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IN THE SUPREME COURT OF FLORIDA

STATE FARM FIRE AND CASUALTY COMPANY,

Petitioner,

vs. CASE NO. 65,681

JOHN JOHNSON,

Respondent.

FILED
SID J. WHITE
FEB 14 1985
CLERK, SUPREME COURT
By ______
Chief Deputy Clerk

Discretionary Review of the
District Court of Appeal
First District

PETITIONER'S REPLY BRIEF

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ISSUES

I. WHETHER THE FIRST DISTRICT ERRED IN ITS FINDING THAT THE RAISING OF AN APPLICABLE EXCLUSION TO AN ADMITTEDLY INSURED VEHICLE IS A "DENIAL OF COVERAGE."

II. WHETHER THE FIRST DISTRICT ERRED BY NOT FINDING THAT THE SUBJECT MOTOR VEHICLE WAS NOT AN UNINSURED MOTOR VEHICLE BECAUSE IT WAS FURNISHED FOR THE REGULAR USE OF THE NAMED INSURED.

III. WHETHER THE SUBJECT MOTOR VEHICLE WAS NOT AN UNINSURED MOTOR VEHICLE FROM WHOSE OWNER JOHNSON WAS LEGALLY ENTITLED TO RECOVER DAMAGES.

IV. WHETHER THE OPINION OF THE FIRST DISTRICT EFFECTIVELY EMASCULATES THE VALIDITY OF THE "HOUSEHOLD EXCLUSION" IN FLORIDA.

V. OTHER POINTS

A. WHETHER AMERICAN FIRE & CASUALTY CO. V. BOYD LENDS SUPPORT TO JOHNSON'S POSITION.

B. WHETHER JOHNSON IS ENTITLED TO RECOVER UNDERINSURED MOTOR VEHICLE BENEFITS UNDER ALL THREE STATE FARM POLICIES.

C. POSTSCRIPT: WHETHER THIS COURT SHOULD RE-EXAMINE LEE.

PRELIMINARY STATEMENT

Johnson fails to provide in his Answer Brief the required summary of argument pursuant to Rule 9.210(4), Florida Rules of Appellate Procedure. Johnson includes a statement of the facts and statement of the case in violation of Rule 9.210(c), Florida Rules of Appellate Procedure. Johnson reargues this Court's decision to accept jurisdiction in violation of Rule 9.330(d), Florida Rules of Appellate Procedure. And Johnson's Answer Brief is replete with invective against insurance companies rather than an analysis and argument of legal issues. Notwithstanding, State Farm will attempt to reply to the argument presented in that Answer Brief.

ARGUMENT

I. THE RAISING OF AN EXCLUSION

Johnson apparently misperceives what both the trial court and the First District held in their respective judgment and opinion. Accordingly, Johnson's "argument" fails to adequately respond to the key issue of this appeal.

The arguments presented to the trial court were based upon a stipulation by both parties that the Chevrolet truck was an insured vehicle pursuant to a policy of motor vehicle liability insurance. [R:75]. Within that context, the issue for determination by the trial court was whether or not the insurer had "denied coverage" and therefore triggered the provision in the uninsured motor vehicle section of the policy that defined an uninsured motor vehicle as an insured vehicle upon which an insuring company denies coverage. The trial court by its Final Judgment held

that the insuring company had not denied coverage on the admittedly insured vehicle and thus the uninsured motor vehicle definition was not applicable to the insured motor vehicle. Therefore, the trial court found that "the Chevrolet truck in which plaintiff was riding at the time of this incident is not an uninsured vehicle." [R:77].

Likewise, the First District was confronted with this same issue of whether or not the raising of an applicable and valid exclusion in a liability policy was the required "denial of coverage" necessary to transform an insured vehicle into an uninsured motor vehicle under the terms of the policy. The First District faced this question head-on but failed to enlighten the parties or the trial court with any reasoning. Rather, the First District simply came to its conclusion in abrupt fashion: "[T]he vehicle was an 'uninsured vehicle' <u>because</u> State Farm had 'denied coverage.'" <u>Johnson v. State Farm Fire & Casualty Co.</u>, 451 So.2d 898, 900 (Fla. 1st DCA 1984) (emphasis supplied).

