IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,362

FOURTH DISTRICT COURT OF APPEALS
CASE NOS. 81-2039, 82-199, 82-883, 82-894

NATIONAL LINEN SERVICE and MATTHEW NELSON DRUMMET,	:
Petitioners,	:
vs.	:
SHERYL BAYLES and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,	:
Respondents.	:

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BRIEF OF PETITIONERS

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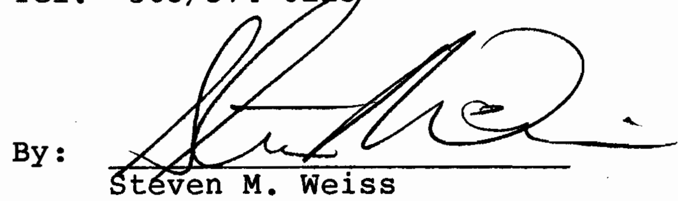

By: Steven M. Weiss

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INTRODUCTION

In this Brief, Petitioners, NATIONAL LINEN SERVICE and MATTHEW NELSON DRUMMET, will be referred to jointly herein as "National Linen".

Respondents, SHERYL BAYLES and MARVIN BAYLES, will be referred to as "Bayles"; Respondent, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, will be referred to as "State Farm"; and the Sheriff of Broward County, ROBERT BUTTERWORTH, will be referred to as "Sheriff Butterworth".

UNINSURED MOTORIST COVERAGE will be abbreviated as "UM".

The abbreviation "R" will refer to the Record submitted to the Fourth District Court of Appeals.

The abbreviation of "TR" will refer to the Transcript, which Respondent State Farm had forwarded to the Fourth District Court of Appeals which is limited in its content which does not reflect the entire transcript of the proceedings during the lengthy trial in this matter.

STATEMENT OF THE CASE AND FACTS

This cause arises out of an accident which occurred at Oakland Park Boulevard, Fort Lauderdale, Broward County, Florida, on June 23, 1979. (R 931-939)

On the above date, June 23, 1979, CYNTHIA MC DONALD TOOLEY, hereinafter "Tooley", was driving in the westbound lane of Oakland Park Boulevard when her vehicle veered off the road, struck a utility pole and flipped over. (R 102; 245; 593)

As a result of the collision with the utility pole, an electrical guywire owned by Florida Power & Light Company was caused to sag across the adjacent highway in a "U" configuration (R 251) with its lowest end being in the eastbound lanes. (R 596-598) At the time of the accident, Mrs. Bayles was traveling behind Tooley and stopped her vehicle in the right-hand lane behind the wreckage. (R 538-541)

Sheriff Butterworth secured the lanes of traffic in the westbound lanes and further warned motorists traveling in that direction. However, no attempts were made by Sheriff Butterworth to block traffic in the eastbound lanes of Oakland Park Boulevard. (TR 103)

The truck driven by Matthew Nelson Drummett and owned by National Linen was heading in the eastbound lane of Oakland Park Boulevard when it struck the low hanging guywire snapping said guywire back across all six lanes of traffic and injuring the Respondent Bayles who was standing and speaking to an investigat-

ing officer of the Broward County Sheriff's Department. (R 372-377; 404)

Tooley was determined to be an uninsured motorist and Bayles, therefore, sought recovery from her own insurer, State Farm, under the uninsured motorist provisions of the applicable policy. After settlement negotiations stalled, an arbitration hearing was scheduled pursuant to the provisions of the subject policy. The arbitration hearing was scheduled for June 11, 1980. Prior to that date, on June 3, 1980, State Farm, by letter of that date, cancelled the scheduled arbitration reasoning that "the tortfeasor had limits equal to or exceeding the limits of the insured," and therefore, there was no coverage under the State Farm policy. (R 905-912; 991-994; 1358-1361; 1373-1376) Bayles, thereafter, filed suit in the Circuit Court, 17th Judicial Circuit in and for Broward County, Florida (R 905-912), seeking declaratory relief against State Farm based on its breach of the applicable uninsured motorist contract and alleging negligence on behalf of Tooley, National Linen and Sheriff Butterworth.

