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IN THE SUPREME COURT OF FLORIDA

STATE FARM FIRE AND CASUALTY COMPANY,

Petitioner,

vs.

JOHN JOHNSON,

Respondent.
_____/

CASE NO.: 65,681

RESPONDENT'S ANSWER BRIEF

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STATEMENT OF THE FACTS

In this brief the parties will be referred to in the same manner as in Petitioner's Initial Brief. That is, Petitioner State Farm Fire and Casualty Company will be "State Farm", and Respondent John Johnson will be "Johnson".

1. On January 17, 1981, Johnson, while living in the home of his uncle, James Townsend, was injured by the negligence of Reginald Townsend, James' son, who also resided in the same home. The injury occurred while Reginald was driving his father's truck in which Johnson was riding as a passenger and which truck was insured by a State Farm policy issued to James Townsend. That policy had a "household exclusion" which excluded Johnson from its liability coverage due to the fact that he was a resident relative. At that time, James Townsend owned two other vehicles, which were insured by State Farm under two other separate policies, each of which had uninsured motorist coverage. Johnson was an insured under both. State Farm included in the uninsured motorist section of each of those policies six exclusions to that coverage which are not found in the statutory language of Setion 627.727 F.S., the uninsured motorist statute.

Johnson's claim for uninsured benefits as an insured under his uncle's policies was totally denied by State Farm, based on one or more of those exclusions.

STATEMENT OF THE CASE

1. Johnson filed suit against State Farm in the Circuit Court of Duval County, at first seeking uninsured motorist benefits from the State Farm policy insuring the truck wherein he was injured, based on the fact that he was prohibited from seeking liability coverage benefits due to the "household exclusion". However, he amended his suit and issue was joined on his claim for the uninsured motorist benefits of the two other policies on his uncle's two other vehicles wherein he was an insured by virtue of his being a relative of the policy owner.

2. The Circuit Court entered a summary final judgment in favor of State Farm, finding that Johnson was not entitled to any uninsured motorist benefits based on its determination that the truck in which Johnson was injured was not an uninsured motor vehicle. Johnson's motion for rehearing based on the law and fact that he would be entitled to "underinsured" motorist benefits from those two other policies even if the truck was an "insured motor vehicle" was denied without comment.

3. Johnson appealed to the District Court of Appeal, First District, which reversed the judgment of the Circuit Court, finding that the truck involved in the accident was an "uninsured vehicle" on the basis that "State Farm had 'denied coverage' and because a contrary interpretation would violate the intent of Florida's Uninsured Motorist Statute . . .", Johnson v. State Farm

Fire and Casualty Co., 451 So.2d 898 (Fla. 1st DCA 1984), the case sought to be reviewed. Because of that determination, the District Court of Appeal stated that it was unnecessary for it to address the issue of the applicability of the "underinsured" coverage of those policies. By separate order, the District Court awarded Johnson's attorneys a fee of $2,000.00. State Farm's petition for discretionary review was granted by this Honorable Court.

ARGUMENT

I

LACK OF JURISDICTION

1. Although this Honorable Court accepted jurisdiction of this case, perhaps as a companion to some other case or cases, Johnson respectfully submits that the requirement of Rule 9.030(a)(2)(iv) Fla.R.App.P. "expressly and directly conflict with a decision of another district court of appeal or of the Supreme Court on the same question of law" has not been met and certiorari should be discharged.

2. In its Petitioner's Jurisdictional Brief, State Farm failed to show conflict with any of the appellate decisions it relied upon, and this failure has been repeated in its Petitioner's Initial Brief filed herein. Rather, State Farm points out that the subject case conforms to Mullis v. State Farm Mutual Automobile Insurance Co., 252 So.2d 229 (Fla. 1971), and asks this Court to "recede from Mullis", that it also follows Brown v. Progressive Mutual Insurance Co., 249 So.2d 429 (Fla. 1971), and asks that Brown "be revisited", that it is in direct agreement with Curtin v. State Farm Mutual Automobile Ins. Co., 449 So.2d 293 (Fla. 5th DCA 1984), is in direct agreement with Boynton v. Allstate Ins. Co., 443 So.2d 427 (Fla. 5th DCA 1984), and is in conformity with Lee v. State Farm Automobile Ins. Co., 339 So.2d 670 (Fla. 2d DCA 1976). State Farm rests its entire case

on alleged conflict with Reid v. State Farm Fire and Casualty Co., 352 So.2d 1172 (Fla. 1977); which however is easily distinguished and by its own language clearly points out that the injured party therein was seeking uninsured motorist benefits from the policy on the same vehicle wherein he was injured, as opposed to the facts in this case wherein Johnson seeks those benefits only from other policies on other vehicles.

