B-5

IN THE SUPREME COURT OF FLORIDA

CASE NO.: 66,348

SHERYL BAYLES and MARVIN BAYLES,

Petitioners,

Vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, et al.,

Respondents.

_____/

DCA CASE NOS: 81-2039, 82-199, 82-894 and 82-883

PETITIONERS' BRIEF

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POINTS INVOLVED ON APPEAL

POINT I

WHERE TWO TORT FEASORS ARE JOINTLY AND SEVERALLY LIABLE FOR DAMAGES CAUSED TO A THIRD PERSON IN AN AUTOMOBILE ACCIDENT, ALTHOUGH ONE TORT FEASOR IS UNINSURED, IF THE OTHER TORT FEASOR HAS LIABILITY INSURANCE WITH POLICY LIMITS EQUAL TO, OR GREATER THAN, THOSE CONTAINED IN UNINSURED MOTORIST COVERAGE POSSESSED BY THE INJURED THIRD PERSON, CAN THE INJURED THIRD PERSON RECOVER UNDER HIS OWN UNINSURED MOTORIST POLICY?

POINT II

WHERE A TORT FEASOR IS UNINSURED AND THE INJURED PARTY POSSESSES AN UNINSURED MOTORIST POLICY, IS THE UNINSURED MOTORIST CARRIER EXCULPATED FROM PAYING ANY UNINSURED MOTORIST BENEFITS UNTIL THE INJURED PARTY HAS PROCEEDED AGAINST EVERY CONCEIVABLE AND INCONCEIVABLE ALLEGED POTENTIAL TORT FEASOR AND HAD A DETERMINATION IN THE CIRCUIT COURT AS TO THE RESPONSIBILITY OF ANY SAID ALLEGED TORT FEASORS?

STATEMENT OF THE CASE AND FACTS

On June 23, 1979 an uninsured motorist negligently drove off the roadway striking a pole. The pole tilted over and a wire supported by that pole was caused to sag across the highway. Petitioner was a witness to the initial accident and was speaking to a police officer about that when a truck coming in the opposite direction struck the wire which then struck Petitioner seriously injuring her.

Petitioner had contracted for uninsured motorist protection with State Farm. After an impasse in settlement negotiations, arbitration was demanded, initially scheduled, then cancelled by Respondent, State Farm. It was the contention of Respondent that the truck which struck the wire was an alleged tort-feaser. The truck was fully covered by insurance and therefore, State Farm claimed petitioner was not entitled to uninsured motorist coverage.

Petitioner then filed complaint in the Circuit Court seeking declaratory judgment against her uninsured motorist carrier, State Farm seeking to enforce coverage. Complaint also sought recovery for negligence, if any, of the truck driver and the truck owner, National Linen Service, and sought recovery for negligence, if any, against the Broward County Sheriff's Department for their failure to secure the scene (R. 905-912).

The trial court granted Petitioner's Motion for Summary Judgment against State Farm determining there was applicable uninsured motorist coverage (R. 1000). The case proceeded to jury trial. Pursuant to a special verdict, the jury found Petitioner's injury was caused by the negligence of the uninsured motorist to the extent of 80%, and by Respondent truck driver and

the truck owner to the extent of 20%. The jury further found the Broward County Sheriff's Department was not liable. Damages were assessed at $50,000.00 (R. 1066-1067).

The trial court, then, in accordance with the jury verdict, entered final judgment against Respondent, State Farm, and against Respondents Drummett and National Linen Service (R. 1081-1083).

The Fourth District Court of Appeal reversed the final judgment as it pertained to State Farm on the basis of Progressive American Insurance Company v. McKinney, Case Numbers 82-2235 and 83-60 (Fla. 4th DCA 11/7/84). As occurred in the McKinney case, the Fourth District Court of Appeal certified the issue as one of great public importance and adopted by reference the issue as presented in McKinney.

