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IN THE SUPREME COURT OF FLORIDA

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By [Signature]
Chief Deputy Clerk

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY, etc.,

Petitioner,

vs.

CASE NO. 65,656

SHERAN PORR, etc.,

DISTRICT COURT OF APPEAL
FIRST DISTRICT, NO. AO-289

Respondent.

SHERAN PORR, etc.,

Petitioner,

vs.

CASE NO. 65,674

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY, etc.,

DISTRICT COURT OF APPEAL
FIRST DISTRICT, NO. AO-289

Respondent.

PETITIONER'S REPLY BRIEF ON THE MERITS
AND ANSWER BRIEF TO CROSS-PETITIONER'S BRIEF

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

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INTRODUCTORY NOTE

Petitioner, STATE FARM MUTUAL AUTOMOBILE 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 is designated as (R-); and references to the Appendix 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 interpretation or construction of the terms of those insurance contracts.

2. Public policy of the State of Florida as expressed by the legislature does not require that UIM coverage be provided by the 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 WARD 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 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 WARD be covered under the provisions of that liability insurance policy insuring that automobile in which WARD was riding as a passenger. Reid v. State Farm Fire and Casualty Company,

352 So.2d 1172 (Fla. 1977).

3. Public policy of the State of Florida as expressed by the legislature does not require that UIM coverage be provided by the policy of insurance on the motor vehicle involved in the accident.

ARGUMENT

POINT I

THE HONORABLE SUPREME COURT SHOULD NOT BY CASE LAW FURTHER EXPAND OR PROVIDE FOR A FURTHER EXCEPTION AS URGED BY THE INSTANT INSURANCE CARRIER TO LEGISLATIVELY DELINEATED UNINSURED MOTORIST BENEFITS, NOWHERE ALLOWED BY STATUTE, WHERE THE DISTRICT COURT OF APPEAL HAS RULED CONSISTENT WITH PRIOR CASE LAW DECISIONS THAT A MOTHER MAY RECOVER DAMAGES FOR THE DEATH OF HER MINOR CHILD CAUSED BY A NEGLIGENT, UNRELATED, UNINSURED DRIVER UNDER TWO UNINSURED MOTORIST COVERAGES ON TWO VEHICLES OWNED BY THE MOTHER AND NOT INVOLVED IN THE FATAL CRASH.

The first error in this point stated by PORR is that the legislature has not legislated against STATE FARM's position in this case. The second error is that the District Court of Appeal did not rule consistent with prior case law.

In addition to those matters argued under this point, PORR (pages 25, 26, 27) argues that the State Farm policies provide UIM coverages on three policies between PORR and STATE FARM. This latter argument and conclusion is also erroneous and is also discussed in this brief in the argument under the cross appeal.

In making these arguments PORR relies on the case of Curtin v. State Farm Mutual Automobile Insurance Company, 449 So.2d 293 (Fla. 5th DCA 1984). This latter case is also before this Honorable Court and serves as the sole basis for the District Court of Appeal's opinion in this case con-

cerning UIM coverage vel non. Curtin is included in the Appendix to this brief because it is the opinion of the District Court of Appeal in this case.

A. Public Policy Does Not Require That UIM Be Provided In The Policies of Insurance Insuring Motor Vehicles Not Involved In The Accident.

Section 627.727, Florida Statutes, provides in part:

(1) no automobile liability insurance covering liability arising out of the ownership, maintenance, or use of any motor vehicle shall be delivered... 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 because of...death, resulting therefrom. (Emphasis added)

The statute (which is clear) requires that UIM coverage be issued to protect the insured from owners or operators of uninsured motor vehicles! PORR's position on this statute and its application to the facts in this case are wrapped up into one sentence of her brief where at page 18, she states, "It is further undeniable that the 'or operator' of the motor vehicle was totally uninsured..." (Emphasis added) Upon this position hangs PORR's whole premise. This premise does not sustain PORR's position because (1) Section 627.727, supra, requires that the motor vehicle (not the "or operator") have UIM coverage, (2) that for there to be UIM coverage there must be an uninsured motor vehicle, and (3) the driver

of PORR's automobile was not totally uninsured.

STATE FARM's initial brief sets forth the premise that (a) an uninsured motor vehicle was not involved in the accident and that (b) Florida Statute 627.727 did not mandate that UIM coverage be available to PORR in this case. STATE FARM stands firm on those positions.

In Curtin, supra, the District Court of Appeal, Fifth District, relied on this Court's opinion in Mullis v. State Farm, supra, construing Florida's uninsured motor vehicle statute. PORR also relies on Mullis. Mullis, it is respectfully submitted, is not applicable to this case.

In Curtin the District Court's opinion (App.- 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. (Emphasis added)

That District Court in this case does not quote the exclusion referenced. That court could not -- there is no such exclusion in those policies, nor is there such an exclusion in Curtin since an uninsured motor vehicle was not involved in that case. Factually, Mullis is not in point since that case involved a situation 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)

Nor is the case of Salas v. Liberty Mutual Fire Insurance Company, 272 So.2d 1 (Fla. 1972) factually or legally in point on the issues involved in this case and the Curtin case, supra. In Salas a sister was riding in her brother's uninsured automobile. A household exclusion contained in the UIM portion of the insurance policy excluded coverage to the sister. This Court, citing Mullis, supra, voided that exclusion on the ground that it was contrary to the Florida uninsured motor vehicle statute. As in Mullis, the motor vehicle involved was not the motor vehicle insured for both liability and UIM coverage. The discussion herein covering Mullis is applicable to Salas.