Bayles moved for summary judgment in connection with the claim for declaratory relief (R 991-994), said motion was granted on July 27, 1981, determining coverage under the uninsured motorist provisions of the State Farm policy. (R 1000) No appeal from that final Order was taken by State Farm.

National Linen moved to stay the proceedings in order to allow the claim between Bayles and State Farm to be arbitrated before proceeding to trial against all three defendants jointly.

(R 998-999) Trial counsel for State Farm, Patrick Winburn, Esquire, requested that the Circuit Court take jurisdiction and resolve all issues pertaining to coverage and liability. (R 1214)

On August 24, 1981, at the completion of a six-day trial, the jury verdict was returned in favor of Bayles in the amount of $50,000.00 against State Farm and National Linen. The jury found no negligence on the part of Sheriff Butterworth. The jury further determined that Tooley was 80% negligent while National Linen was 20% negligent. Consequently, State Farm, standing in the shoes of Tooley, the uninsured motorist, was responsible for 80% of the total award, or $40,000.00, with National Linen responsible for 20% of the award, or $10,000.00. (R 1066-1067)

Final Judgment was entered on September 8, 1981 (R 1082) and became final on October 21, 1981 when all post trial motions were denied. (R 1102-1106) State Farm appealed (R 1182) and oral argument was heard on April 20, 1983. On November 7, 1984, the Fourth District Court of Appeals reversed the finding of the lower Court stating that:

> 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. See State Farm Mutual Insurance Company v. Bayles, 459 So.2d 387 (Fla. 4 DCA 1984).

The Fourth District Court of Appeals thereupon, relying on its decision of the same date in the case of Progressive American

Insurance Company v. McKinnie, Nos. 82-2235 and 83-60 (Fla. 4 DCA November 7, 1984), certified the above question to this Court and this appeal followed.

ISSUES FOR DETERMINATION

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 §627.727(1) REQUIRES THAT 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 PERSON CANNOT RECOVER UNDER HIS OWN UNINSURED MOTORIST POLICY.

II. WHETHER THE FOURTH DISTRICT COURT OF APPEALS ERRED IN HOLDING THAT STATE FARM DID NOT COMMIT INVITED ERROR WHERE STATE FARM DENIED PLAINTIFFS' RIGHT TO ARBITRATION AND REQUESTED THAT THE ISSUES OF UNINSURED MOTORIST COVERAGE AND LIABILITY BE DETERMINED BY THE CIRCUIT COURT.

STATEMENT OF JURISDICTION

This Court has jurisdiction under the Florida Constitution, Article V, §3b(3), 1980, and Fla.R.App.P. 9.030(a)(2)(A)(v).

Rule 9.030(a)(2)(A)(v) provides for discretionary jurisdiction of this Court of a decision of the District Court of Appeal that passes upon a question certified to be of great public importance.

In the case at bar, the Fourth District Court of Appeals certified the underlying question to this Court as one of great public importance to-wit:

> 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 PERSON RECOVER UNDER HIS OWN UNINSURED MOTORIST POLICY?

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 §627.727(1) REQUIRES THAT 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 PERSON CANNOT RECOVER UNDER HIS OWN UNINSURED MOTORIST POLICY.

On this record, properly viewed, the District Court of Appeals of Florida, Fourth District, erred in holding that there was no coverage under the uninsured motorist provisions of the applicable State Farm automobile insurance policy issued to Respondent, Sheryl Bayles. In its decision of November 7, 1984, the Fourth District Court of Appeals quotes from §627.727(1), Florida Statutes, 1981, wherein it states 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 Court interpreted the above section as requiring that

> Where two tortfeasors are jointly and severally liable for damages caused to a third person in an automobile accident and one tortfeasor is uninsured, the other tortfeasor has liability insurance with policy limits equal to, or greater than those contained in

> the uninsured motorist coverage possessed by the injured third person, the injured third person cannot recover under his own uninsured motorist policy.

A. Petitioner agrees with the dissenting opinion of Chief Judge Anstead in the case of Progressive American Insurance Company v. McKinnie, supra, the companion case of the herein action, wherein he stated:

> Uninsured motorist coverage comes into play when one is injured by an uninsured motorist. Here, Appellee claims an injury at the hands of an uninsured motorist, thereby invoking the coverage of Appellant [insurer]. The fact that a second, insured, motorist is also involved should not bar the Appellee from invoking coverage that is clearly applicable on the face of the terms of the policy. [emphasis added].