ARGUMENT

POINT I

WHERE TWO TORT FEASORS ARE JOINTLY AND SEVERALLY LIABLE FOR DAMAGES CAUSED TO A THIRD PERSON IN AN AUTOMOBILE ACCIDENT, ALTHOUGH ONE TORT FEASOR IS UNINSURED, IF THE OTHER TORT FEASOR HAS LIABILITY INSURANCE WITH POLICY LIMITS EQUAL TO, OR GREATER THAN, THOSE CONTAINED IN UNINSURED MOTORIST COVERAGE POSSESSED BY THE INJURED THIRD PERSON, CAN THE INJURED THIRD PERSON RECOVER UNDER HIS OWN UNINSURED MOTORIST POLICY?

If the opinion of the Fourth District Court of Appeal is not reversed, a very sad state of affairs will be permitted to exist in Florida Uninsured Motorist Law. Insurers who accept premiums for contracts which provide for arbitration, could escape arbitrating by forcing insured plaintiffs to seek judgment against real or imagined joint tort-feasors. Indeed, in this case, the Plaintiff was forced to drag in Defendants who were found to be 20% at fault and 0% at fault. Woe to the Plaintiff who must try

his case against two such Defendants without the presence of the 80% at fault uninsured motorist.

The decision of the Fourth District Court of Appeal permits insurers to be the judge of who is and who is not a joint tort-feasor. Simply by pointing to an alleged joint tort-feasor, an insurer can escape his contracted for duty to arbitrate. Later, after forcing the Plaintiff to try his case in Circuit Court against any and all alleged joint tort-feasors, a 1% finding of liability will justify the insurer forcing the insured Plaintiff through such a legal labyrinth.

The opinion of the Fourth District Court of Appeal has the following effects:

1) Creates piecemeal litigation:

2) 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;

3) Forces insured Plaintiffs to follow a course of action prescribed by their insurer, as opposed to being master of their litigation;

4) Creates delay, frustration and costs for the Plaintiff. In this case arbitration was originally scheduled for June 3, 1980. The injured Plaintiff has not yet received a penny for an accident which occurred five years ago, although she has spent in excess of $8,000.00 prosecuting this claim since arbitration was denied by State Farm. Furthermore, by forcing Plaintiffs to try their case against any and all alleged joint tort-feasors, Plaintiffs have sued an innocent party Defendant and have ended up with an adverse cost judgment. All this frustration on the basis of an arbitrary decision by insurers that other parties caused the injury to Mrs. Bayles;

5) Violates the principles of joint and several liability without any countervailing policy being advanced;

6) 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.

No party is being asked to pay more than their pro-rata share

of damages. Nor is the Plaintiff seeking double recovery. The contract, and the Florida policy should not be subverted by a faulty analysis of this problem in past cases. State Farm is not paying "excess over" as precluded by Florida Statute 627. 727(1). If this judgment is reversed, State Farm would simply be paying their fair share for the liability of the uninsured motorist in accordance with their insurance policy, while the owner and driver of the truck would pay their fair share in accordance with the statutes providing for contribution among joint tort-feasors.

It should be noted that in this case the breach of contract, i.e., the resusal to arbitrate, occurred before there was any official determination that joint tort-feasors, one insured and one uninsured, caused the accident and injuries to Mrs. Bayles. Reluctant Plaintiffs will have to file Circuit Court actions and prosecute these cases to their fullest degree in order to determine whether whether or not some insurance company adjuster was correct in his all powerful assessment that a particular accident was caused by the joint negligence of an insured and an uninsured vehicle. An adjuster will say there was a hole in the road so the city is a joint tort-feasor, or the pole was too close to the road so FP&L is a joint tort-feasor, or that the car over there didn't have his turn signal on, so they are a joint tort-feasor. Law suits will be filed all over the place by Plaintiffs seeking liability from Defendants who have been declared liable not by juries, not by law, but by letters of insurance adjusters and their attorneys.

If the DCA opinion is affirmed there will also be no way to join in the action the uninsured motorist carrier in the event that

the insurer is wrong in its assessment regarding the liability of other parties the insurer has forced the Plaintiff to sue. In such cases, there will be wasted time for the Plaintiff, frustration, lost services of attorneys and costs assessed against the Plaintiff. If the uninsured motorist laws are designed to protect the interest of the injured insured, then certainly a better course would be to permit the injured insured to exercise his contractual rights, bring an uninsured action against his insurer, and permit the insurance company to seek subrogation or contribution against any alleged joint tortfeasor who it may deem jointly liable.

