66,348 Bayles

IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,362

FILED
SID J. WHITE
FEB 25 1985
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

NATIONAL LINEN SERVICE and MATTHEW NELSON DRUMMET,

Petitioners,

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY and SHERYL BAYLES,

Respondents.

BRIEF OF RESPONDENT, STATE FARM, ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

QUESTIONS PRESENTED

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, CAN THE INJURED THIRD PERSON RECOVER UNDER HIS OWN UNINSURED MOTORIST POLICY?

[CERTIFIED QUESTION]

POINT II

DID STATE FARM COMMIT "INVITED ERROR" BY NOT OBJECTING TO ITS INSURED'S REQUEST TO HAVE THE TRIAL COURT DETERMINE ALL ISSUES OF COVERAGE, LIABILITY AND DAMAGES?

PREFACE

This brief is submitted on behalf of the Respondent, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, in response to the brief submitted by Petitioners, NATIONAL LINEN SERVICE and MATTHEW NELSON DRUMMET, who were also Defendants below in an action by STATE FARM'S insureds, CHERYL BAYLES and MARVIN BAYLES.[1] 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.

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[1] CHERYL BAYLES and MARVIN BAYLES have filed a separate petition for review, Case No. 66,348. A motion to consolidate the two cases is pending.

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]

In response to NATIONAL LINEN'S argument on this issue, STATE FARM will adopt the argument contained in its brief filed in Case No. 66,348, Bayles v. State Farm (motion for consolidation pending).

Certain additional arguments raised by NATIONAL LINEN, however, require comment. NATIONAL LINEN relies upon Kenilworth Insurance Company v. Drake, 396 So.2d 836 (Fla. 2d DCA 1981), quoting the Kenilworth court's statement that "the coverge available to the insured is not affected by the fact that there may be more than one tortfeasor involved." Looking at the case cited in Kenilworth for that proposition, however, it is clear that what the court meant was that the uninsured motorist carrier's exposure would not be increased regardless of the number of tortfeasors involved.[2] Furthermore, in Kenilworth the driver's liability was not adjudicated, and the driver's liability policy was not brought into play. Even if it had been, however, it is clear from a reading of

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[2] "In our view USF&G'S limit of liability for uninsured motorist benefits is $10,000, irrespective of the number of tortfeasors and vehicles in the collision, and that the availability of an insured $10,000 recovery from tortfeasor Shell precludes access to USF&G'S uninsured motorist benefits." United States Fidelity & Guaranty Company v. Timon, 379 So.2d 113 (Fla. 1st DCA 1979).

Kenilworth that the two UM policies exceeded the amount of liability coverage, contrary to the facts in the present case. If STATE FARM'S UM coverage exceeded the total liability coverage available to MRS. BAYLES, we would obviously have a totally different situation -- but that is simply not the case.

NATIONAL LINEN further argues that Florida's public policy is violated by the decision under review, on the basis that Section 627.727(1), Florida Statutes, is designed for the protection of insured persons and not for the benefit of insurance companies "or for motorists who cause damage to others" [quoting from Boulnois v. State Farm Mutual Automobile Insurance Co., 286 So.2d 264 (Fla. 4th DCA 1973) at 266]. This is a somewhat curious argument for NATIONAL LINEN to advance since it (through its driver) of course falls in the category of "motorists who cause damage to others," but nonetheless seeks to have the statute interpreted in its favor based on that same public policy.

In any event, as STATE FARM set forth at length in its brief in the companion case of Bayles v. State Farm, the fears of dire consequences which will allegedly flow from the decision under review are unfounded. NATIONAL LINEN argues not only that insurers will be encouraged to act in bad faith, but also that consumers will be encouraged to carry low limits of liability insurance.[3] Neither contention has merit. The notion that a person or corporation would

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[3] NATIONAL LINEN refers throughout this section of its brief (pages 13-16) to "personal injury protection." We assume that this is meant to refer to bodily injury liability insurance, and not the type of first-person insurance required by Section 627.736, Florida Statutes.

consciously decide to reduce his liability coverage based on this decision is without any support whatever. Furthermore, nothing in the opinion, as we understand it, relieves UM insurers from their contractual duty to arbitrate liability and damages. In addition, the Legislature has provided penalties for insurers who unsuccessfully deny coverage or otherwise do not comply with policy provisions by Section 627.428, Florida Statutes [providing for attorney's fees] and Section 624.155, Florida Statutes [providing civil remedies in cases of insurer misconduct].