In the case of Behrmann v. Industrial Fire and Casualty Insurance Company, 374 So.2d 568 (Fla. 3 DCA 1979), Judge Schwartz in his dissenting opinion, codifies the position of Petitioner, National Linen, with regard to the present situation. In Behrmann, two automobiles were involved in an accident, one tortfeasor was insured, the other was not. Judge Schwartz stated:

> 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 [citation omitted] 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, the 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 [citations omitted], requires, I believe, a result opposite to that reached by the Court. [Emphasis added] Id. at 569.

As noted by Judge Anstead in referring to Judge Schwartz' opinion above,

> ... allowing coverage in such a situation will not subvert the purpose of uninsured motorist coverage, but rather, will enhance it, since the insured, if injured at the hands of two insured motorists would have been able to look to both for recovery of its total damages. So, here, the insured should be able to invoke his uninsured motorist coverage to insure as close as possible within the coverage that he does recover his total damages.

As stated by Judges Schwartz and Anstead, when one purchases uninsured motorist coverage, it is to insure against all injuries that occur as a result of an accident with an uninsured motorist, regardless of whether the other individuals involved possess personal injury protection.

In the present situation, State Farm denied Bayles' request for arbitration in violation of its policy provision regarding the uninsured motorist claim, see Weinstein v. American Mutual Insurance Company of Boston, 376 So.2d 1219 (Fla. 4 DCA 1979); Sellers v. United States Fidelity and Guaranty Company, 185 So.2d 689 (Fla. 1966), thereby forcing Bayles and National Linen to engage in the subject litigation which resulted in the herein appeal. State Farm, by denying arbitration, in violation of its policy provisions, "gambled" that if another tortfeasor, in this case National Linen, were found to be even minimally negligent, State Farm would totally escape liability even though,

under the terms of its policy of insurance with Mrs. Bayles, it was bound to provide her with uninsured motorist protection.

As a result of a six-day jury trial in this matter, State Farm, standing in the shoes of the uninsured motorist Tooley, was found to be 80% negligent, while National Linen was found to be 20% negligent. Using the argument advanced by State Farm, the Fourth District Court of Appeals held that although Tooley was found to be four-fifths negligent and National Linen was found to be merely one-fifth negligent, State Farm, nevertheless, was absolved of any and all liability in this matter, and the "gamble," in essence, paid off.

1. To hold, as the Fourth District Court of Appeals suggests, that an insured's uninsured motorist coverage does not apply, where one of a number of tortfeasors has personal injury protection greater than the uninsured motorist coverage of the insured, encourages <u>bad faith</u> dealings by the insurer. Said ruling encourages bad faith in the following ways: it encourages the insurer to deny coverage under its policy; it encourages the insurer to deny the insured's right to arbitration under the uninsured motorist provisions, as occurred here; and it forces the insured into a lengthy and often expensive circuit court proceeding to determine its rights, when arbitration was created for the very purpose of preventing such expensive and time-consuming legal battles. Surely, the legislature of the State of Florida, in enacting F.S.A. §627.727(1), could not have intended for such a result.

Florida courts have continually interpreted the public policy behind Florida Statute 627.727(1) and its predecessor, 627.085(1) as follows:

> It has long been the public policy of the State of Florida to require uninsured motorist protection in automobile policies written in this state to afford to the public generally the same protection that the public would have had if the uninsured motorist had carried public liability coverage. The statute is designed for the protection of injured persons; _it is not designed for the benefits of insurance companies or for motorists who cause damage to others_. [Emphasis added].

Boulnois v. State Farm Mutual Automobile Insurance Company, 286 So.2d 264, 266 (Fla. 4 DCA 1973); _Curtin v. State Farm Mutual Automobile Insurance Company_, 449 So.2d 293 (Fla. 5 DCA 1984); _Brown v. Progressive Mutual Insurance Company_, 249 So.2d 429 (Fla. 1971); _Standard Accident Insurance Company v. Gavin_, 184 So.2d 229 (Fla. 1 DCA 1966).