The automobile insurance contract which Petitioners entered with State Farm provided in pertinent part under the uninsured motorist vehicle section:

> SECTION III - Uninsured Motor Vehicle - Coverage
>
> We will pay damages for bodily injury an insured is legally entitled to collect from the owner or driver of an uninsured motor vehicle. The bodily injury must be caused by accident arising out of the operation, maintenance or use of an uninsured motor vehicle.
>
> * * *
>
> Uninsured Motor Vehicle - means:
>
> 2. b. The limits of liability are less than the limits you carry for uninsured motor vehicle coverage under this policy.
>
> * * *
>
> Deciding Facts and Amount
>
> Two questions must be decided by agreement between insured and us;
>
> 1) Is the insured legally entitled to collect damages from the owner or driver of the uninsured motor vehicle;
>
> 2) If so, in what amount?
>
> If there is no agreement, these questions shall be decided by arbitration upon written request of the insured or us. Each party shall select

a competent and impartial arbitrator. These two shall select a third one." (R. 1363-1372).

There is nothing in the language of State Farm's policy or any pre-condition which require Plaintiffs to bring an action and exhaust all remedies against parties which State Farm arbitrarily considers to be jointly liable.

An insured is not required to first seek and obtain payment, by settlement or after judgment of all bodily injury liability insurance benefits from any alleged tort-feasor before he can compel arbitration under his own uninsured/underinsured motorist coverage. Weinstein v. American Mutual Insurance Company of Boston, 376 So. 2d 1219 (Fla. 4th DCA 1979).

Where arbitration is specified as the method to determine both liability and damages, an attempt to avoid arbitration constitutes a breach of contract, and this is so whether the insured or the insurer attempts to circumvent arbitration. Wells v. Aetna Insurance Company, 332 So. 2d 630 (Fla. 2nd DCA 1976). Accordingly, where an insured attempted to manipulate the legal remedies of the Plaintiff under a similar uninsured motorist contract, the Fourt District Court of Appeal has stated: "There is no provision in the policy or in Florida Statutes, requiring the insured to obtain judgment against the uninsured tort-feasor as a pre-condition of arbitration." Great American Insurance Company v. Pappis, 345 So. 2d 823 (Fla. 4th DCA 1977).

State Farm in its answers to interrogatories contends that they were entitled to deny arbitration because of liability insurance coverage available to another alleged tort-feasor (R. 1373-1376). Notwithstanding this contention, an insurer's self-serving opinion of legal fault in the answer to an interrogatory is not

determinative of uninsured motorist benefits under the provisions of the applicable policy. Travelers Insurance Company v. Wilson, 371 So. 2d 145 (Fla. 3rd DCA 1979) at p. 148.

In Weinstein, the court clearly indicated that it was inconsequencial whether any alleged tort-feasor had liability coverage less than, equal to, or more than the applicable uninsured/underinsured coverage. The court stated:

> "It is not of record here what the alleged tortfeasors' coverage must be, if in fact the alleged tortfeasors had coverage. That question, however, is not determinative of the main issue: Whether appellant may compel arbitration . . . to require the insured Plaintiff . . . to first obtain payment of a judgment or settlement is requiring more than the statutory intention and affectively limits the effect of this statute which is meant to provide coverage for an uninsured where the tort-feasor has no insurance or inadequate insurance to recompense the injured insured." Weinstein, supra at 1220.

The exact issue certified by the Fourth District Court of Appeal has been determined by many sister jurisdictions, which have overwhelmingly held that an injured insured could compel his insurer to proceed to arbitration under uninsured motorist provisions similar to those herein, even though one of two alleged joint tort-feasors was insured.

In Motorist Mutual Ins. Co. v. Tomanski, 271 N.E. 2d 924 (Ohio 1971), the Supreme Court of Ohio stated:

> "The sole question presented is whether the Tomanski claim under the uninsured motorist contract is enforceable; or, stated another way, whether the concurrent negligence of the operator of an insured third vehicle postpones, reduces, or eliminates the contractual rights which would otherwise exist. We hold that the presence of the third vehicle does not alter the contractual obligation under the uninsured motorist provision of the policy of the insurer." Tomanski, supra at 925.