In his Answer Brief to this Court, Johnson has not cited any authority to contradict the reasoning of State Farm as argued in its Initial Brief that the raising of a valid exclusion from coverage does not constitute a "denial of coverage" triggering the alternate definition of uninsured motor vehicle. Johnson's Brief is wholly silent in answer to State Farm's argument that an exclusion and a denial are two separate and distinct concepts as well as actions. State Farm argued that as a limitation of coverage, an exclusion operates automatically to limit coverage and emanates from the contract itself; a denial of coverage, on the other hand, takes

an affirmative step on the part of the insurer to deny coverage where it otherwise existed because of some omission or commission on the part of the insured. State Farm presented this Court with numerous examples taken from the very policies at issue in this case to show this Court the distinction between the two concepts. In response, however, Johnson, being unable to contradict this argument, ignored the argument completely. By ignoring the very basis for the trial court's final judgment, by ignoring the explicit holding of the district court below, and by not proferring any relevant argument to the issue raised by State Farm that was litigated below,[1] Johnson has apparently conceded this issue at

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[1]Only in the single paragraph numbered "2" on pages 10-11 of his Answer Brief does Johnson respond at all to the holding of the First District finding the operation of an exclusion to be a denial of coverage. Johnson disagreed with the stark finding of the district court and its explicit holding. Johnson stated that he "sincerely doubted" that where the First District wrote "denied coverage" it really meant "denied coverage." Rather, Johnson wrote, he "interpreted" the district court's express language to mean "won't pay" instead. One wonders if Johnson is serious in his argument on this point, especially when he implies that "exclusions or other technical reasons" are unimportant in determining if an insurer must pay benefits for coverages that an insured is not legally entitled to receive. It is precisely because of "technical reasons" that any insured receives coverage or is excluded from any policy; such is inherent in the nature of every contract.

For Johnson to argue, furthermore, that this case can be viewed in terms of a single insured versus the ingenuity of insurance conglomerates in drafting "adhesive insurance policies" is to pander to the prejudices of an unseen-jury in the worst way. State Farm reargues what it argued to this Court previously: it only wishes to be treated as fairly as any individual. State Farm does not want any more rights than any individual. By the same logic, it agrees that Johnson should have all of the uninsured motor vehicle coverage paid for -- but no more. There was no broad uninsured motor vehicle coverage paid for under any of the policies at issue.

this level. Accordingly, State Farm requests that this Court agree with its reasoning, as the trial court did, that the raising of an applicable and valid exclusion to an admittedly insured vehicle is not a "denial of coverage" that would trigger an uninsured motor vehicle definition, and therefore quash the opinion of the First District.

II. FURNISHED FOR THE REGULAR USE

Johnson has failed to respond at all in his Answer Brief to the argument presented by State Farm on this issue, and thus has apparently conceded the correctness of that argument.

State Farm repeats that Barlow v. Auto-Owners Insurance Co., 358 So.2d 1128 (Fla. 4th DCA 1978), holds that a "regular use" exclusion in uninsured motor vehicle coverage is valid and not against public policy. Thus, if this Court does indeed believe that State Farm "denied coverage" when it raised an applicable and valid policy exclusion, then it should nevertheless hold the subject motor vehicle not to be an uninsured motor vehicle under any of the policies because it was furnished for the regular use of the insured or his relative.

III. UNINSURED MOTOR VEHICLE

Johnson has failed to respond at all in his Answer Brief to the argument presented by State Farm on this issue, and thus has apparently conceded the correctness of that argument.

State Farm repeats that the bedrock of any court decision, by this Court or any court, concerning uninsured motor vehicle coverage is section 627.727, Florida Statutes (1983). State Farm

urges the Court to carefully examine the precise language of that statute and discern that the statute explicitly pertains to uninsured motor vehicles and not uninsured motorists. That crucial distinction goes far in explaining the inconsistencies between cases like Taylor v. Safeco Insurance Co., 298 So.2d 202 (Fla. 1st DCA 1974) or Centennial Insurance Co. v. Wallace, 330 So.2d 815 (Fla. 3rd DCA 1976) and Lee v. State Farm Mutual Automobile Insurance Co., 339 So.2d 670 (Fla. 2d DCA 1976) or Boynton v. Allstate Insurance Co., 443 So.2d 427 (Fla. 5th DCA 1984). The former cases rely upon and adjudicate based upon the explicit legislative intent as evidenced in express legislative language; the latter cases not only do not rely upon or follow the clear wording of the statute, but judicially rewrite the statute in their emphasis upon uninsured motorists (rather than uninsured motor vehicles) in order to judicially expand the risk undertaken by uninsured motor vehicle carriers beyond that ever contemplated by the legislature. If in fact such is the legislative intent, that should be voiced by the legislature, not the courts.

IV. VALIDITY OF "HOUSEHOLD EXCLUSION"

Johnson has failed to respond at all in his Answer Brief to the argument presented by State Farm on this issue, and thus has apparently conceded the correctness of that argument.

