IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,348

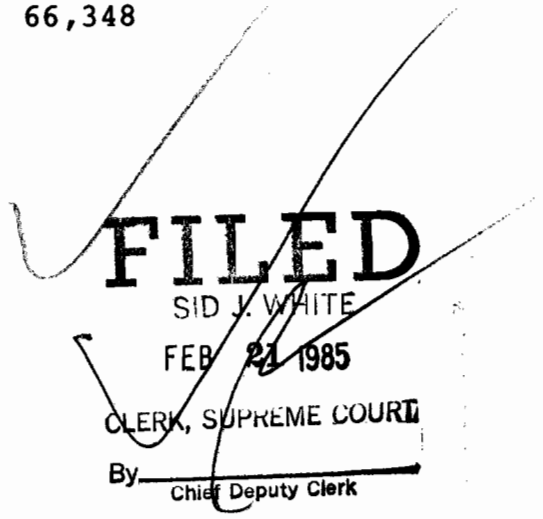
SHERYL BAYLES, et al,

Petitioners,

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, et al,

Respondents.



BRIEF OF RESPONDENT, STATE FARM, ON THE MERITS

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[CERTIFIED QUESTION]

POINT II

MAY AN INSURED PROCEED TO ARBITRATION AGAINST HIS UNINSURED MOTORIST CARRIER WITHOUT FIRST BRINGING SUIT AGAINST OTHER ALLEGEDLY RESPONSIBLE TORTFEASORS.

PREFACE

This brief is submitted on behalf of the Respondent, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, in response to the brief submitted by Petitioners, CHERYL BAYLES and MARVIN BAYLES, who were Plaintiffs below. In this brief, the parties will be referred to by name, as Plaintiff and Defendant, or as the insurer and the insured. Reference to the Record On Appeal will be by "R.". Any emphasis appearing in this brief is that of the writer unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

STATE FARM accepts the statement of the case and facts set forth by the Plaintiffs as accurate and complete for the purposes of this proceeding.

ARGUMENT

POINT I

WHERE TWO 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, THE INJURED THIRD PERSON CANNOT RECOVER UNDER HIS OWN UNINSURED MOTORIST POLICY.

[ANSWERING CERTIFIED QUESTION IN THE NEGATIVE]

It is STATE FARM'S contention that the District Court of Appeal, Fourth District, correctly decided the only issue before it, and that its certified question to this Court should be answered in the negative.

Although Plaintiffs phrase their point on appeal in the language of the certified question, their argument appears to be directed to an entirely different issue, namely whether an uninsured motorist carrier may escape arbitration by claiming that some other financially responsible party may have contributed toward causing the accident which resulted in injury to its insured. That is not the issue here, nor was it the issue before the District Court of Appeal. Furthermore, STATE FARM does not seek such a result.

As the case was presented to the District Court of Appeal, a jury had already determined that a financially responsible tortfeasor was partially at fault in causing the accident which injured MRS. BAYLES. The appellate court's conclusion that there was no uninsured motorist coverage afforded under the policy, because another tortfeasor was insured in an amount in excess of STATE FARM'S uninsured motorist limits, was necessarily limited to

those facts. The District Court was neither called upon to decide, nor did it undertake to decide, whether an insurer could, as Plaintiffs put it, "escape arbitration by forcing insured plaintiffs to seek judgment against real or imagined joint tort-feasors." (Plaintiffs' brief, page 2).

In the present case, STATE FARM did deny arbitration based on its view that under the case law existing at the time, Plaintiffs could not recover uninsured motorist benefits where an insured tortfeasor was partly at fault in causing the loss. However, as we pointed out when this same issue was raised before the Fourth District, if Plaintiffs did not want to litigate their entire liability and damage case in Circuit Court, they certainly had the option of bringing an action against STATE FARM to compel arbitration. Had they done so, and prevailed in their argument under Weinstein v. American Mutual Company of Boston, 376 So.2d 1219 (Fla. 4th DCA 1979), they could have had their arbitration against STATE FARM.