Additionally, almost every jurisdiction which has considered this issue is in accord with the reasoning of the Ohio Supreme

Court. Gentry v. City Mutual Insurance Company, 384 N.E. 2d 131 (Ill. 1978); Security National Insurance Co. v. Han, 107 Cal Rptr. 439 (Cal. 1973); Collicott v. Economy Fire and Casualty Co., 227 N.W. 3d 668 (Wis. 1974) See also 7 Appleman Insurance Law and Practice Sec. 4331 N. 1535 (1972 cum. supp.).

It is interesting to note that Tomanski, and its progeny base their reasoning upon leading Florida uninsured motorist cases including the Florida Supreme Court case of Sellers v. United States Fidelity and Guaranty Company, 185 So. 2d 689 (Fla. 1966), wherein it was held:

> An "automobile liability carrier providing coverage against injury by an insured motorist in accord with requirements of this statute, after accepting premium for such coverage, may not deny coverage on ground that insured has other similar insurance available to him." Sellers, supra at 689; approved in Tuggle v. Government Employees Insurance Company; 207 So. 2d 674 (Fla. 1968)

Where a claim for uninsured motorist coverage was denied by State Farm on the sole basis that there was a possible involvement of another insurance policy, the Fourth DCA held that: "State Farm's denial of coverage under the uninsured motorist's provision of its policy with the Plaintiffs was clearly a breach of contract, for which damages should be determined and assessed in Trial Court." Boulnois v. State Farm Mutual Automobile Insurance Company, 286 So. 2d 264 (Fla. 4th DCA, 1973) at p. 265 and 267.

The avowed purpose of uninsured motorist protection under Florida Statute Sec. 627.727(1) is designed for the protection of injured persons, and is not designed for the benefit of the insurance companies or for motorists who cause damage to others. Boulnois, supra, at p. 266. Furthermore, the long established policy in Florida is that every insured within the definition of uninsured motorist protection in automobile policies is entitled to recover

under the uninsured motorist policy up to the limits thereof, for damages he or she would have been able to recover against the offending motorist if that motorist had maintained a policy of liability insurance. Tuggle, supra.

The decision in McKinney, which the Fourth District Court of Appeal held controlling in this case, is the result of mispronouncements on the law originating from cases which dealt primarily with the amount of coverage available and stacking as opposed to the issues presented on this appeal.

The first case, chronologically is Behrmann v. Industrial Fire and Casualty Insurance Company, 374 So. 2d 568 (3rd DCA 1979). There is absolutely no reasoning set forth for the decision in Behrmann. Furthermore, Behrmann expressly indicates that it is concerned with the Plaintiff stacking coverages.

Judge Schwartz in his dissent in Behrmann recognized that the majority opinion would subvert policy considerations long established in Florida uinsured motorist cases. In his dissent Judge Schwartz stated:

> "If both drivers were insured, the Plaintiff would clearly be entitled to recovery, in effect against both of their liability carriers. Therefore, a simple application of the general rule that the purpose of U.M. is to provide the insured with the same protection accorded if the tortfeasor were covered by liability insurance, e.g., Aetna Casualty and Surety Company v. Ilmonen, 360 So. 2d 1271, 1274 (Fla. 3rd DCA 1978), requires, I belive a result opposite to that reached by the court." Behrmann, supra at p. 569.

In United States Fidelity and Guaranty Company v. Timon, 379 So. 113 (Fla. 1st DCA 1979) the court considered the amount of available coverage to injured Plaintiffs where there was a tortfeasor with $10,000.00 in liability coverage and uninsured motorist benefits in the amount of $10,000.00, called into question

by a phantom tort-feasor (by definition uninsured). The court held that the claimant's total recovery could not exceed the policy limits of the uninsured motorist coverage, or stated otherwise, the combined available coverage to the Plaintiff was in the amount of $10,000.00 and not $20,000.00.