3. Despite all of the above, State Farm states, on page 17 of its Initial Brief, that "research has disclosed no Florida cases directly on point." State Farm has apparently overlooked American Fire and Casualty Company v. Boyd, 357 So.2d 768 (Fla. 1st DCA 1978), wherein it was held that when a policy of automobile insurance affords no coverage because of an exclusionary clause, the vehicle is not an insured vehicle, as cited in support of the holding in Boynton, supra.

4. As a result, there exists not a single Florida appellate decision in conflict with the holding of the case sought to be reviewed, to the effect that, when an exclusionary clause in the policy covering the injury causing vehicle prevents recovery from its liability coverage, recovery is proper and appropriate from uninsured motorist coverage under separate policies of insurance on separate vehicles wherein the claimant is an insured. This certiorari should be discharged as having been improperly invoked.

II

THE PURPOSE OF UNINSURED MOTORIST COVERAGE

1. Prior to discussing the case law which has evolved in interpreting uninsured motorist coverage, we suggest that a review of its inception in Florida and purpose would be most beneficial. As the destructive losses and damages resulting from motor vehicle collisions on Florida highways rose steadily, the Legislature attempted to find an answer to the economic losses being suffered by the victims of those collisions which could be offset by insurance rather than thrust upon the State or the general public. At first the Legislature felt that liability insurance was the answer and went through the stages of making liability insurance in certain minimum amounts a prerequisite to driving a vehicle on our highways, later increasing the minimum of such mandatory coverage from $5,000.00 per person to $10,000.00 per person, to $15,000.00 per person and, finally to single limits of $25,000.00, to take effect in 1962. At that point the insurance industry fought back, and, in the 1961 Legislature, reversed the escalation of the minimum liability coverage by replacing it with a new creature of statute, mandatory uninsured motorist coverage. Although this new coverage may have achieved its intended purpose, it has also spawned extensive and on-going litigation in its interpretation since its inception, which hardly seems to be diminishing today. We submit that one of the causes of this constant

litigation is the fact that the statute is quite broadly drafted (including the various amendments over the years), permitting the insurers to draft and insert in their policies various definitions, restrictions, exclusions and exceptions, all of which reduce their coverage payments until tested and removed by judicial decree. Illustrations are found in those very cases pertinent to this cause as well as many others, some of which are:

(a) Co-employee exclusion clause held inapplicable to uninsured motorist coverage-Allison v. Imperial Cas. and Indem. Co., 222 So.2d 254 (Fla. 4th DCA 1969).

(b) Contact requirement by hit-and-run vehicle held invalid-Brown v. Progressive, supra.

(c) Exclusion of family members occupying a non-insured motor vehicle struck down-Mullis v. State Farm, 252 So.2d 229 (Fla. 1971).

(d) "Family-household" exclusion held invalid-Salas v. Liberty Mutual Fire Ins. Co., 272 So.2d 1 (Fla. 1972).

(e) Exclusionary clause when insured is occupying non-covered vehicle found invalid-McDonald v. Southeastern Fidelity Ins. Co., 373 So.2d 94 (Fla. 2d DCA 1979).

(f) Exclusionary clause denying coverage to family member while operating own non-insured vehicle held invalid-Harbach v. New Hampshire Ins. Group, 413 So.2d 1217 (Fla. 5th DCA 1982).

2. This Honorable Court has repeatedly expressed its interpretation of the purpose and effect of uninsured motorist coverage, pertinent examples of which are found as follows:

(a) "The purpose of the uninsured motorist statute 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. The statute is designed for the protection of injured persons, not for the benefit of insurance companies or motorists who cause damage to others.
Brown v. Progressive, supra, at page 430.

(b) "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.
Mullis v. State Farm, supra, at page 233.