NATIONAL LINEN next argues that it has been denied "equal protection" and "fundamental due process" by the Fourth District's decision, since under that decision it cannot have contribution from STATE FARM. This argument is wholly untenable for several reasons. First, STATE FARM is not a "joint tortfeasor" at all, so as to give rise to liability under Section 768.31, Florida Statutes. Cynthia Tooley is the other tortfeasor in the case, from whom contribution may be claimed, not STATE FARM. STATE FARM, of course, was sued by its insured based on its insurance contract, not because of any tortious activity or because it provided liability coverage to Tooley.

It appears that NATIONAL LINEN'S real quarrel is with the concept of joint and several liability, which will now permit STATE FARM'S insureds SHERYL and MARVIN BAYLES, to execute the entire judgment against NATIONAL LINEN if they so choose. A defendant's right to contribution, however, does not in any way affect a plaintiff's right to collect his entire judgment from any of the defendants held jointly and severally liable, as this Court

established at the outset when contribution became the law of this State. Lincenberg v. Issen, 318 So.2d 386,394 (Fla. 1975). Joint and several liability is (and should be) the rule, and it does not deprive NATIONAL LINEN of any constitutional rights whatever.

POINT II

STATE FARM DID NOT COMMIT "INVITED ERROR" BY NOT OBJECTING TO ITS INSURED'S REQUEST TO HAVE THE TRIAL COURT DETERMINE ALL ISSUES OF COVERAGE LIABILITY AND DAMAGES.

Under this Point, NATIONAL LINEN argues that STATE FARM committed "invited error". The gist of this argument seems to be that since STATE FARM acquiesced in having the trial court determine both coverage and liability, it was somehow precluded from appealing an adverse judgment. There is no basis whatever in the law for such a position. In the first place, there was no "error" at all in having the trial court determine all issues before it. Cruger v. Allstate Insurance Company, 162 So.2d 690 (Fla. 3d DCA 164). Secondly, by agreeing that the court consider an issue, STATE FARM certainly did not waive its right to challenge the correctness of the court's ruling on appeal.

The cases cited by NATIONAL LINEN for its "invited error" argument are clearly not on point. In County of Volusia v. Niles, 445 So.2d 1043 (Fla. 5th DCA 1984), the jury instruction challenged on appeal had been given at the appellant's request. In Bould v. Touchette, 349 So.2d 1181 (Fla. 1977), the appellant had failed to object to a jury instruction which he later challenged on appeal. In Hawkins v. Perry, 1 So.2d 620 (Fla. 1941), the ruling appealed from was sought by the appellant. In Hunter v. Employer's Mutual Liability Insurance Company, 427 So.2d 199 (Fla. 2d DCA 1982), the Appellant had stipulated that there were no issues of fact remaining, and could not contend to the contrary on appeal. In Keller Industries Inc. v. Morgart, 412 So.2d 950 (Fla. 5th DCA 1982), the appellant approved or failed to object to a particular

verdict form which he later challenged on appeal. Finally, in Grey v. Break, 440 So.2d 1297 (Fla. 5th DCA 1983), the evidence of insurance complained of on appeal was initially injected into the case by the appellant.

It is clear that none of the above cases is applicable, and that STATE FARM neither committed "invited error" nor waived its right to challenge the rulings of the trial court on coverage as well as the jury's determination of liability.

CONCLUSION

The decision of the District Court of Appeal was correct and should be approved in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing were served by mail this 22nd 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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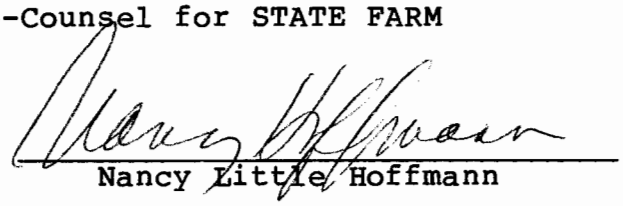
By 
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