Timon is clearly distinguishable in that the court did not entertain the question of Plaintiff's right to compel arbitration under a policy which provides that liability and damages be determined by arbitration. On remand, the trial court proceeded with the Timon case holding the uninsured motorist carrier in the case to determine their percentage of liability. That case was ultimately settled with the uninsured motorist carrier contributing to the settlement. The issue presented and the only matter resolved in Timon was the total amount of coverage available to the Plaintiff.

One court has cited the Timon case to stand for a principle diametrically opposed to the purpose for which State Farm cites and relies upon this case. In Kenilworth Insurance Company v. Drake, supra, the Court stated:

> "The purpose of UMC is to provide those so insured with a fund from which they can be compensated for injuries sustained in automobile accidents, just as though the tortfeasor had carried that much liability insurance . . . the coverage available to the insured is not affected by the fact that there may be more than one tortfeasor involved." (Citing Timon, supra as authority). Kenilworth, supra at 839.

In Travelers Insurance Company v. Wilson, 371 So. 2d 145 (Fla. 3rd DCA 1979) Plaintiff initially filed suit against an alleged tortfeasor. Thereafter, Plaintiff attempted to proceed with uninsured motorist benefits with regard to a phantom vehicle which allegedly contributed to the accident. The insurer brought an action to determine its rights and duties, and the court held that the insurer was

not entitled to a judgment that coverage does not exist because there has been no determination of the fact that there was a joint tort-feasor with equal or greater limits to the uninsured motorist coverage. Our case differs from Wilson in that Petitioners did not initially institute a separate action against another alleged joint tort-feasor before attempting to proceed against State Farm.

Furthermore, the Wilson court held that there was no provision which requires the Plaintiff to maintain only one suit against one tort-feasor at a time. The court stated that the Plaintiff is entitled to show the existance of an uninsured vehicle which caused the accident, and which would give rise to insurance coverage. Nevertheless, the court abated the uninsured motorist action pending the outcome of the first law suit filed against the alleged tort-feasor with full insurance coverage.

In Wilson the court was concerned that the Plaintiff's total recovery could not exceed certain limits. The holding in Wilson like Timon simply stands for the proposition that the Plaintiff is not entitled to a double recovery where the applicable liability limits of one joint tort-feasor are equal to the uninsured motorist benefits called into question by virtue of a phantom vehicle. A careful reading of Wilson clearly indicates that had the uninsured motorist action, and the action against the alleged insured tort-feasor been joined together the court would have proceeded with the entire action as did the trial court in the case at bar.

A misreading of Wilson lead to dicta in Fenner v. McLowhorn, 424 So. 2d 50 (Fla. 2nd DCA 1982) which actually encourages insurance companies to resist arbitration. The court stated:

> "State Farm asserts that it had no alternative to pay the uninsured motorist benefits to Fenner because an uninsured motorist carrier may not require the insured to litigate his cause of action against a third party tort-feasor prior

> to making a claim under the uninsured motorist provisions of his own policy. Arrieta v. Volkwagen Insurance Company, 343 So. 2d 918 (Fla. 3rd DCA 1979). However, State Farm could have resisted the claim on the premise that McLowhorn was a jointly negligent tort-feasor with liability limits equal to the uninsured motorist coverage." See Travelers Insurance Company vs. Wilson, 371 So. 2d 145 (Fla. 3rd DCA 1979). Fenner, supra at 51-52

State Farm was actually correct in their assertion in Fenner that it was appropriate for them to pay uninsured motorist benefits in accordance with Arrieta. Nevertheless, the court encourages insurers to resist arbitration on the mere "premise" of a joint tort-feasor. This result supports unnecessary and piecemeal litigation discussed earlier and abandons the principle that arbitration agreements are valid, irrevocable and enforceable and public policy favors arbitration as an alternative to litigation. Oppenheimer and Co., Inc. v. Young, 456 So. 2d 1175 (Fla. 1984).

Fenner avoids the possibility of a double recovery by permitting subrogation for the liability insurance carrier. In this case double recovery and a fair result to each Defendant is protected by principles of contribution among joint tort-feasors.

The remainder of the cases cited in the McKinney opinion rely on the cases discussed above, none of which set forth intelligent policy reasons or squarely address the issue presented in this case.

