IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,348

SHERYL BAYLES, et al,

Petitioners,

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, et al,

Respondents.

BRIEF OF AMICUS, ACADEMY OF FLORIDA TRIAL LAWYERS IN SUPPORT OF POSITION OF PETITIONERS.

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TOPICAL INDEX

LIST OF CITATIONS AND AUTHORITIES

I.

STATEMENT OF CASE AND FACTS

AMICUS adopts the statement of case and facts contained in petitioners' main brief.

II.

ARGUMENT--POINT I

WHERE THE TORTFEASORS ARE JOINTLY AND SEVERALLY LIABLE FOR DAMAGES CAUSED TO A THIRD PERSON IN AN AUTOMOBILE ACCIDENT, ALTHOUGH ONE TORTFEASOR IS UNINSURED, IF THE OTHER TORTFEASOR HAS LIABILITY INSURANCE WITH POLICY LIMITS EQUAL TO, OR GREATER THAN, THOSE CONTAINED IN UNINSURED MOTORIST COVERAGE POSSESSED BY THE INJURED THIRD PERSON--UNDER FLORIDA LAW: (1) THE INJURED THIRD PERSON MUST BE ALLOWED TO RECOVER UNDER HIS OWN UNINSURED MOTORIST POLICY SO LONG AS THERE IS NO DUPLICATION OF PAYMENT; AND (2) MUST BE ALLOWED TO PURSUE HIS UNINSURED MOTORIST INSURER WITHOUT FIRST PURSUING THE INSURED TORTFEASOR.

A.

INTRODUCTION

There are really two questions involved here. The first relates to the existence, vel non, of coverage. The second, assuming arguendo the existence of coverage, relates to the insured's choice of whom to sue. AMICUS will discuss both herein, infra.

AMICUS adopts the arguments advanced by petitioner as its own. It will not reiterate them here. Rather, AMICUS will try to contribute by discussing legislative history, legislative intent and the practical aspects of the situation. A full knowledge of both the legal and the practical is essential to rendition of the appropriate decision here.

B.

THE CERTIFIED COVERAGE QUESTION-- LEGAL CONSIDERATIONS

Prior to 1961, a responsible Florida citizen was not in control of his own insurance destiny. If he had an accident with an irresponsible/uninsured motorist, he had no recourse for recompense. To place the responsible citizen in control of his destiny, the legislature passed the original uninsured motorist statute, then § 627.0851, now § 627.727, Florida Statutes.

The original statute has been oft amended to more and more place the responsible citizen in total control of his destiny. For example:

1. The original statute did not specify the amount of uninsured motorist coverage which must be provided. Insurers would only provide $10,000. The legislature twice amended the statute in this regard. First, it required provision of coverage limits equal to liability limits unless there were an informed knowing rejection or selection of lower limits. Second, it required provision of coverage limits up to $300,000 at the request of the insured even if the insured had lower liability limits.

2. The original statute did not require provision of underinsured motorist coverage. The legislature amended the statute to require provision of such coverage.

3. Effective October 1, 1984, the legislature again amended the statute to broaden available coverage.

It is thus seen that the legislature clearly intends

that the uninsured/underinsured motorist statute provide the greatest amount of coverage available. The objective is to place responsible citizens in control of their own destiny.

The appellate courts of this State have properly read and implemented legislative intention. Since the passage of the original uninsured motorist statute, in an unbroken line of cases, the appellate courts of Florida have held that the statute itself and the policies issued in accordance with statutory provisions must be construed liberally to afford the greatest amount of coverage possible. Virtually every insurer attempt to limit the applicability of uninsured motorist protection by inclusion of various policy restrictions on coverage which must be afforded pursuant to the provisions of Florida law has been struck down. E.g., SALAS v. LIBERTY MUT. FIRE INS. CO., 271 So. 2d 1 (Fla. 1972); MULLIS v. STATE FARM MUT. AUTO INS. CO., 252 So. 2d 229 (Fla. 1971); GOVERNMENT EMPLOYEES INS. CO. v. JESSE FARMER, 330 So. 2d 236 (Fla. 1 DCA 1976); STATE FARM MUT. AUTO INS. CO. v. ANDERSON, 332 So. 2d 623 (Fla. 4 DCA 1976); JOHNS v. LIBERTY MUTUAL FIRE INS. CO., 337 So. 2d 830 (Fla. 2 DCA 1977); LIBERTY MUTUAL INS. CO. v. MARINO, 370 So. 2d 397 (Fla. 3 DCA 1979); LEE v. STATE FARM AUTO INS. CO., 339 So. 2d 670 (Fla. 2 DCA 1976); HAUSLER v. STATE FARM MUT. AUTO INS. CO., 374 So. 2d 1037 (Fla. 2 DCA 1979); and McDONALD v. SOUTHEASTERN FIDELITY INS. CO., 373 So. 2d 94 (Fla. 2 DCA 1979).

In MULLIS, this Court struck down a policy exclusion relating to injuries suffered by an insured while

occupying or through being struck by a motor vehicle owned by the named insured or any resident of the same household if such vehicle was not insured under the subject policy. The Court stated:

* * *

> "In sum, our holding that is that uninsured motorist coverage prescribed by Section 627.0851 [now 627.727] 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 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.