The issue before the District Court of Appeal was not whether STATE FARM was wrong in refusing to arbitrate when it believed there was no coverage under the policy, but rather whether, once the jury had determined that a tortfeasor with adequate liability limits was at least partially at fault in causing the accident, and the Plaintiffs could be made whole thereby, those Plaintiffs were also, or alternatively, entitled to pursue a claim against their uninsured motorist carrier. It is that question which the District Court of Appeal answered in the negative in the present case, as well as the decision in Progressive American Insurance Company v. McKinnie,

(Fla. 4th DCA Case Nos. 82-2235 and 83-60, opinion filed November 7, 1984).

The same result has been reached by every District Court of Appeal in this state: by the Fifth District Court of Appeal in Scharfschwerdt v. Allstate Insurance Company, 430 So.2d 578 (Fla. 5th DCA 1983); by the Second District Court of Appeal in Craft v. Government Employees Insurance Company, 432 So.2d 1343 (Fla. 2d DCA 1983) and Fenner v. McLowhorn, 424 So.2d 50 (Fla. 2d DCA 1982); by the First District Court of Appeal in United States Fidelity and Guaranty Company v. Timon, 379 So.2d 113 (Fla. 1st DCA 1979); and by the Third District Court of Appeal in Travelers Insurance Company v. Wilson, 371 So.2d 145 (Fla. 3d DCA 1979).

Approval of the District Court of Appeal's decision in the present case will not result in the "parade of horribles" posited by the Plaintiffs or by amicus curiae. The holding in this case does not in any way affect, and certainly does not eliminate, an insured's contractual right to arbitration under its policy. As we understand it, an insured has the right to arbitration of factual disputes such as liability and damages, although of course the Circuit Court has the sole jurisdiction to determine questions of coverage. State Farm Fire & Casualty Company v. Glass, 421 So.2d 759 (Fla. 4th DCA 1982).

In the present case, Plaintiffs chose to have the trial court determine all questions of coverage, liability and damages. They need not have done so, however, nor will injured plaintiffs in the future be deprived of "control of their own destiny," as amicus curiae suggests. An insured's right to arbitration remains

precisely what it always has been and is unchanged by this opinion. Thus, if an insured seeks to pursue his arbitration remedies, the arbitrators will, as they have always done, determine who caused the accident and what the damages are. Any coverage questions will, as they have always been, be determined by the Circuit Court. If no coverage questions exist, the arbitration award will be confirmed by a judgment of the Circuit Court, and the uninsured motorist carrier will then have the option of pursuing its subrogation rights against all tortfeasors.

Once again, the opinion under review deals only with the situation where a fact finder has determined that an insured driver was responsible, and that it had adequate insurance coverage to pay the entire judgment. Thus, the result reached by the District Court of Appeal, when properly limited to these facts, does not deprive the Plaintiff of her right to recover her full damages. Despite recent political efforts to the contrary, joint and several liability is still alive and well in Florida, and the Plaintiff's recovery of the full amount of her judgment is assured under these facts.

We agree with Plaintiffs and with amicus curiae that the purpose of uninsured motorist protection under Section 627.727, Florida Statutes, is the protection of injured persons.[1] However, that purpose is in no way thwarted, nor the spirit of the law violated,

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[1] It is equally clear that the statute is not designed for the benefit of motorists who cause damage to others, Boulnois v. State Farm Mutual Automobile Insurance Company, 286 So.2d 264 (Fla. 4th DCA 1973), and thus the insured tortfeasor (or his carrier) cannot legitimately claim that the Fourth District's interpretation of the statute was error because it adversely affected their interests.

by the result reached by the Fourth District Court of Appeal on the facts of this case. The problems posed by Plaintiffs and by amicus regarding the application of this decision to other factual situations will, we suggest, be dealt with by the courts on a case-by-case situation, but they are not before the Court here.

Section 627.727(1), Florida Statutes, provides that uninsured motorist coverage

> ...shall be over and above, but shall not duplicate the benefits available to an insured... from the owner or operator of the uninsured motor vehicle or any other person or organization jointly or severally liable together with such owner or operator for the accident.