Mullis is not applicable because:

1. The Financial Responsibility Law does not require that the liability coverage on the motor vehicle in which PORR's 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 PORR has

not been violated. Under the Financial Responsibility Law PORR is not entitled to collect under the liability provision of State Farm's policy and the equivalent coverage of UIM benefits to PORR 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 PORR's son was a passenger in an uninsured motor vehicle at the time of the accident. Mullis does not compel this result because of this 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 (PORR). 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 PORR. The liability coverages afforded on the automobiles insured by PORR and not involved in such accident would not afford liability coverage. This is the bargain and contract between PORR and STATE FARM. South Carolina Insurance Co. v. Heuer, 402 So.2d 480 (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)

To counteract this bargain with STATE FARM, PORR's brief at page 13 seemingly says that since the driver of her car carried no insurance, she should be allowed to collect UIM benefits. That statement does not change the statute or the bargain. It also ignores the simple fact that it was she, not the insurer, who gave the automobile to the driver.

PORR'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, at
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. In point of fact, the District Court by so holding in this case (through its acceptance of Curtin, supra) directly conflicts both factually

and legally with the facts and legal principles set forth by this Court in Reid.

Public policy does not require that insurance protect a person from injuries caused by a driver when that person gave the automobile to the driver!

B. State Farm's Policies of Insurance Should Not Be Construed to Provide UIM Coverage On Automobiles Not Involved In The Accident.

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.

As stated, supra, the language and holding in Curtin serves as PORR's position and the District Court's holding in this case. PORR's argument boils down to stating that the policies of insurance are ambiguous. They are not. Nor did STATE FARM grasp at straws in stating that you do not construe different contracts to reach a "negative definition" conclusion such as the District Court of Appeal, Fifth District, did in Curtin, supra.

The further fallacy of PORR's position and the District Court's opinion which is based on Curtin, supra, is that (a)

the automobile in which WARD was riding is an insured automobile and (b) STATE FARM never denied liability coverage. Liability coverage to PORR did not have to be denied. PORR, under the terms of a valid exclusion applicable to the liability portion of the policy of insurance did not have that coverage available to her. 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 Company 390 So.2d 325 (Fla. 1980).

PORR then states that if the policy of insurance is liberally construed to favor the insured, there is UIM coverage. This statement does not refer to any of the terms of the policies of insurance involved in this case. PORR in fact avoids STATE FARM'S brief on the matter of interpretation concerning the "negative definition" set forth in the Court's opinion in Curtin, supra. That comment of the Court is still not understandable.

ARGUMENT

POINT II

SECTION 627.727, FLORIDA STATUTES, DOES REQUIRE THAT UNINSURED MOTORIST COVERAGE BE PROVIDED TO A CLASS I INSURED UNDER THE PROVISIONS OF POLICIES OF INSURANCE PROVIDING SUCH COVERAGE TO AUTOMOBILES NOT INVOLVED IN THE ACCIDENT UNDER THE FACTS OF THE INSTANT CASE.

This point is in fact discussed under PORR's Point I. Unlike the case of Curtin, supra, PORR is correct that the accident in this case occurred after October 1, 1980. The change by the Legislature of Florida Statutes Section 627.4132 did not change the conclusions contained in the discussion under Point I of this brief. WARD was not riding in an uninsured motor vehicle. Accordingly, the question of whether he was a Class I or Class II insured should never have been raised in the first place.

ARGUMENT

CROSS APPEAL

POINT I

THE HONORABLE DISTRICT COURT OF APPEAL ERRED IN DETERMINING THAT RESPONDENT PORR COULD NOT RECOVER FOR THE DEATH OF HER MINOR CHILD UNDER FACT CIRCUMSTANCES WHEREIN THE DEATH OF HER MINOR CHILD, ROBERT WARD, WAS CLEARLY ATTRIBUTABLE TO THE NEGLIGENCE OF AN UNINSURED DRIVER WHO WAS NOT RELATED BY BLOOD OR MARRIAGE TO EITHER THE OWNER OF THE VEHICLE OR THE MINOR CHILD KILLED AND UNDER FACT CIRCUMSTANCES WHERE THERE IS NO LOGICAL RATIONALE SUPPORTIVE OF A HOUSEHOLD - EXCLUSION CLAUSE AS TO UNINSURED MOTORIST BENEFITS, AND THUS UNDER A TOTAL FACT SITUATION WHICH DOES NOT SUPPORT AN EXCEPTION TO THE GENERAL RULE THAT "AN INSURER MAY NOT LIMIT THE APPLICABILITY OF UNINSURED MOTORIST PROTECTION".

STATE FARM's argument under Point I of this brief is also applicable to this point or cross appeal.