As set forth in the above decisions, the public policy of the State of Florida, in requiring insurers to offer uninsured motorist coverage, _is to provide the insured with coverage when involved in an accident with an uninsured motorist_. Furthermore, as stated by the Second District Court of Appeals in the case of _Kennelworth Insurance Company v. Drake_, 396 So.2d 836 (Fla. 2 DCA 1981):

> The coverage available to the insured is not affected by the fact that there may be more than one tortfeasor involved. _Id._, at 839.

Accordingly, the public policy of this state requires that this Court interpret F.S.A. §627.727(1) as applying, when the insured is involved in an accident with an uninsured tortfeasor, regardless of whether or not other tortfeasors, who may be insured, are involved.

2. If the doctrine, as advanced by the Fourth District Court of Appeals, is affirmed, insureds, knowing that by possessing large limits of personal injury protection, they expose themselves to possibile liability for the negligent acts of co-tortfeasors who may be uninsured, even if these insureds are found to be merely 1% negligent, would in effect be encouraged to purchase lower amounts of insurance to avoid such excessive and outrageous liability. By doing so, they would ensure that by having lower levels of coverage, the UM coverage under the injured insured's policy would protect them from excessive liability. Conversely, insurers would find it necessary to increase their rates for, by providing high levels of personal injury protection coverage, they could be held responsible for damage caused by an uninsured motorist who was involved in an accident with one of their insureds and who was almost totally at fault.

Encouraging individuals to purchase less personal injury protection, forcing insurers to raise their premium rates, or rendering existing UM coverage virtually worthless, as was the case with Mrs. Bayles' UM coverage here, could not be what the Legislature had intended, when enacting F.S.A. §627.727(1), which, according to the case of Boulnois, supra, was not designed

to protect the insurance companies or the tortfeasors, but rather the insured. The decision of the Fourth District Court of Appeals would not serve to protect the insureds, but rather, would expose them to greater liability.

In enacting F.S.A. §627.727(1), the Florida Legislature clearly wanted the citizens to be protected against the uninsured motorist by mandating that the insurance companies offer said insurance and that these policies be construed to contain such protection absent a knowing waiver by the insured. See, State Farm Mutual Automobile Insurance Company v. Gant, 9 F.L.W. 2065 (Fla. 2 DCA Oct. 5, 1984); Tarlton v. Dixie Insurance Company, 450 So.2d 300 (Fla. 2 DCA 1984); Lane v. Waste Management, Inc., 432 So.2d 70 (Fla. 4 DCA 1983); Cone v. American Home Assurance Company, 367 So.2d 677 (Fla. 3 DCA 1979); Empire Fire and Marine Insurance Company v. Solomon, 444 So.2d 1123 (Fla. 3 DCA 1984); General Accident Fire & Life Assurance Corporation v. McKenzie, 410 So.2d 558 (Fla. 4 DCA 1982); and General Insurance Company of Florida v. Sutton, 396 So.2d 855 (Fla. 3 DCA 1981).

The Legislature, which obviously wanted to protect the insured against the uninsured motorist, could not have condoned the scenerio as set forth above, which would occur if the opinion of the Fourth District Court of Appeals is adopted, to wit: encouraging insurers to deal in bad faith by denying arbitration and forcing the insureds into an often expensive and lengthy court proceeding, encouraging individuals to purchase lower amounts of personal injury protection so as not to exceed the uninsured motorist coverage contained in the injured

insured's policy, and forcing the insurers to raise their personal injury protection rates to counteract possible excessive liability in situations where their insureds' actual liability is minimal.

As indicated by the case law cited above, the public policy of the State of Florida concerning Florida Statute 627.727(1) mandates that the decision of the Fourth District Court of Appeals be reversed.

3. As pointed out by Judge Anstead of the Fourth District Court of Appeals in the case of Progressive American Insurance Company v. McKenzie, supra, and incorporated by reference into the opinion of the Court herein, the decision expressed by the Fourth District Court of Appeals is a minority view in the United States.

In the case of Motorists Mutual Insurance Company v. Tomanski, 271 NE.2d 924 (Ohio 1971), the Supreme Court of Ohio was confronted with a UM endorsement in the subject policy of insurance which provided:

> Damages for bodily injury caused by uninsured automobiles.
>
> Obligates the insurer 'to pay all sums which the insured ... shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of bodily injury ...'