State Farm repeats that were it to stand as law, the opinion of the First District would sound the death-knell of the heretofore-valid "household exclusion" in Florida. There is no logical distinction between the "member of the household" exclusion

in a liability policy (upheld by this Court in Reid v. State Farm Fire & Casualty Co., 352 So.2d 1172 (Fla. 1977)) and the identical exclusion in an uninsured motor vehicle policy. In both situations, the reason for the exclusion -- the protection of the insurer from collusive lawsuits between family members -- remains extant. And, importantly, the instant case is distinctly on all fours with that reasoning: plaintiff Johnson, the driver Reginald Townsend [Johnson's cousin] and the owner James Townsend [Johnson's uncle] are all relatives admittedly residing in the same household, and the instant case is certainly a "friendly" lawsuit. Since this Court has upheld the "household exclusion" in liability policies because of the realistic fear of over-friendly or collusive suits [Reid], and since that justification does not cease to exist merely because claim is made under the uninsured motor vehicle portion of a policy, this Court should hold the household exclusion applicable in uninsured motor vehicle cases.

V. OTHER POINTS

A. American Fire & Casualty Co. v. Boyd

Johnson states on page 5 of his Answer Brief that State Farm apparently overlooked American Fire & Casualty Co. v. Boyd, 357 So.2d 768 (Fla. 1st DCA 1978), in the argument section of its brief. State Farm was well aware of that case and did not overlook it. Boyd makes the same error that this Court did in Brown v. Progressive Mutual Insurance Co., 249 So.2d 429 (Fla. 1971). Boyd fails to follow the wording (and thereby the intent) of section 627.727, Florida Statutes (1983) and thus makes the mistake, already

discussed, of confusing an uninsured motor vehicle with an uninsured motorist. Boyd began by correctly stating that the issue was whether the trial court erred in determining that the vehicle operated by the tortfeasor "was an uninsured motor vehicle." 357 So.2d at 769. It then reiterated that correct position of the law: "The sole issue is whether the Hansen vehicle was 'an uninsured vehicle' within the meaning of that term as used in F.S. § 627.727." Id. at 769. Boyd then engaged in faulty reasoning in reaching its conclusion. Boyd went off on the mistaken tangent that since the tortfeasor had no insurance available to him (and thus was an uninsured motorist), that the motor vehicle -- with a stated policy of insurance applicable to it -- was thereby uninsured. This is the same confusion of terms and misreading of plain statutory language discussed earlier in State Farm's Initial Brief to this Court. Suffice it to say, Boyd lends no credence to any argument put forth by Johnson in his brief.

B. No Recovery Under Three Policies

The only argument of substance in Johnson's Answer Brief that merits response in this Reply Brief is Johnson's raising of the issue of underinsured motor vehicle coverage under three policies, apparently as a fall-back position should this Court agree with State Farm and the trial court that the raising of a valid exclusion does not constitute a denial of coverage triggering an uninsured motor vehicle definition. "Out of precaution," [Answer Brief of Johnson at 14], Johnson decided to include this issue in his Answer Brief. An examination of the posture of this case, however,

discloses that Johnson has not properly raised this issue since he filed no cross appeal.

Johnson seeks to recover, in his Answer Brief, for underinsured motor vehicle benefits pursuant to three policies of insurance. First, it should be re-emphasized, since Johnson has glossed over this crucial fact in his Answer Brief, that Johnson specifically is suing upon only the two automobile liability insurance policies other than the policy insuring the Chevrolet truck. [R:76]. In his Amended Complaint, for example, Johnson sought to recover only uninsured motor vehicle benefits under the other two policies. [R:6-7]. In his Pretrial Statement, a copy of which is attached hereto as Appendix A,[2] Johnson specifically stated, and correctly so, that his action was a claim

> for uninsured motorist benefits . . . pursuant to two policies of insurance . . . . The issues are (1) whether plaintiff is entitled to uninsured motorist benefits under said policies.

[Plaintiff's Pretrial Statement] (emphasis supplied). The trial court, likewise, recognized this fact in its Final Judgment, even to the point of emphasizing that

> Plaintiff amended his Complaint and sought to recover uninsured motorist benefits only under the other two automobile liability policies issued by Defendant to Plaintiff's uncle.

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[2]Pursuant to Rule 9.200(f)(1), Florida Rules of Appellate Procedure, the parties by stipulation may correct an omission in the record. The undersigned contacted Johnson's attorney on February 5, 1985 and received his agreement to supplement the record by the addition of "Plaintiff's Pretrial Statement."