PORR's argument under this point is difficult to follow. First of all, PORR's argument seems to be against an exclusion barring recovery by any insured under the liability provisions of the policy of insurance on the automobile involved in the accident. This point is not on appeal before this Court and the exclusion is not contrary to the Financial responsibility Law of the State of Florida, e.g., Reid v. State Farm Fire and Casualty Company, 352 So.2d 1172 (Fla. 1977) and cases cited therein. Nor has the legislature seen fit to change that law. Secondly, the case law pertaining to the question of family immunity is irrelevant to this case. That question has nothing to do with either

the legislative requirements concerning (a) the Financial Responsibility Law or (b) the uninsured motor vehicle law.

In this latter regard, PORR has failed to point out (and cannot) how Section 627.727, Florida Statutes, requires that UIM coverage be applicable to an insured automobile under the facts of this case. PORR cannot do so because that statute does not require such coverage. Ergo, to not provide that coverage is not against public policy.

Mullis has been cited for the proposition that UIM coverage is available if an uninsured motorist is involved in an accident. This Honorable Court did not so hold. In Mullis, page 233, this Court states:

Uninsured motorist coverage or family protection is intended by the statute to protect the described insureds thereunder to the extent of the limits described in Section 324.021(7) "who are legally entitled to recover damages, namely those from owners or operators of uninsured motor vehicles because of bodily injury" and is not to be "whittled away" by exclusions and exceptions. (Emphasis added)

As with the statute construed, this Court correctly states that the protection afforded concerns "owners or operators of uninsured motor vehicles."

In so holding, Mullis established two classes. The first class is composed of the insured, his spouse and family members residing in the insured's household. The second class was composed of persons occupying the insured vehicle. PORR seemingly states that because WARD is classified

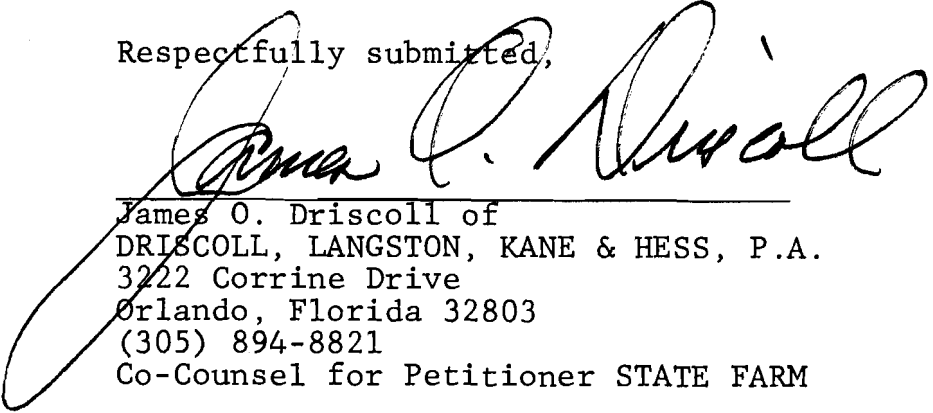
as a Class I insured, the automobile owned by her becomes an uninsured motor vehicle because she gave that automobile to a person who had no insurance of his own. PORR then makes the jump to the conclusion that this Court re-visit Reid, supra, and hold that it is against public policy (as expressed by the legislature) to not provide uninsured motor vehicle insurance to her in this case. This is a ludicrous conclusion, the basis for which cannot be found in Section 627.727 nor in any rational construction of that statute. And it is certainly not a risk bargained for by STATE FARM in its policy of insurance with PORR.

CONCLUSION

For the reasons contained in STATE FARM's initial 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 dismissal of this case finding that UIM coverage is not available to PORR under the two policies of UIM insurance on automobiles not involved in the accident.

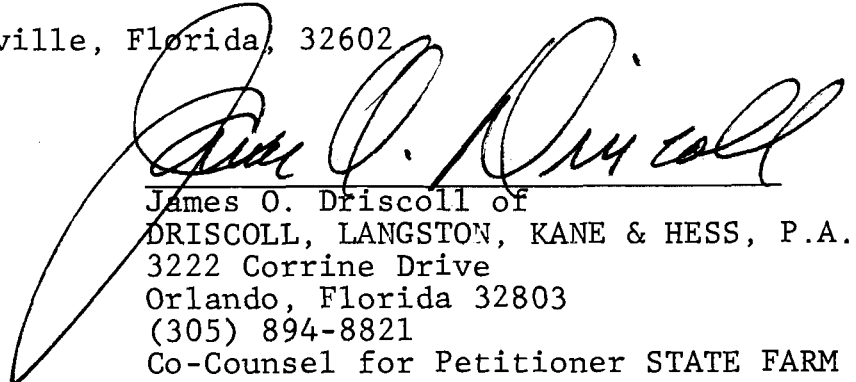
Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief has been furnished by mail this 5th day of March, 1985, to THOMAS W. DAVIS, ESQ., 200 N.E. First Street, Gainesville, Florida, 32601; and W. C. O'NEAL, ESQ., P. O. Drawer O., Gainesville, Florida, 32602


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