In construing this provision in conjunction with the applicable Ohio Statute, the court held:

> where the occupant of a motor vehicle, covered under an uninsured motorist insurance contract, obligating insurer

> to pay all sums which the insured or his legal representative shall be legally entitled to recover from the owner or operator of an insured automobile because of bodily injury, is injured in an accident with such an uninsured automobile, his right of recovery under the contract is not eliminated by the presence of an insured motor vehicle in the same accident. [emphasis added]. Id., at 927.

In the subject litigation, the policy of insurance issued by State Farm to Mrs. Bayles contained the following UM endorsement:

> 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. (R 1363)

The provision in the policy at hand is almost identical to the provision in Tomanski, supra. As seen from the cases cited above, the public policy of the State of Florida clearly is more in accord with the persuasive argument of the Supreme Court of Ohio in Tomanski, than it is with the decision of the Fourth District Court of Appeals here.

This Ohio view is also shared by the First District Court of Appeals of Illinois which approved of the Ohio Supreme Court holding in Tomanski, in Gentry vs. City Mutual Insurance Company, 66 Ill.App.3d 730, 384 N.E.2d 131, (Ill.1 DCA Div. 2d 1978), stating:

> ...Almost every jurisdiction which has considered this issue is in accord with the reasoning of the Ohio Supreme Court. Tholen v. Carney, 555 F.2d 479 (5th Cir. 1977); Security National Insurance Company v. Hand, 31 Cal.App.3d 227, 107 Cal.Rptr. 439 (1973); O'Brien v. Aetna Casualty & Surety Company 33 A.D.2d 1085, 307 N.Y.S.2d 689 (1970). See also, 7 Appleman Insurance Law and Practice, §4331N.15.35 (1972 CUM.SUPP.). Id., at 133.

Thereafter, based on its stated approval of the holdings of the Ohio Supreme Court and of other jurisdictions cited, the Illinois First District Court of Appeals held:

> Thus it seems clear that defendants' contention that uninsured motor vehicle insurance was designed to give protection to a claimant who has recourse solely against an uninsured motorist is contrary to the intent and purpose of the statute ... We find that plaintiffs are entitled to coverage under the uninsured motor vehicle provision required by the Illinois Insurance Code, that the mere presence of an insured vehicle does not suspend such coverage. [emphasis added].Id., at 134.

The California courts have also gone the way of Ohio and Illinois. In the case of Security National Insurance Company v. Hand, 31 Cal.App.3d 277, 107 Cal.Rptr. 439 (1973), the Second District Court of Appeals, Fifth Division, stated:

> In law, the uninsured driver is fully liable for all of a claimant's damages, as if the insured driver were not even in the picture. This is precisely the kind of liability which uninsured motorist

> coverage is all about... 107 Cal.Rptr. at 445.

See, also, Tholen v. Carney, supra, wherein the Fifth Circuit Court of Appeals held that even though the insured's injury was found to have been caused by the negligence of both an insured an uninsured motorist, provisions which would disallow the application of the insured's UM coverage were merely to prevent double recovery, and were not to make the UM coverage secondary to other sources of recovery. When reading F.S.A. §627.727(1), literally, as quoted by the Fourth District Court of Appeals, in its opinion in the herein case:

> ... 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 ...

It is clear that the language of this statute is similar to the one in Tholen, supra, which also attempts to prevent double recovery, but does not purport to make UM coverage secondary to other sources of recovery.

Numerous other cases from various jurisdictions further support the view advanced by National Linen herein. They include: Wilhelm v. Universal Underwriters Insurance Company, 60 Ill.App.3d 894, 377 N.E. 2d 62 (1978); Harthcock v. State Farm Mutual Automobile Insurance Company, 248 So.2d 456 (Miss. 1971); Raitt v. National Grange Mutual Insurance Company, 111 NH 397, 285 A.2d 799 (NH 1971); Powers vs. Continental Insurance Company,

29 App.Div.2d 1041, 289 NYS 2d 467 (NY Dept. 3d 1968); Statewide Insurance Company v. Lang, 30 App.Div.2d 974, 294 NYS 2d 661 (NY Dept. 2d 1968); O'Brien v. Aetna Casualty & Surety Company, supra; State Farm Mutual Automobile Insurance Company v. Katan, 75 Misc.2d 82, 347 NYS 2d 408 (NY 1973); Commonwealth Fire & Casualty Insurance Company v. Manis, 549 SW 2d 303 (KY App. 1977).