(c) "Thus, the intention of the Legislature, as mirrored by the decisions of this Court, is plain to provide for the broad protection of the citizens of this State against uninsured motorists. As a creature of statute rather than a matter for contemplation of the parties in creating insurance policies, the uninsured motorist protection is not susceptible to the attempts of the insurer to limit or negate that protection.
Salas v. Liberty Mutual, supra, at page 5.

3. Undaunted by these repeated pronouncements, however, the insurance companies continue to attempt to restrict, narrow and limit the Legislative intent of providing insurance payments to the innocent injured parties in order to allievate the parties themselves, the State or the general public from suffering the loss. To permit State Farm to avoid its duty after receiving direct premium payment for this protection defies not only the letter but also the very spirit of the Uninsured Motorist Statute as repeatedly announced by this Court's foregoing decisions. We respectfully suggest that this Court's important decisions in support of that Legislative intent do not need to be "receded from", "revisited" or restricted in any way in order to improve State Farm's profit picture.

III

STATE FARM'S POSITION

1. State Farm appears to take the following positions in this case:

(a) Since the injuring truck is listed on an insurance policy, Johnson under no possible conditions can be elligble for uninsured motorist benefits of any other policy, despite his exclusion from making a claim under the liability coverage.

(b) State Farm's exclusion for motor vehicles "furnished for the regular use of the named insured or his relatives" is valid to prevent Johnson from making an uninsured motorist claim under the policies.

(c) The award of an attorney's fee is invalid without expert testimony or other evidence.

2. State Farm spends considerable time in its Brief attempting to show that a refusal to pay benefits in reliance upon an exclusion is quite different from a "denial of coverage", probably because of the fact that in its own policy one of the definitions of an "uninsured motorist vehicle" is an insured vehicle whose insuring company denies coverage. Although the District Court of Appeal decision used the language "because State Farm had "denied coverage" as part of its reasoning below, we sincerely doubt that it meant that the insurer had to make a formal denial and we do not rely upon it as such even though State Farm did so in this case. That is, we interpret the District Court's language to mean that when the insuring company "won't pay" benefits from

its liability coverage because of exclusions or other technical reasons, not related to the usual questions of fault, negligence and liability, then the motor vehicle becomes an "uninsured motor vehicle" with respect to any other policy of insurance available to the injured party. Such is exactly the purpose and intent of uninsured motorist coverage. If the injured party can't collect from the insurance policy covering the injuring vehicle, then he should be able to collect from his unrelated policy coverage. To hold otherwise would do utmost violence to the concept of this mandatory coverage and award State Farm for finding a strained and ridiculous loophole.

3. As an analogy, to show exactly the same thought and basis, the Florida Courts have held that when an insured tortfeasor's policy of insurance is exhausted by other claimants, or even reduced below the statutory minimum by other claimants, uninsured motorist coverage comes into play. See Del Toro v. Allstate Ins. Co., 360 So.2d 432 (Fla. 3d DCA 1978); State Farm Mutual Automobile Ins. Co. v. Diem, 358 So.2d 39 (Fla. 3d 1978); and Lee v. State Farm Mutual Automobile Ins. Co., 339 So.2d 670 (Fla. DCA 2d 1976). The intended result of uninsured motorist coverage is then achieved.

4. This Honorable Court recognized and expressed its desire to achieve this result in Brown v. Progressive Mutual, supra, as follows:

> "Failure on the part of the injured party to make such proof results in nonrecovery, and the certainty that in some cases at least, injured persons then become the burden of society or of the state, despite their attempt to protect themselves by purchase of insurance intended to shield them against damages inflicted by a party from whom recovery cannot be made in person or through his insurance.
> 249 So.2d 429, at 430.

State Farm, to the contrary, through its ingenuity in drafting its adhesive insurance policy, first excludes all family passengers from liabiity coverage and now would prohibit recovery of those damages for losses which "then become the burden of society or of the state, despite their attempt to protect themselves by purchase of insurance. . .", by raising the spectre of playing "havoc with liability insurance rates structures." That same spectre was raised in the insurer's argument in Brown v. Progressive, supra, about fifteen years ago, with gloomy predictions of how the insurers in Florida would be bankrupted by spurious claims from every drunk who ran his vehicle off the road and wrapped it around the nearest tree. Fortunately, we have faith in truth-determining juries, even if the insurance industry doesn't, and we have no fear that the rate structures of those insurers will be altered in any way by the proper payment of uninsured motorist benefits to injured passengers in family owned vehicles when the tortfeasor is the host driver.