[R:76]. Johnson thus failed to raise any issue relating to underinsured motor vehicle benefits under three policies throughout this litigation before the trial court.

Second, only on August 8, 1983, after nearly a year of litigation and after a Final Judgment was entered in this action, did Johnson raise for the first time -- in a Motion for Rehearing from the Final Judgment -- the question of whether or not he might be entitled to recover underinsured motor vehicle benefits. [R:78-79].[3] Even then, he specifically limited the issue to underinsured motor vehicle benefits under the two "other" policies, (insuring the DeVille and the Buick). Never did Johnson raise the issue of underinsured motor vehicle coverage under three policies to the trial court, either before or after final judgment. In his Motion for Rehearing, Johnson argued that he is allowed to stack the uninsured motor vehicle benefits of the two "other" policies [$20,000 on the DeVille and $10,000 on the Buick] for a total of $30,000. Then, according to Johnson's own argument:

> [G]iving full credit to the "insured" Chevy, Johnson still has $30,000 less the Chevy's $15,000 liability coverage, or $15,000 of "underinsured" motorist coverage available.

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[3]At no time prior to the entry of the Final Judgment did Johnson give the trial court an opportunity to review a claim for underinsured motor vehicle benefits, either under two policies or three. Johnson cannot be and is not permitted to raise a claim on a motion for rehearing that was not presented to the trial court for review. Charter Department Corp. v. Eversole, 342 So.2d 143 (Fla. 1st DCA 1977); Doane v. Doane, 330 So.2d 753 (Fla. 2d DCA 1976).

[R:78]. Johnson cannot, now, on an appeal where he has not cross-appealled on any issue, raise this issue in an Answer Brief. For this Court to allow the raising of an issue in an Answer Brief without any notice of cross-appeal heretofore being timely filed, and for the stated reason of being "out of precaution" -- makes a mockery of a fair system of appellate rules and should not be countenanced.

Notwithstanding the above, the posture of the "underinsured" argument (as relating to the two "other" vehicles) is in the form of a denial by the trial court of a motion for rehearing. [R:80]. If indeed Johnson is allowed an unauthorized appeal of the denial of his motion for rehearing, case law concerning the standard of review of that denial must be consulted. In this regard, the law in Florida is clear that a denial of a motion for rehearing will not be disturbed by a reviewing court unless the complaining party clearly demonstrates an abuse of discretion on the part of the lower court. Jones v. Airport Rent-A-Car, Inc., 342 So.2d 104 (Fla. 3d DCA 1977); Batteiger v. Batteiger, 109 So.2d 602 (Fla. 3d DCA 1959). Thus, Johnson must clearly demonstrate that the trial court abused its discretion in denying his motion for rehearing. Nowhere in Johnson's Answer Brief to this Court is there any argument, explicit or implicit, that the trial court abused its discretion in denying Johnson's motion for rehearing. String-citing appellate decisions and quoting others at length on the question of stacking in general does not respond to the precise issue of an abuse of discretion by a trial court in

denying a motion for rehearing. Thus, Johnson should not be allowed to enter by the backdoor when he cannot enter by the front. Johnson failed to sue for both uninsured and underinsured benefits on all three policies. Only after entry of a final judgment against him did he first seek to inject recovery under underinsured coverage pursuant to two policies. Johnson should not now be allowed, at this stage of the proceedings, to recover underinsured benefits under three policies. This Court should not be a party to such action.

Finally, assuming for the purposes of argument that Johnson did present a claim for underinsured motor vehicle benefits, and further assuming that Johnson did present a claim under all three policies, and lastly assuming for the purposes of argument that the lower court abused its discretion in denying Johnson's motion for rehearing, it is clear that Johnson would only be entitled to a maximum of $15,000 in underinsured motor vehicle benefits.

If underinsured motor vehicle coverage is found to exist, and if Johnson is entitled to stack the uninsured motor vehicle coverages to create an underinsured situation, it is clear that Johnson could stack only the coverages on the two vehicles other than the Chevrolet truck, to arrive at a total of $30,000 of coverage. That coverage must then be reduced by the $15,000 liability coverage on the Chevrolet truck, to result in a net underinsured motor vehicle coverage of $15,000. There can be no question, however, that Johnson cannot stack the UM coverage on the Chevrolet truck in which he was riding. First, as stated above,

Johnson abandoned any claim he had for uninsured motor vehicle coverage benefits under the Chevrolet truck policy when he amended his complaint and sought recovery only under the other two policies. [R-7]. Second, Reid v. State Farm Mutual Automobile Ins. Co., supra, conclusively shows that Johnson cannot recover uninsured motor vehicle benefits under the Chevrolet truck policy.[4] Finally, in Johnson's own Motion for Rehearing, he contended that he could stack only the uninsured motor vehicle benefits on the two "other" vehicles. Johnson did not seek to recover even underinsured benefits under the Chevrolet truck policy. [R-78]. Therefore, assuming that Johnson has a valid claim for underinsured motorist benefits, he is entitled to a maximum of $15,000.