The cases cited above, from various jurisdictions throughout the United States, show that the decision of the Fourth District Court of Appeals is a minority decision which severely conflicts with the public policy of the State of Florida as delineated in the cases of Standard Accident Insurance Company, supra; Boulnois, supra; Curtin, supra; and Kennelworth Insurance Company, supra. Furthermore, the public policy of the State of Florida is similar to the public policy statements of the states in the cases cited above, wherein the courts have held that an insured's uninsured motorist coverage applies when the insured is involved in accident with an uninsured motorist, regardless of whether or not another tortfeasor involved is covered by personal injury protection.

Accordingly, the decision of the Fourth District Court of Appeals determining that there was no coverage under the State Farm policy issued to Mrs. Bayles must be reversed.

B. Petitioner, National Linen, further contends that the effect of the Appellate Court's ruling is to release State Farm as a party, and to hold National Linen, which was found by a jury to be 20% negligent, responsible for the entire verdict. Exoner-

ating State Farm while exposing National Linen to possible liability for more than its pro rata share of the entire liability is a violation of National Linen's equal protection under the law as well as a denial of fundamental due process. Under Florida law, no tortfeasor is compelled to make contribution beyond its own pro rata share of the entire liability. See FSA §768.31(2)(b) and FSA §768.31(3)(a). The Fourth District Court of Appeals has effectively denied to National Linen its right to contribution from State Farm Insurance Company which the trial court found to be a joint tortfeasor, standing in the shoes of the uninsured motorist, Tooley, who was found by a jury to be 80% negligent. In the case of Pensacola Interstate Fair, Inc. v. Popovich, 389 So.2d 1179 (Fla. 1980), this Court stated that releasing one tortfeasor and not the other,

> ... places these defendants in a disfavored class and denies the opportunity to recoup their losses from the person or entity actually responsible ... Id. at 1181. See also, Wilhelm v. Traynor, 434 So.2d 1011 (Fla. 5 DCA 1983).

Fundamental fairness and due process requires that the order of the Fourth District Court of Appeals rendered on November 7, 1984 be reversed, or in the alternative, that National Linen should not be held responsible for more than its pro rata share of the entire liability or $10,000.00.

II. WHETHER THE FOURTH DISTRICT COURT OF APPEALS ERRED IN HOLDING THAT STATE FARM DID NOT COMMIT INVITED ERROR WHERE STATE FARM DENIED PLAINTIFFS' RIGHT TO ARBITRATION AND REQUESTED THAT THE ISSUES OF UNINSURED MOTORIST COVERAGE AND LIABILITY BE DETERMINED BY THE CIRCUIT COURT.

On this record, properly viewed, the District Court of Appeals of Florida, Fourth District, erred in holding that State Farm had not committed invited error by denying Bayles' right to arbitration under the policy and by requesting that the Circuit Court take jurisdiction and determine the issues of uninsured motorist coverage and liability.

On July 22, 1981, counsel for National Linen requested that the trial Court stay the Circuit Court proceedings until Bayles and State Farm proceeded to arbitration concerning the uninsured motorist claim. Counsel for State Farm, Mr. Winburn, argued that National Linen had no standing to make such an argument and that State Farm wished to proceed in the Circuit Court in order to resolve all of the issues rather than doing it piecemeal. At the hearing of July 22, 1981, the following arguments were advanced:

Mr. Dougherty: [Trial counsel for National Linen] ... I think you should determine coverage today. But I think that, when you determine coverage, you should stay the trial against the other tortfeasors, and permit the three-man panel in the arbitration proceeding to determine whether or not that's proximate cause ...

So, I am urging you, Judge, if you rule today, that there is coverage, the proper procedural thing to do is, having determined coverage, to say, 'I determined coverage under

the relief sought in Count I for Declaratory Relief, and the matter shall proceed forward with three-man arbitration to determine liability and, therefore, proximate causation and damages, and onc that awaed is entered, there is 90 days within which to confirm it under the arbitration code,' ...