5. Since Johnson cannot claim against the liability coverage of his uncle's truck policy, it is clear that his claim, with all proper defenses thereto, should be made against those other policies of insurance which provide him with uninsured motorist coverage wherever and whenever he is injured in a motor vehicle incident.

IV

UNDERINSURED MOTORIST COVERAGE

1. Because of its ruling that the injury causing truck was an "uninsured vehicle", the District Court of Appeal, below, stated that there was no need to consider Johnson's claim for "underinsured" motorist benefits. We agree, but, out of precaution, feel that we should include that matter in this brief in view of the possibility that this Honorable Court might disagree with that conclusion.

2. That is, even if there is a finding that the offending truck is an "insured" vehicle the "underinsured" coverage of the three State Farm policies when "stacked" together also affords Johnson a maximum of $30,000 in benefits. As stated by this Honorable Court in Williams v. Hartford Accident and Indemnity Co., 382 So.2d 1216 (Fla. 1980), at page 1220:

> "Uninsured vehicle coverage is specified by section 627.727(1), Florida Statutes (1971) (quoted above), as available to the extent it is excess over but not duplicative of other recoveries, including 'recovery from any automobile liability or automobile medical expenses coverages.' Not only is the word 'any' all-encompassing, but the term 'automobile liability. . . coverages' must refer primarily to the liability insurance of other motorists. By making 'uninsured vehicle coverage' excess over any recovery from the tortfeasor's insurer, chapter 71-88 made such coverage also function as underinsured vehicle coverage.

In an earlier case, Travelers Indemnity Co. v. Powell, 206 So.2d 244 (Fla. 1st DCA 1968), the District Court of Appeal, First District clarified the role of uninsured motorist coverage in its Opinion, which is just as applicable today, at page 247, as follows:

> "The coupling of uninsured motorist coverage with family protection coverage in an automobile liability policy has made each member of a family an insured under each policy purchased by any family member. Complications arise when there are several members of a family, each owning an automobile, each purchasing a separate policy, and each being an insured under all policies. Since it has been decided in Sellers that an insurance company could not limit its liability under the statute by a 'set-off', an 'excess insurance', or 'other insurance' provision, such provisions being void as contrary to public policy, the question now before us is whether an insurance company can accomplish the same result with a nonliability clause although there has been no rejection of coverage by the insured. That is, can the company nullify its statutory liability by an exclusion clause specifying that it will not be liable if the insureds are riding in an automobile owned by one but insured by another company? We conclude that there is no difference in the exclusion clause here under consideration and 'set-off' provisions or 'other insurance' provisions. Both are more restrictive than the terms of the statute. If one is void, so is the other."

3. In 1981, at the time of Johnson's injury, the U.M. statute, Section 627.727 F.S. (1981) read, in pertinent part, as follows:

> "(3) For the purpose of this coverage, the term 'uninsured motor vehicle' shall, subject to the terms and conditions of such coverage, be deemed to include an insured motor vehicle when the liability insurer thereof:
>
> (a) * * *
>
> (b) Has provided limits of bodily injury liability for its insured which are less than the limits applicable to the injured person provided under uninsured motorist's coverage applicable to the injured person."

This was essentially the same statute which was considered in GEICO v. Farmer, 330 So.2d 236 (Fla. 1st DCA 1976), wherein the Court dismissed the insurer's interlocutory appeal from a Duval County Circuit Court's stacking of the insured's U.M. coverage for excess benefits over the tortfeasor's liability coverage. When the insurance companies found that "stacking" was the unanimous ruling of the Florida courts, they successfully sponsored the "anti-stacking" legislation of 1977 found in Sec. 627.4132, which reduced coverage to one vehicle in all but exceptional cases. Fortunately for Johnson, however, this statute was repealed, effective October 1, 1980, see South Carolina Ins. Co. v. Kokay, 398 So.2d 1355 (Fla. 1981), re-establishing the applicability of the holding in U.S.F.&G. Co. v. Curry, 395 So.2d 530 (Fla. 1981), to the present situation, to the effect that all injured persons, even only beneficiaries of a policy, may "stack" U.M. benefits from all applicable policies.

