IN THE SUPREME COURT OF FLORIDA

CASE NO. 65,681

DCA CASE NO. AU-378

STATE FARM FIRE AND
CASUALTY COMPANY,

Petitioner,

v.

JOHN JOHNSON,

Respondent.
_____/

PETITIONER'S JURISDICTIONAL BRIEF

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PRELIMINARY STATEMENT

In this Brief, the parties will generally be identified by name, State Farm Fire and Casualty Company being Petitioner and John Johnson being Respondent. References to the Appendix, including the decisions of the First District Court of Appeal, are designated by the symbol "(A-)."

STATEMENT OF THE CASE AND FACTS

This cause initially arose when Respondent was injured while riding as a passenger in a Chevrolet pick-up truck. There was no other vehicle involved. The pick-up truck was owned by Respondent's uncle, James Townsend, and driven by Reginald Townsend, the son of James Townsend and Respondent's cousin. (A-1). Respondent claimed that his injuries resulted from the negligence of Reginald Townsend. (A-1). At the time of the accident, both Reginald Townsend and Respondent resided in the home of James Townsend. (A-1).

Petitioner had issued three policies of automobile liability insurance to James Townsend, one policy insuring the Chevrolet truck in which Respondent was riding at the time of this accident, and the other two policies insuring other vehicles owned by James Townsend. (A-4). Each policy contained identical liability and uninsured motorist provisions, and each policy was in effect on the date of this incident. (A-4). In addition, each policy provided the following with regard to uninsured motorist coverage:

"An uninsured motor vehicle does not include a land motor vehicle:

* * *

2. furnished for the regular use of you, your spouse or any relative."

(A-8).

The policies further provided that:

"THERE IS NO COVERAGE:

* * *

2. FOR BODILY INJURY TO AN INSURED:

a. WHILE OCCUPYING, OR

b. THROUGH BEING STRUCK BY A MOTOR VEHICLE OWNED BY YOU, YOUR SPOUSE OR ANY RELATIVE IF IT IS NOT INSURED FOR THIS COVERAGE UNDER THIS POLICY."

(A-8).

Initially, Respondent sued his cousin Reginald, his uncle James, and Petitioner for damages under the liability portion of the State Farm policy insuring the Chevrolet truck in which he was riding at the time of the accident. (A-2). Final Judgment was entered for Petitioner State Farm based upon a policy provision which excluded liability coverage for bodily injury to "any insured or any member of an insured's family residing in the insured's household" (the "member of the household" exclusion). (A-2).

Respondent then instituted this action, first seeking to recover uninsured motorist benefits under the policy insuring the Chevrolet truck. (A-2). After Petitioner moved

to dismiss on the basis of Reid v. State Farm Fire and Casualty Co., 352 So.2d 1172 (Fla. 1977) (A-17). Respondent amended his Complaint to attempt instead to recover uninsured motorist benefits under the two other policies maintained by James Townsend. (A-2).

In its Final Judgment, the trial court found that the Chevrolet truck in which Respondent was a passenger at the time of this accident was not an uninsured vehicle under the two policies and, as a result, that Respondent was not entitled to recover uninsured motorist benefits under the two policies. (A-3).

In its opinion filed on May 31, 1984, the First District Court of Appeal reversed the trial court's Final Judgment, based upon the authority of Curtin v. State Farm Mutual Automobile Ins. Co., 449 So.2d 293 (Fla. 5th DCA 1984). (A-20). The First District Court held that the Chevrolet truck in which Respondent was riding was an uninsured vehicle and that Respondent was entitled to present a claim under the uninsured motorist coverage of two insurance policies issued by Respondent on the two other vehicles owned by James Townsend. (A-3).

Respondent timely moved for a rehearing of this decision (A-10), which rehearing was denied in an order entered on July 6, 1984. (A-16). On August 1, 1984, Petitioner timely filed its Notice Invoking Discretionary Jurisdiction.

POINTS INVOLVED ON JURISDICTION

I. THE DECISION RENDERED BY THE FIRST DISTRICT COURT OF APPEAL IN THE INSTANT CASE IS IN DIRECT AND EXPRESS CONFLICT WITH THE DECISION OF THIS HONORABLE COURT IN REID v. STATE FARM FIRE AN CASUALTY CO., 352 So.2d 1172 (Fla. 1977).