He [counsel for Bayles] has two choices, and the law favors arbitration, which he sought. It would be incorrect -- and I will give you the decisions when he finishes argument -- if you determine there is coverage today, it is our position that arbitration should proceed first, and after the award is entered, then there should be a determination of liability. (R 1199-1200).

Mr. Winburn: [Trial counsel for State Farm]. Your Honor, I believe he has just argued his motion for a stay and continuance, and he has argued his motion and I won't attempt to address both ...

It's our position that there were two separate incidents, and whether or not coverage is valid depends on whether or not the injury was caused by the accident arising out of operation, maintenance or use of the uninsured motor vehicle.

Clearly, although the court did not grant our summary judgment, it is a very close question as far as whether or not her injuries were caused by anything that the uninsured motorist did. As to the arbitration, we have no objection to the circuit court action concluding, and in fact, under cases which the plaintiff, I am sure, after the other defendants' argument, will argue at some length, a circuit court case is now the proper place to adjudicate all the various issues, and we have no

objection to that, and the plaintiff certainly, in his complaint, has requested that, and I am not even -- I don't believe that the defendant has any standing to require us to arbitrate under a contract between State Farm and the Plaintiff. (R 1201-1202).

Mr. Winburn: We are very much opposed to having a continuance of the trial. We are ready to go to trial, and want to go to trial. (R 1205).

Mr. Dougherty: ...You should decide the issue of coverage in terms of the proper procedure, once you decide that there is coverage, you can allow the arbitrators to decide the issue of liability and damages. But to have a jury decide all of them at the same time, Judge, is improper. (R 1212)

Mr. Halpern: [Trial counsel for Bayles] Can I cite a case to you? Cruger v. Allstate. It's in my Complaint, and it says here that where either party to insurance contract--and this was an insurance contract--alleges a proper case for declaratory relief, Circuit Court being accorded general jurisdiction is fully empowered and should --not could--and should completely adjudicate all rights of parties relating to coverage, liability, damages, etc., to avoid piecemeal determination of rights, notwithstanding contract provision for arbitration. (R 1212)

Mr. Winburn: Your Honor, if I could interject, the only person who is arguing against bringing this action in the Circuit Court and not arbitrating is someone who is not even a party to the arbitration [Mr. Dougherty for National Linen]. The only people who are parties to the arbitration are the Plaintiff and State Farm. We have no objection to bringing everybody at once in

Circuit Court and getting all the issues resolved rather than doing it piecemeal. And I believe that Kruger v. Allstate does say that. The issue of coverage is what he is seeking a determination on, summary judgment on, and there are issues of fact and we should request that Your Honor deny the summary judgment and we will proceed to go to trial in August. (R 1213)

Mr. Halpern: Judge, our request is that you would find that as a matter of law, there was uninsured motorist coverage and that the defendant breached a contract by denying arbitration when it is the preferred manner of resolving this. Not at this stage, but it was. (R 1213)

After hearing argument from all counsel, Circuit Court Judge Raymond J. Hare granted summary judgment as follows:

...

ORDER GRANTING
MOTION FOR SUMMARY JUDGMENT

THIS CAUSE came on to be heard upon Motion for Plaintiffs, SHERYL BAYLES and MARVIN BAYLES, for Summary Judgment against Defendant, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, with regard to Plaintiffs' action for declaratory judgment more fully described in Count I of Plaintiffs' Amended Complaint. This Court having heard argument of counsel and being otherwise duly advised in the premises, it is considered

ORDERED and ADJUDGED that:

1. Motion for Summary Judgment of Plaintiffs with regard to action for declaratory judgment against STATE FARM AUTOMOBILE INSURANCE COMPANY is hereby granted and this Court decrees insurance coverage by the Defendants, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, existed in connection with this cause for the Plaintiffs in accordance with the applicable policy including the full

> policy limits of the applicable uninsured motorist benefits.
>
> 2. This Court retains jurisdiction to determine prayer of Plaintiffs for reasonable attorneys' fees pursuant to Florida Statute 67.428 awarding of costs, interest or any other equitable relief which this Court may deem just and proper pending further motions and hearings.
>
> ... (R 1000)

National Linen contends that trial counsel for State Farm, Mr. Winburn, committed invited error by requesting that the issues of uninsured motorist coverage and liability be determined by the Circuit Court, as indicated by the excerpts above, and is thereby estopped in contesting the findings of the trial Court on appeal.