4. If there was any doubt left on the subject, it was specifically spelled out in Lumbermens Mutual Casualty Co. v. Martin, 399 So.2d 536 (Fla. 3d DCA 1981), wherein it was clearly stated that:

> "Under the applicable pre-Sec.627.4132 law, since Francisco, Jr. was a relative of the named insured residing in his household and therefore a 'class one' additional insured, the $15,000 UM limits for the four vehicles so-insured by the policy were correctly stacked for a total of $60,000 in available coverage."

5. In view of the above, it is quite clear that whenever Johnson entered one of his uncle's three State Farm insured vehicles he had the "stacked" U.M. coverage of all three. If he was injured by any tortfeasor who had $15,000 of liability coverage and suffered damages in excess of that amount, he had excess U.M. coverage in the total amount of all three policies less the amount of the tortfeasor's liability policy. In this case, since Johnson cannot collect the benefits of the tortfeasor's liability coverage because of the family exclusion and based on the holding of Reid v. State Farm, supra, that Johnson cannot claim the U.M. benefits of the Chevy truck policy, Johnson must be afforded the right to "stack" all three policies, deduct the $15,000.00 found in that Chevy truck policy, and seek the benefits of the U.M. coverage of the other two State Farm policies wherein he is an insured. To hold otherwise makes a sham of over ten years of Florida appellate decisions and the expressed intent of the Legislature in including underinsured benefits in the uninsured motorist law whose purpose is to provide for insurance benefits to those who are unable to secure full compensation from the wrongdoer and his liability insurer for motor vehicular injuries.

V

APPELLATE ATTORNEYS FEES

1. Finally, since it managed to have this case reviewed, State Farm objects to the award of attorneys fees by the District Court of Appeal, not because the award was in violation of Rule 9.400(b) Fla.R.App. or Section 627.428 F.S. which provide for the award of such a fee, but rather because the appellate court "did not have before it any evidence upon which it could base an award of attorney's fees to Johnson." We wonder why State Farm burdened an otherwise well-written brief with such impracticality. Of course the District Court of Appeal had Johnson's initial and reply brief before it, of course the District Court of Appeal listened to the oral argument presented to it, of course the District Court of Appeal was the only Court to determine the value of Johnson's attorneys services before it. What would State Farm have an appellate court do? Remand the case to the circuit court which knew nothing of the presentation of the appeal to take evidence of other attorneys as to what they might suggest was a reasonable fee? Or turn the appellate courts into trial courts and the taking of testimony? It has, in the past, been the successful claimant's attorney who grumbled at the usually token fees awarded by the appellate court. What a nice turn of events to see the insurer complaining. Is it the method or is it the reasonable amount of the fee that prompts State Farm to complain?

CONCLUSION

Johnson submits that the jurisdictional conflict required by Rule 9.030(a)(iv) Fla.R.App.P. does not exist and, as a result, this review should be dismissed. Subject to the above, Johnson submits that the Opinion of the District Court of Appeal, First District under review should be affirmed. However, if said Opinion is reversed, Johnsn submits that this cause should be remanded to the District Court of Appeal, First District for consideration of the issue of "underinsured motorist coverage", which it did not consider in view of its ruling that the offending vehicle was an "uninsured motor vehicle" with respect to the State Farm policies on other vehicles.

Very respectfully submitted,

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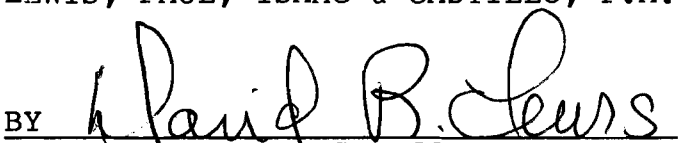
BY 
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been furnished to John M. McNatt, Jr., P.A.; James P. Wolf, Esquire; and Jerry J. Waxman, Esquire, of Mathews, Osborne, McNatt, Gobelman & Cobb, 1500 American Heritage Life Building, Jacksonville, Florida 32202, by mail, this 23rd day of January, 1985.

David R. Lewis

ATTORNEY