The Fourth District Court of Appeal interpreted this language to require the result reached in the present case. In reaching the same result, the First District Court of Appeal in Timon, supra, held that

> The availability of one joint tortfeasor's liability insurance benefits, in the same amount as claimants' uninsured motorist benefits, satisfies the purpose for which uninsured motorist benefits were provided by law and contract, irrespective of the fact that those uninsured motorist benefits would be available to claimants in full were the [uninsured motorist] the only tortfeasor, and irrespective of the fact that claimants' insured recovery would be greater were the [uninsured motorist]... an insured tortfeasor brought jointly to court with the [insured] tortfeasor....

Timon, supra at 113-114.

The out-of-state cases cited by Plaintiffs are, for the most part, inapplicable to these facts and in any event should not be controlling where there exists a solid body of Florida case law on the subject. Standard Accident Insurance Company v. Gavin, 184 So.2d 229 (Fla. 1st DCA 1966). In Gentry v. City Mutual Insurance

Company, 384 N.E.2d 131, 66 Ill. App. 3rd 730 (1978), unlike the present case, the liability of the various drivers had not been adjudicated, and an action against the tortfeasors was still pending. The Illinois court simply held that the mere presence of an insured vehicle did not suspend uninsured motorist coverage. In Security National Insurance Company v. Hand, 107 Cal.Rptr. 439, 31 Cal. App. 3d 227 (1973), the issue was whether an uninsured motorist carrier had a right of subrogation against the tortfeasor's liability carrier, where the injured party had been damaged in an amount in excess of both policies. In that case, the California court held that the UM insurer's subrogation rights do not take precedence over the injured Plaintiff's uncompensated loss. In Collicott v. Economy Fire and Casualty Company, 227 N.W.2d 668 (Wis. 1975), the court simply held that under Wisconsin law, it was not necessary for the insured to sue the alleged tortfeasors prior to proceeding against the uninsured motorist carrier.

The foreign decision most heavily relied upon by the Plaintiffs, and cited in numerous other decisions, is Motorists Mutual Insurance Company v. Tomanski, 271 N.E.2d 924, 27 Ohio St.2d 222 (1971). There, the Ohio court held that an insured's right of recovery against his uninsured motorist carrier was not eliminated by the presence of an insured motor vehicle in the same accident. Again, that is not the situation we have here, since the Fourth District Court of Appeal was dealing with the situation where the liability of the various parties had already been determined by a jury. Indeed, the Ohio court in Tomanski distinguished the situation where all tortfeasors and the uninsured motorist carrier were before the

court and subject to its judgment regarding comparative responsibility for the accident. Tomanski, supra at 926.

Similarly, we respectfully suggest that this Court's language in Sellers v. United States Fidelity and Guaranty Company, 185 So.2d 689 (Fla. 1966) and Tuggle v. Government Employees Insurance Company, 207 So.2d 674 (Fla. 1968), simply cannot be stretched to the extent of requiring reversal of the decision here under review. In Sellers, this Court was concerned with the excess/escape clauses contained in uninsured motorist policies, dealing with the situation where a party was covered by more than one uninsured motorist policy. In Tuggle, the question was whether a UM carrier could set off from its coverage those amounts paid under its medical payments coverage to the same insured. In those decisions, this Court was properly concerned with seeing to it that the statutorily required uninsured motorist protection was not reduced by the availability of other insurance. Neither case dealt with a situation where the insured would be fully recompensed by an insured tortfeasor against whom he had already recovered judgment.

This Court has, of course, since held that an uninsured motorist carrier is not required to pay benefits which would duplicate those received from a tortfeasor's liability carrier in Dewberry v. Auto-Owners Insurance Company, 363 So.2d 1077 (Fla. 1978) [allowing set-off for liability benefits paid by underinsured motorist's carrier].

