurance Co. v. Kokay, 398 So.2d 1355 (Fla. 1981). Those other policies are either the same or less than that liability policy on the automobile occupied by WARD. This is further discussed, infra, in this brief. Accordingly, to reach a conclusion that there is UIM coverage available in this case requires a finding that the vehicle in which WARD was riding is an uninsured motor vehicle. This is, as stated, contrary to Reid, supra; and to reach the conclusion that UIM coverage is available from coverages on automobiles not involved in the accident is contrary to F.S. 627.4132 and Harbach, supra.

2. Section 627.727, Florida Statutes, does not (a) require a holding that WARD was involved in an accident with an uninsured motor vehicle, nor does it (b) require that State Farm pay UIM coverage on motor vehicles not involved in this accident.

ARGUMENT

POINT III

THE DISTRICT COURT OF APPEAL ERRED IN ITS OPINION HOLDING THAT THE TWO POLICIES OF UIM INSURANCE COVERAGE ON AUTOMOBILES NOT INVOLVED IN THE ACCIDENT STACKED.

This point should never have been reached by the District Court of Appeal for the reasons set forth in Points I and II, supra. The District Court of Appeal nevertheless reached that conclusion.

In State Farm Mutual Automobile Insurance Company v. Taylor, 434 So.2d 37 (Fla. 5th DCA 1983), the court at page 37 states:

> The trial court permitted stacking of uninsured motorist coverages under two policies, one issued to Thomas C. Taylor and Sonia S. Taylor, and the other issued to Thomas Taylor. State Farm appeals. We reverse.
>
> To permit stacking of these policies would, in this instance be a violation of section 627.4132, Florida Statutes (1979), which prohibits stacking insurance policies involving the same named insured. See South Carolina Insurance Co. v. Kokay, 398 So.2d 1355 (Fla. 1981). Although we have been urged not to follow it, we agree that the opinion in Lowry v. State Farm Mutual Automobile Insurance Co., 421 So.2d 688 (Fla. 3d DCA 1982) correctly interprets the law under facts similar to these.

The named insured in this case is, as stated above, SHERAN PORR, on all three policies.

The District Court of Appeal opinion allowing stacking has no basis in the law.

CONCLUSION

For the reasons herein, STATE FARM requests that this 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 Order of Dismissal for STATE FARM finding that UIM coverage is not available to PORR 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 U.S. Mail this 24th day of January, 1985, to THOMAS W. DAVIS, Attorney for Respondent, 200 N.E. First Street, Gainesville, FL 32601.

Attorney for Petitioner