II. THE DECISION RENDERED BY THE FIRST DISTRICT COURT OF APPEAL IN THE INSTANT CASE IS IN DIRECT AND EXPRESS CONFLICT WITH THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL IN CURTIN V. STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., 449 So.2d 293 (Fla. 5th DCA 1984), IN THAT THE FACTS IN CURTIN VARY MATERIALLY FROM THOSE IN THE INSTANT CASE.

ARGUMENT

I. THE DECISION RENDERED BY THE FIRST DISTRICT COURT OF APPEAL IN THE INSTANT CASE IS IN DIRECT AND EXPRESS CONFLICT WITH THE DECISION OF THIS HONORABLE COURT IN REID v. STATE FARM FIRE AN CASUALTY CO., 352 So.2d 1172 (Fla. 1977).

In the instant case, Respondent was injured while riding as a passenger in a Chevrolet truck driven by his cousin and owned by his uncle. Petitioner had issued three automobile insurance policies to the uncle, one insuring the truck and the other two insuring two other vehicles owned by the uncle. Both Respondent and his cousin, the alleged tortfeasor, were members of the insured's household. Respondent sued his cousin, his uncle, and State Farm, but was unable to recover insurance benefits under the liability policy insuring the Chevrolet truck because he was a member of the insured's household. Respondent then sought to recover uninsured motorist benefits

under the two other automobile insurance policies issued by Petitioner to Respondent's uncle.

Under similar facts in precisely this situation, this Honorable Court held in Reid v. State Farm Fire and Casualty Co., 352 So.2d 1172 (Fla. 1977) (A-17), that the vehicle in question was not an uninsured vehicle and did not become uninsured because liability coverage is not available to the plaintiff because of certain policy exclusions. Here, however, the First District has held directly to the contrary, holding that the Chevrolet truck became an uninsured vehicle when the liability coverage on that same vehicle was not available to Respondent because of a valid exclusion in the liability policy, i.e., the member of the household exclusion. It is this direct, express, and irreconcilable conflict that Petitioner requests this Court to resolve.

In Reid, as in the instant case, the plaintiff was injured while riding as a passenger in an automobile driven by her sister (here, cousin), owned by her father (here, uncle), and insured by Petitioner. The plaintiff first brought suit against her sister and State Farm. The trial court found that, as the result of the member of the household exclusion in the State Farm policy, plaintiff was excluded from recovering under the State Farm policy. Plaintiff then sought to recover uninsured motorist benefits, contending that, because she could not recover liability benefits under the liability policy, then she could recover under the uninsured motorist provisions of

the policy. This Court dispensed with plaintiff's argument in the following passage:

> "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."

352 So.2d at 1172 (citations omitted).[1]

This principle of law has direct application to the instant case. Here, the Chevrolet truck in which Respondent was riding was an insured vehicle, the owner having obtained a policy of insurance from Petitioner State Farm. However, because Respondent was a member of the insured's household, the liability coverage was not available to him. This fact did not convert the Chevrolet truck into an uninsured vehicle; rather, the truck was insured. Therefore, Respondent could not recover under the uninsured motorist coverages of the two State Farm policies.[2]

This identical result was reached by the trial court in the instant case. However, the First District, in

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[1]This is precisely the same language relied upon by the Honorable F.J. Upchurch in his dissent in Boynton v. Allstate Insurance Co., 443 So.2d 427 (Fla. 5th DCA 1984), as to which this Court has accepted discretionary jurisdiction in Allstate Insurance Co. v. Boynton, Supreme Court Case No. 64,848 (oral argument set for October 5, 1984). Judge Upchurch also dissented in Curtin v. State Farm Mutual Automobile Insurance Co., 449 So.2d 293 (Fla. 5th DCA 1984), upon the same grounds.

[2]Petitioner is not unmindful of the fact that, in Reid, plaintiff sought to recover under the uninsured motorist coverage of the same policy concerning which liability benefits were excluded to the plaintiff. However, there exists no valid reason for distinguishing this situation from that in the instant case in that the policy provisions in all three policies are identical.

contravention of the principle in Reid, reversed the trial court's decision.

There is a clear, direct and express conflict between the decision of the First District in the instant case and the decision of this Honorable Court in Reid v. State Farm Fire and Casualty Co., supra, and this Court should resolve that conflict of decisions.