* * *

In MULLIS, this Court also stated:

* * *

> "Whatever bodily injury is inflicted upon named insured or insured members of his family by the negligence of an uninsured motorist, under whatever conditions, locations, or circumstances; any of such insureds happen to be in at the time, they are covered by uninsured motorist liability insurance issued pursuant to the requirements of Section 627.0851 [now 627.727]"

2. In SALAS, this Supreme Court struck down an exclusion similar to that involved in MULLIS stating:

* * *

> "Likewise, in Mullis v. State Farm Mutual Automobile Insurance Co., supra, we said:

> "'Whenever bodily injury is inflicted upon named insured or insured members of his family by the negligence of an uninsured motorist, under whatever conditions, locations or circumstances, any of such insureds happen to be in at the time, they are covered by uninsured motorist liability insurance issued pursuant to the requirements of Section 627.0851.'
> (252 So. 2d 229, p. 233)
>
> "Thus, the intention of the Legislature as mirrored by the decision 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 and creating insurance policies, the uninsured motorist protection is not susceptible to the attempts of the insurer to limit or negate that protection. (Emphasis supplied.)
>
> "A direct attempt of the insurer to limit the applicability of uninsured motorist protection, such as is contained in the policy under consideration here, has already been rejected as struck down by us in Mullis. Why, therefore, should we create such an exception, obviously not in the contemplation of either party, indirectly? We feel that we should not."
>
> * * *

Without question, the statute must be construed so as to provide the insured with the same protection which would be available if the tortfeasor were covered by insurance with liability limits at least as high as those purchased by the uninsured/underinsured motorist coverage insured.

Without question also TRAVELERS INSURANCE CO. v. WILSON, 371 So. 2d 145 (Fla. 3 DCA 1979), BEHRMAN v. INDUSTRIAL FIRE AND CAS. INS. CO., 374 So. 2d 568 (Fla. 3 DCA 1979) and their misbegotten progeny--including companion case PROGRESSIVE AMERICAN INS. CO. v. McKINNIE, 4 DCA Case Nos.

82-2235 and 83-60, opinion filed November 7, 1984, 9 FLW 2342, and the decision sought to be reviewed--are totally out of sinc with legislative intent and the plethora of Florida cases concerning this type of coverage.

Judge Schwartz in his BEHRMAN dissent hit the proverbial nail squarely on the head when he, at 374 So. 2d 569, said:

* * *

> "In my judgment, none of the decisions cited in the majority opinion, all of which deal with markedly different situations, are controlling. The plaintiff in this case, who was ostensibly covered by $15,000 in UM insurance provided by Industrial Fire, was a passenger in a car, the driver of which was insured with $15,000 liability limits by Stonewall Insurance Company. The car was involved with another uninsured vehicle in an accident in which both drivers were at fault. Under these circumstances, I believe, as the appellant contends, that she is entitled to the benefit of both coverages, with her own UM properly regarded, not as being 'stacked' upon her driver's liability policy, compare Dewberry v. Auto-Owners Ins. Co., 363 So. 2d 1077 (Fla. 1978), but as representing the other, uninsured, motorist's liability. If both drivers were insured, the plaintiff would clearly be entitled to recover, in effect, against both of their liability carriers. Therefore, a simple application of the general rule that the purpose of UM is to provide the insured with the same protection accorded if the tortfeasor were covered by liability insurance, e.g., Aetna Casualty and Surety Co. v. Ilmonen, 360 So. 2d 1271, 1274 (Fla. 3d DCA 1978), requires, I believe a result opposite to that reached by the court." (Emphasis supplied.)

* * *

C.

THE CERTIFIED COVERAGE QUESTION--
PRACTICAL CONSIDERATIONS

As pointed out in petitioners' main brief here--and

this is deserving of repetition--the decision sought to be reviewed has the following practical effect:

1. It permits insurers to be the judge of who is and who is not a joint tortfeasor. Simply by conjuring up a supposed joint tortfeasor, an insurer can escape its contractual obligations.

2. It creates piecemeal litigation.

3. It dilutes the favored remedy of arbitration by permitting insurers to escape or delay arbitration by forcing injured insureds to proceed against other parties at the whim of the insurer.

4. It forces insured plaintiffs to follow a course of action prescribed by their insurer, as opposed to being master of their litigation.

5. It creates delay, frustration and costs for the plaintiff.

6. It violates the principles of joint and several liability without any countervailing policy being advanced.

7. It violates the principles of uninsured motorist protection that serve to place the insured in the same position as if the uninsured motorist had liability insurance coverage.

The following very important additional practical considerations were not called to this Court's attention by petitioners in their main brief:

1. An insured who purchases collision, property damage or uninsured/underinsured motorist coverage is buying and

paying for security and peace of mind. He is not buying, and should not be forced to buy a lawsuit or lawsuits.

2. The insurer should be required to pay the claim and then exercise its jealously guarded and protected right to subrogation and sue--at its expense and not at the expense of the insured--whomsoever it pleases.

3. Many is the insurer which has walked away from its contractual obligations by alleging that its subrogation rights have been destroyed by the insureds violation of reporting or settlement requirements.

III.

ARGUMENT--POINT II

At pages 14-15 of their brief, petitioners argue a second point. AMICUS agrees with what was said there. it does not desire to comment further with regard thereto.

IV.

CONCLUSION

It is respectfully submitted that for the reasons stated in petitioners' main brief and in this AMICUS brief, the decision sought to be reviewed should be quashed and the cause remanded to the District Court of Appeal with appropriate opinion of this Court and directions to render an appropriate decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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