Judge Anstead stated in his dissent in McKinney and adopted in this case:

> "The fact that a second, insured motorist also involved should not bar the appellee from seeking coverage that is clearly applicable in the face of the terms of the policy. As Judge Schwartz noted, this will not subvert the purpose of uninsured motorist coverage, but, rather will enhance it, since appellee, if injured at the hands of two insured motorists would have been able to look to both for recovery of his total damages. So, here, the appellee should be able to invoke his uninsured motorist coverage to insure, as close as possible, within the coverages, that he does recover his total damages."

POINT II

WHERE A TORT FEASOR IS UNINSURED AND THE INJURED PARTY POSSESSES AN UNINSURED MOTORIST POLICY, IS THE UNINSURED MOTORIST CARRIER EXCULPATED FROM PAYING ANY UNINSURED MOTORIST BENEFITS UNTIL THE INJURED PARTY HAS PROCEEDED AGAINST EVERY CONCEIVABLE AND INCONCEIVABLE ALLEGED POTENTIAL TORT FEASOR AND HAD A DETERMINATION IN THE CIRCUIT COURT AS TO THE RESPONSIBILITY OF ANY SAID ALLEGED TORT FEASORS?

The certified question posed by the Fourth District Court of Appeal does not really fully pose the full problem with their decision. The Fourth District Court of Appeal dealt with a situation where Petitioners proceeded in the Circuit Court and after a jury trial there was a determination that one alleged tort feasor is not culpable, another was 20% at fault and the third, standing in the shoes of the uninsured motorist, was 80% at fault. However, the very real problem is what remedy Plaintiff has before the fact of one or more jury trials involving various potential defendants which is discussed under Point II.

The determination by the District Court of Appeal herein compels an injured party to first proceed in the Circuit Court against every other real or imagined potential defendant. If after one or more initial trials against said defendants, the uninsured motorist carrier comes up with another potential party who had insurance coverage, then presumably the injured party would have to proceed against them as well, ad infinitum until suit against every potential defendant has been exhausted. By then, assuming the statute of limitations has not yet run on the uninsured motorist claim, Petitioner presumably could proceed against the uninsured motorist carrier.

In the pending matter, because of the posture of the uninsured motorist carrier, upheld at this point by the District Court of

Appeal, suit had to be maintained against the truck driver and owner who, in fact, were found to be tort feasors to the extent of bearing 20% responsibility for the injury, as well as against the Broward County Sheriff's Department. If Petitioner had not proceeded against the Broward County Sheriff's Department and the truck driver was found not culpable, then Respondent, State Farm before proceeding with arbitration, could under the DCA opinion have required Petitioner in any event to proceed against the Broward County Sheriff's Department.

Accordingly, the opinion of the Fourth District Court of Appeal should be reversed and attorney's fees awarded to the Petitioners should be reinstated in accordance with Florida Farm Bureau Mutual Ins. Co. v. Quinones, 409 So. 2d 97 (Fla. 3rd DCA, 1982); Sec. 627.428 (1) Fla. Statutes.

CONCLUSION

For the reasons set forth above in Petitioner's brief, the opinion of the Fourth DCA should be reversed and the final judgment should be reinstated. The attorneys' fee award against State Farm should also be reinstated should the Petitioner prevail on the underlying uninsured motorist issue. The case should be remanded with instructions that judgment be entered in favor of the Petitioners against State Farm Mutual Automobile Insurance Company, National Linen Service and Matthew Nelson Drummett who should be jointly and severally liable for the damages sustained by SHERYL BAYLES.

CERTIFICATE OF SERVICE

I HEREBY CERTITY that copies of the foregoing was served by mail this ____ day of January, 1985 upon: RICHARD PURDY, ESQ., 540 N.E. 4th Street, Suite B, Fort Lauderdale, FL 33301; JAMES F. DOUGHERTY, ESQ., 2250 S.W. 3rd Avenue, Miami, FL 33129; NANCY LITTLE HOFFMAN, ESQ., Suite 201, Jay Mark Building, 500 S.E. 6th Street, Fort Lauderdale, FL 33301; THOMAS T. GRIMMETT, ESQ., P.O. Box 14218, Fort Lauderdale, FL 33302.

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