In Florida, under the doctrine of invited error, a party cannot successfully complain of an error for which he is himself responsible or for a ruling that he has invited the trial Court to make. See County of Volusia v. Niles, 445 So.2d 1043 (Fla.. 5 DCA 1985); Bould v. Touchette, 349 So.2d 1181 (Fla. 1977); Hawkins v. Perry, 1 So.2d 620 (1949); Hunter v. Employers' Mutual Liability Insurance Company, 427 So.2d 199 (Fla. 2 DCA 1982); Keller Industries, Inc. v. Morgart, 412 So.2d 950 (Fla. 5 DCA 1981); Gray v. Brake, 440 So.2d 1297 (Fla. 5 DCA 1983).

As indicated by the transcript of the hearing of July 22, 1981, Mr. Winburn, trial counsel for State Farm, requested that the trial Court take jurisdiction and that all of the issues of coverage and liability be resolved by that court. (R 1213). Based upon this invitation, the Honorable Raymond J. Hare found

uninsured motorist coverage under the State Farm policy and entered summary judgment in accordance with that finding. Said judgment was not appealed by State Farm. The case thereafter proceeded to trial where the issues of liability were properly submitted to a jury which, after a six-day trial, found National Linen 20% liable and State Farm, standing in place of Cynthia McDonald Tooley, an uninsured motorist, 80% liable.

It is clear that State Farm denied arbitration under its policy to Bayles (R 905-912), and requested that the issues of liability and coverage be determined by the trial court. (R 1201-1202, 1205, 1213). After the trial judge found coverage, and a trial was held in the Circuit Court as requested by State Farm, State Farm, unhappy with the judge's finding and the jury verdict, turned to the Appellate Court for reversal of the results, claiming error, which, if one existed, was invited by the actions of State Farm's trial counsel.

By requesting that the trial Court take jurisdiction in order to decide the issues of coverage and liability, and by failing to appeal the finding of coverage by the trial Court, State Farm committed invited error and is, therefore, bound by the determinations of the trial Court. Accordingly, the Fourth District Court of Appeals erred in holding that the Respondent State Farm had not committed invited error by requesting that the issues of coverage and liability be determined by the trial Court.

CONCLUSION

Petitioners, National Linen Service and Matthew Nelson Drummet, respectfully request that this Honorable Court reverse the decision of the Fourth District Court of Appeals and hold (1) that there was applicable uninsured motorist coverage under Respondent Sheryl Bayles' policy with Respondent State Farm Mutual Automobile Insurance Company, regardless of the presence of another tortfeasor covered by personal injury protection; (2) that if an error existed, trial counsel for State Farm committed invited error by requesting that the issues of coverage and liability be determined by the trial court, and is, therefore, estopped from contesting that determination on appeal; (3) that State Farm, standing in the shoes of Cynthia McDonald Tooley, an uninsured motorist, is responsible for its pro rata share of the total liability corresponding to the 80% finding of negligence by the jury, or $40,000.00; and (4) that under no circumstances should National Linen be required to pay damages beyond its own pro rata share of the total liability, corresponding to the 20% finding of negligence by the jury, or $10,000.00.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief of Petitioners has been mailed to Nancy Little Hoffman, Attorney at Law, Hoffmann and Burris, P.A., 644 S.E. 4th Avenue, Fort Lauderdale, FL 33301; Richard Purdy, Esquire, 1322 S.E. Third Avenue, Fort Lauderdale, FL 33316; Thomas T. Grimmett, Esquire, Grimmett & Korthals, P.O. Box 14218, Fort Lauderdale, FL 33302; and Jay Halpern, Esquire, Keyfetz, Poses & Halpern, P.A., 44 West Flagler Street, #2400, Miami, FL 33130, and Edward Perse, Esquire, Horton, Perse & Ginsberg, 410 Concord Building, Miami, Florida 33130, this 30th day of January, 1985.

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