We respectfully submit that neither the Plaintiffs nor amicus curiae have advanced any compelling reason or persuasive authority which would require this Court to reverse the judgment of the Fourth

District Court of Appeal in the present case and in effect overrule the holdings of every District Court of Appeal in this state on the same question. Properly restricted to its facts, the present decision in no way impinges upon an insured's rights under his uninsured motorist contract, nor does its interpretation of Section 627.727, Florida Statutes, in any way violate the spirit and intent of that statute. We believe the District Court of Appeal's decision was the correct one, and should be approved by this Court.

POINT II

AN INSURED MAY PROCEED TO ARBITRATION AGAINST HIS UNINSURED MOTORIST CARRIER WITHOUT FIRST BRINGING SUIT AGAINST OTHER ALLEGEDLY RESPONSIBLE TORTFEASORS.

Under this point of their brief, Plaintiffs are essentially posing a hypothetical question to this Court. In the case at bar, the issue of whether STATE FARM was wrong in refusing to arbitrate, and whether it should have thus been compelled to arbitrate, was passed upon by neither the trial court nor the District Court of Appeal. Under the factual scenario presented here, when STATE FARM declined to arbitrate, Plaintiffs elected to file suit in Circuit Court against all tortfeasors as well as STATE FARM. Plaintiffs never asked the trial court to rule upon the question of whether STATE FARM'S refusal to arbitrate was wrongful, nor was the Fourth District Court of Appeal properly presented with that question. By the time the case got to the Fourth District Court of Appeal, of course, it was in a significantly different posture, since the Plaintiffs at that point had recovered a judgment against a tortfeasor with liability limits in excess of the judgment.

As stated earlier in this brief, STATE FARM does not believe that the decision under review here has any impact whatever on the question of an insurer's duty to arbitrate. We fully agree with Plaintiffs that the carrier cannot require its insured to litigate against every "conceivable and inconceivable alleged potential tortfeasor" as a condition precedent to arbitration. Arrieta v. Volkswagen Insurance Company, 343 So.2d 918 (Fla. 3d DCA 1977); Weinstein v. American Mutual Company of Boston, 376 So.2d 1219 (Fla. 4th DCA 1979). However, that question was not determined in the

present litigation, and we respectfully submit that it is not before this Court for review in this case.

CONCLUSION

For the reasons set forth above, Respondent STATE FARM respectfully requests this Court to approve the decision of the District Court of Appeal, Fourth District, in all respects.

Respectfully submitted,

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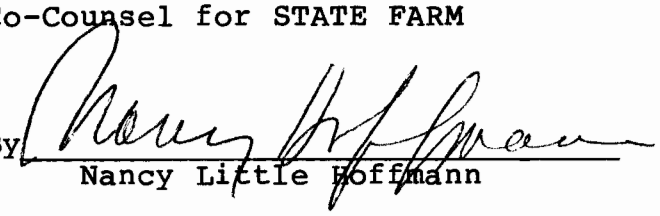
By 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing were served by mail this 19th day of February, 1985, upon: JAY HALPERN, ESQ., Atty. for BAYLES, 44 West Flagler Street, Suite 2400, Miami, Florida 33130; JAMES F. DOUGHERTY, ESQ., Atty. for NATIONAL LINEN and DRUMMET, 2600 Southwest Third Avenue, #300, Miami, Florida 33129; Edward A. Perse, Esq., HORTON, PERSE & GINSBERG, Attys. for Amicus, AFTL, 410 Concord Bldg., Miami, FL 33130; and Thomas T. Grimmett, Esq., GRIMMETT & KORTHALS, Co-Counsel for STATE FARM, P. O. Box 14218, Ft. Lauderdale, FL. 33302.

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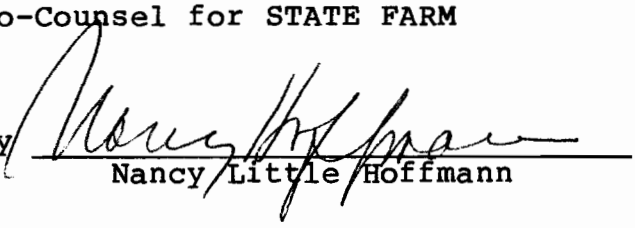
By 
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