II. THE DECISION RENDERED BY THE FIRST DISTRICT COURT OF APPEAL IN THE INSTANT CASE IS IN DIRECT AND EXPRESS CONFLICT WITH THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL IN CURTIN V. STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., 449 So.2d 293 (Fla. 5th DCA 1984), IN THAT THE FACTS IN CURTIN VARY MATERIALLY FROM THOSE IN THE INSTANT CASE.

In concluding that the Chevrolet truck in question was an uninsured vehicle and that Respondent could recover under the uninsured motorist coverage of the State Farm policies, the First District expressly relied upon the recent decision of the Fifth District Court of Appeal in Curtin v. State Farm Mutual Automobile Insurance Co., 449 So.2d 293 (Fla. 5th DCA 1984). (A-20). Because the facts in Curtin vary materially from those in the instant case, the decision of the First District is in direct and express conflict with that of the Fifth District in Curtin.[3]

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[3]This Court has discretionary jurisdiction to review the decision of a district court of appeal based on conflict when a district court of appeal misapplies the law by relying on a decision which involves a situation materially at variance with the one under review. Gibson v. Avis Rent-A-Car System, Inc., 386 So.2d 520 (Fla. 1980); Frankel v. City of Miami Beach, 340 So.2d 463 (Fla. 1976).

In Curtin, the plaintiff was injured while riding as a passenger in a car owned by his father and insured by State Farm; the plaintiff resided with his father at the time of the accident. Unlike the facts in the instant case, the car was driven by a friend of the family (not a member of the household), whose alleged negligence caused the accident in question.

The plaintiff's father also owned two other vehicles, and had obtained separate insurance policies from State Farm as to these vehicles; each policy contained uninsured motorist coverage. Plaintiff sought to recover uninsured motorist benefits under these two other policies. The Fifth District reversed a summary final judgment in favor of State Farm and held that plaintiff could recover uninsured motorist benefits under the two other policies.

The vitally important distinction (one which the First District apparently did not comprehend) between the facts in Curtin and those in the instant case relates to the status of the alleged tortfeasor. In Curtin, the alleged tortfeasor was specifically not a member of the same household as that of the plaintiff and the insured. In the instant case, however, Respondent, the alleged tortfeasor, and the insured are all members of the same household.

The Fifth District Court in Curtin, in declining to apply the holding in Reid to the facts in Curtin, specially recognized this distinction:

> "The court [in Reid] noted that public policy would allow family member exclusions from coverage to protect insurance companies from 'over friendly or collusive lawsuits between family members.' [citation omitted]. But the problem with applying Reid to this case is that the exclusion sought by State Farm would encompass all kinds of motorists other than family members: felons and thieves; friends and acquaintances. The actual negligent driver here was not a family member."

449 So.2d at 296 (Court's emphasis).

In the instant case, however, the danger of an "over friendly or collusive lawsuit between family members" is readily apparent. Respondent (plaintiff below), the alleged tortfeasor, and the owner and named insured are all related and all reside in the same household. The reasons for applying the public policy referred to in Reid, while absent in Curtin, are wholly present in the instant case.

In the instant case, the First District misapplied the law by relying upon the decision of the Fifth District Court in Curtin[4] which involved a factual situation materially at variance with the one presented herein. Thus, there exists a clear, express and direct conflict between the decision of the First District in the instant case and that of the Fifth District in Curtin, and this Court should resolve that conflict.

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[4]Petitioner has been informed that the insurer in Curtin has sought discretionary review before this Honorable Court. State Farm Mutual Automobile Insurance Co. v. Curtin, Supreme Court Case No. 65,387.

CONCLUSION

The decision of the First District in the instant case is in direct and express conflict with Reid v. State Farm Fire and Casualty Co., supra, and Curtin v. State Farm Mutual Automobile Insurance Co., supra. Accordingly, jurisdiction vests in this Court pursuant to Article V, Section 3(b)(3), Florida Constitution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail to David R. Lewis, Esquire, 2648 Atlantic Boulevard, Jacksonville, Florida 32207; and Lane Burnett, Esquire, 331 East Union Street, Jacksonville, Florida 32202 this 6th day of August, 1984.

James P. Wolf
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