C. Postscript: Re-Examine Lee.

Finally, by way of concluding comment, State Farm requests that this Court re-examine the holding of Lee v. State Farm Mutual Automobile Insurance Co., 339 So.2d 670 (Fla. 2d DCA 1976), and cases citing to it, to see that Lee has been wrongly cited; it does not, in fact, stand for what it is claimed to stand for. This is important because of cases like the instant appeal which ultimately can be traced to an incorrect reading of Lee.

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[4]See Curtin v. State Farm Mutual Automobile Insurance Co., 449 So.2d 293 (Fla. 5th DCA 1982), where the court held Curtin could not recover uninsured motor vehicle benefits under the policy insuring the vehicle involved in the accident. See also Porr v. State Farm Mutual Automobile Insurance Company, 452 So.2d 93 (Fla. 1st DCA 1984), where the court likewise held the passenger could not recover under the policy insuring the vehicle involved in the accident.

Lee involved two automobile liability policies. At issue, though, was the meaning of the phrase "applicable at the time of the accident." The court held that that phrase was ambiguous and thus construed the policy in favor of finding coverage. The holding of the case, then, was that the "applicable" phrase was ambiguous. There was no discussion in Lee, at all, on the issue of the number of policies involved, i.e., one or two.

Hartford Accident & Indemnity Co. v. Fonck, 344 So.2d 595 (Fla. 2d DCA 1977), distinguished Lee in an attempt to disallow coverage. Fonck came up with a distinguishing factor that was not inherent in Lee. The Fonck court stated that in Lee, it was crucial that the court was dealing with two separate policies, while in Fonck there was only one policy. With this beginning in Fonck, Lee then took on a new life alien to its stated holding.

This Court in Reid v. State Farm Fire and Casualty Co., 352 So.2d 1172 (Fla. 1977), gave impetus to this incorrect citation to Lee by adopting the one policy-two policy distinction proffered by Fonck, even though that distinction was not made in Lee.

In Curtin v. State Farm Mutual Automobile Insurance Co., 449 So.2d 293 (Fla. 5th DCA 1984), the court confronted the one policy-two policy distinction directly and made that issue the rationale for its holding. As authority the court cited Lee to be controlling.

Finally, the First District in the instant opinion based its holding on Curtin, which as seen above, based its holding on Lee. Thus, the First District in the case under review has grounded

its opinion in a case (Curtin) that held as controlling a case (Lee) that never discussed the one policy-two policy distinction and of which any such mention would be dicta. State Farm proposes that any such distinction is meaningless: quite simply, an insured motor vehicle under one policy is an insured motor vehicle under all other policies covering it. Said vehicle, as noted correctly in Reid -- and holding true no matter how many policies are involved -- cannot be both an insured and uninsured motor vehicle at the same time.

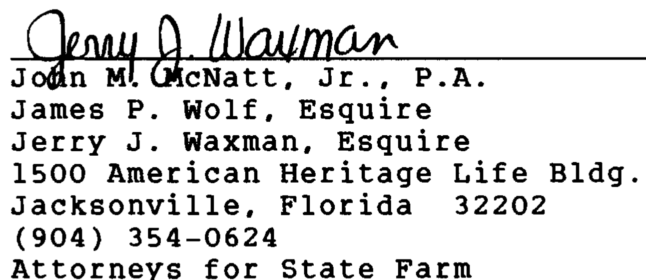
This Court should re-examine the false and meaningless distinction engrafted upon Lee by the Fonck court and approved by the Reid court, and recede from such a distinction without a difference.

CONCLUSION

State Farm respectfully asks this Court to quash the opinion of the First District and reinstate the trial court's final judgment.

Respectfully submitted,

MATHEWS, OSBORNE, McNATT
GOBELMAN & COBB



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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, 2468 Atlantic Boulevard, Jacksonville, Florida 32207; and to Lane Burnett, Esquire, 331 East Union Street, Jacksonville, Florida 32202 this 12 day of February, 1985.

Jerry J. Wayman
Attorney