IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,348

FOURTH DISTRICT COURT OF APPEALS
CASE NOS. 81-2039, 82-199, 82-883, 82-884

SHERYL BAYLES and MARVIN BAYLES, *

Petitioners, *

Vs. *

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, et al., *

Respondents. *

REPLY BRIEF OF PETITIONERS

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By: _____
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INTRODUCTION

Petitioners, Sheryl Bayles and Marvin Bayles will be responding to State Farm's arguments as contained in their Brief on the merits in case number 66,348.

Respondent, State Farm Mutual Automobile Insurance Company will be referred to as "State Farm."

Respondents, National Linen Service and Matthew Nelson Drummet will be jointly referred to as "National Linen."

The abbreviation "A" will refer to the appendix to Petitioners' Brief on the merits in case number 66,348.

Petitioners wish to bring to the attention of this court an error on page of 4 of Petitioners' Brief. The words "'excess over'" should be substituted with the words "'duplicate' benefits."

ARGUMENT

I. WHETHER THE FOURTH DISTRICT COURT OF APPEALS ERRED IN REVERSING THE FINAL JUDGMENT OF THE TRIAL COURT AS IT PERTAINS TO STATE FARM, HOLDING THAT FLORIDA STATUTE SS627.727(1) REQUIRES THAT, WHERE TWO TORTFEASORS ARE JOINTLY AND SEVERALLY LIABLE FOR DAMAGES CAUSED TO A THIRD PERSON IN AN AUTOMOBILE, ALTHOUGH ONE 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 PERSON CANNOT RECOVER UNDER HIS OWN UNINSURED MOTORIST POLICY.

State Farm concedes in their brief that an insurance carrier cannot require an insured to litigate against every "conceivable and inconceivable alleged potential tortfeasor" as a condition precedent to arbitration (State Farm breif at p. 10). Nevertheless, State Farm seeks a result which will reward them for wrongfully resisting arbitration on this very basis.

The injured insured brought a Declaratory Action against State Farm and obtained a Summary Judgment holding that uninsured motorist benefits provided coverage to Mrs. Bayles for the accident in question (A.28). Having succeeded in a proper case for declaratory relief, Petitioners were entitled to have all issues resolved in Circuit Court in accordance with Cruger v. Allstate, 162 So. 2d 690 (Fla. 3rd DCA 1964). Circuit Court "is fully impowered and should completely adjudicate all rights of parties relating to coverage, liability, damages, etc., in order that the rights of the parties not be determined in a piecemeal fashion" notwithstanding contract provision for arbitration. Cruger at p. 694.

Once Petitioner obtained the Summary Judgment declaring that uninsured motorist benefits apply to this case, State Farm was responsible at that moment to the injured insured for an attorney's fee for

insured/petitioner having successfully obtained a judgment against their insurer, State Farm. Sec. 627.428, Florida Statutes. It should further be noted, that after the Court decreed the applicability of uninsured motorist coverage by State Farm to petitioner, respondent, National Linen moved that this case be abated pending arbitration between Bayles and State Farm. State Farm vehemently argued against such a procedure and urged the court to proceed with trial against all parties. (See brief of National Linen Service and Matthew Nelson Drummett in Case No. 66,362 at p. 21-25).

It is convenient now for State Farm to suggest that Petitioner should have compelled and proceeded with arbitratiion. Nevertheless, when the chips were on the table, State Farm cancelled a properly scheduled arbitration, and then further resisted arbitration once Plaintiffs had obtained a judgment allowing it.

State Farm argues that the Plaintiff can be made whole by executing their judgment against National Linen. This is not true. Plaintiffs had an arbitration originally scheduled back in June of 1980. Now, almost five years later, the Plaintiff has not seen a single penny of recovery from this case. The Plaintiff has had to endure delay, costs, frustration and complicated multi-party and appellate litigation as a result of State Farm's refusal to arbitrate. This is precisely why the trial court awarded the Plaintiff an attorney's fee for their efforts in Circuit Court against State Farm.

As far as Mrs. Bayles is concerned the "parade of horribles" alluded by State Farm occurred in this very case.

In Travelers Insurance Company v. Wilson, 371 So. 2d 145 (Fla. 3rd DCA 1979), upon which State Farm so heavily relies, the court gave great importance to the fact that before insured brought an uninsured motorist action, they had filed a circuit court action against

a financially responsible alleged joint tortfeasor. The order of insured's actions was important in the ultimate decision by the court. Here it should be stressed that petitioner first attempted to proceed with arbitration against their insurer, State Farm before filing any action for damages against National Linen.

Respondent relies upon section 627.727(1), Florida Statutes, wherein it is stated uninsured motorist coverage:

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

If State Farm pays their pro-rata share of the verdict in this case nothing will be duplicated. There will be no double recovery and no additional limits of insurance coverage are either sought or created by such a result. State Farm is simply paying over and above what National Linen, a 20% tortfeasor rightfully should pay. There is no stacking of coverage which was the purpose of the statute.

The Fourth District Court of Appeal opinion must be reversed in order to synchronize this case with legislative intent, public policy, and almost every other jurisdiction which has considered this point. To hold otherwise, would subvert the long established policy in Florida 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 the motorist had maintained a policy of liability insurance. Tuggle v. Government Employees Insurance Company, 207 So. 2d 64 (Fla. 1968).

CONCLUSION

Petitioners, Sheryl Bayles and Marvin Bayles, submit that the arguments advanced by the Respondent, State Farm are without merit, and accordingly based on the reasons set forth in Brief of petitioners, Sheryl Bayles and Marvin Bayles in case number 66,348, and Brief of Amicus, Academy of Florida Trial Lawyers in support of position of Petitioners, as well as Brief of Petitioners, National Linen Service and Matthew Nelson Drummet in case number 66,362, that the decision of the Fourth District Court of Appeals be reversed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 15 day of March, 1985 to: NANCY LITTLE HOFFMAN, ESQ., 644 Southeast Fourth Avenue, Fort Lauderdale, FL 33301; STEVEN M. WEISS, ESQ., Dougherty & Fishman, 2600 S.W. 3rd Avenue, Suite 300, Miami, Florida 33129; RICHARD PURDY, ESQ., 1322 S.E. 3rd Avenue, Fort Lauderdale, FL 33316; THOMAS T. GRIMMETT, Grimmett & Korthals, P.O. Box 14218, Fort Lauderdale, FL 33302; EDWARD PERSE, ESQ., Horton, Perse & Ginsberg, P.A., 410 Concord Building, 66 West Flagler Street, Miami, FL 33130.

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