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.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, and SHERYL BAYLES,

Respondents.

REPLY BRIEF OF PETITIONERS

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INTRODUCTION

There is currently a motion pending to consolidate the herein appeal with the appeal styled Sheryl Bayles, et al., Petitioners, vs. State Farm Mutual Automobile Insurance Company, et al., Respondents, Supreme Court Case No: 66,348. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Respondent in both actions, has adopted the argument which it advanced in the companion case, No: 66,348, with regards to the main issue in the herein appeal. Accordingly, Petitioners, NATIONAL LINEN SERVICE and MATTHEW NELSON DRUMMET in the herein Brief will be responding to STATE FARM's arguments as contained in Case No: 66,348 and Case No: 66,362.

For the purposes of this Brief, Petitioners, NATIONAL LINEN SERVICE and MATTHEW NELSON DRUMMET will be jointly referred to as "NATIONAL LINEN."

Respondents/Petitioners, 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."

CYNTHIA MacDONALD TOOLEY, the uninsured motorist, will be referred to alternately as "TOOLEY" or "UNINSURED MOTORIST."

Uninsured motorist coverage will be abbreviated as "UM."

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

Citations to the Brief of Respondent, STATE FARM will be referred to with the abbreviation "B-362," or "B-348," to identify the appropriate Respondent Brief.

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, 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.

A. Respondent, STATE FARM, in its Brief on the merits, disputes the contention of both NATIONAL LINEN and BAYLES, that the decision of the Fourth District Court of Appeals, in interpreting F.S.A. §627.727(1), as above, is abhorent to the public policy of the State of Florida. STATE FARM contends that:

> ...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 of the Florida Statutes, in any way, violates the spirit and intent of that statute. ... (B-348, pg. 9).

As fully set forth in the Brief of Petitioner, NATIONAL LINEN in the herein case, as well as the Briefs in Case No: 66,348 of BAYLES, and the amicus brief of the Academy of Florida Trial Lawyers, the holding of the Fourth District Court of Appeals is indeed contrary to the public policy of the State of Florida. As stated by the Fourth District Court of Appeals in Boulnois vs. State Farm Mutual Automobile Insurance Company, 286 So.2d 264 (Fla. 4 DCA 1973):

> It has long been the public policy of the State of Florida to require uninsured motor ist protection in automobile policies written in this state to afford the public generally the same protection that the public would have had if the uninsured motorist had carried personal 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. Id., at 266, see, also, Curtin vs. State Farm Mutual Automobile Insurance Company, 449 So.2d 293 (Fla. 5 DCA 1984), Brown vs. Progressive Mutual Insurance Company, 249 So.2d 429 (Fla. 1971), Standard Accident Insurance Company vs. Gavin, 184 So.2d 299 (Fla. 1 DCA 1966).

Permitting the uninsured motorist carrier to totally escape liability merely by the presence of another tortfeasor who has personal liability coverage equal to or greater than the UM coverage provided the insured, regardless of his level of culpability, encourages insurance carriers to bargan in bad faith. In fact, as a result of this decision, there is no incentive for insurance companies to bargain in good faith, for if there is even the slightest possibility that another tortfeasor is culpable to even the smallest degree, the insurer would be able to escape liability. Consequently, they would force the insured to exhaust all possible remedies against all possible tortfeasors before they would admit coverage and submit to binding arbitration.

As justification for its argument that the opinion of the Fourth District Court of Appeals does not encourage bad faith, STATE FARM opines:

> ...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 the policy provisions by §627.428, Florida Statutes [providing for attorneys' fees] and §624.155, Florida Statutes [providing civil remedies in cases of insurer misconduct]. (B-362, pg. 4).

STATE FARM reasons that since there are statutory provisions guarding against bad faith, that if an insurer were to act in bad faith by, for example, denying arbitration, the insured has adequate remedies at law. In essence, Respondent suggests that the insured should incur the further time and expense of additional litigation to prove bad faith on the part of the insurer, in order to recoup attorneys' fees and additional relief recoverable under these statutes, while the very purpose of arbitration is to avoid lengthy, drawn-out court proceedings, by resolving these matters in the most inexpensive and least time- consuming ways possible.

Furthermore, it would appear from the District Court's opinion, that if the insurer can show that there was the possibility, no matter how slight, that another tortfeasor was involved, the insurer would have proper grounds to deny arbitration, destroying any claim of bad faith the insured might have against it. The insured would be forced to incur the unnecessary time and expense that arbitration and Florida Statute 627.727(1) were designed to prevent. Accordingly, the argument of STATE FARM is without basis.

Finally, it is suggested by the Respondent that the entire argument of BAYLES, NATIONAL LINEN and the Academy of Florida

Trial Lawyers are without merit, because the Fourth District Court of Appeals did not specifically rule that an insurer could escape arbitration by forcing the insured to seek judgment against all other possible tortfeasors, and also, that the Appellate Court's decision was meant to be restricted to its facts. STATE FARM contends:

> ...Their argument [Plaintiffs'] 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. This is not the issue here, nor was it the issue before the District Court of Appeals. ...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 tortfeasors.' (B-348, pg. 2).

The contentions of STATE FARM have no basis whatsoever in law or in fact. While the District Court did not <u>specifically</u> rule that an insurer can escape arbitration by forcing insureds to seek judgment against real or imagined joint tortfeasors, and surely did not intend such a result, its decision nevertheless clearly creates such a result. In fact, Petitioners contend that the Fourth District Court of Appeals could not possibly have intended such a result, as it is contrary to the public policy of the State of Florida, the argument which forms the basis of this appeal.

STATE FARM is attempting to diffuse the true issue here, which is not whether the Court specifically decided whether insurers could escape arbitration by first forcing injured plain-

tiffs to seek judgment against real or imagined joint tortfeasors, but rather, whether the decision rendered by the Fourth District Court of Appeals does, in fact, create this result. For the reasons advanced in the Brief of the Petitioners, it clearly does, and therefore, it should be reversed.

Further, the holding of the Fourth District Court of Appeals was not, as Respondent argued, intended to be limited to the facts of the case, for if it were, that court would obviously not have seen the need to certify the question as one of great public importance to this Court. By so certifying it, the Fourth District Court of Appeals voiced its concern that the issue which it had decided, could have extremely important and far-reaching effects within the State of Florida, and that a definitive ruling by this Court is necessary to best serve the interests of the citizens of this State. Accordingly, Respondent's contentions that this decision was meant to apply solely to the facts of this case have no basis whatsoever in fact, and is specifically controverted by the actions of the Fourth District Court of Appeals in certifying the question.

B. Petitioner responds to specific allegations of STATE FARM in Case No: 66,362, as follows:

1. Respondent contends that Petitioner misapplied the case of Kennelworth Insurance Company vs. Drake, 396 So.2d 836 (Fla. 2 DCA 1981) to the present situation. Petitioners cited this case for the proposition that the UM coverage available to the insured is not affected by the fact that there may be more than one tortfeasor involved. Respondent contends that the

Second District Court of Appeals merely meant that the uninsured motorist carrier's exposure would not be increased, regardless of the number of tortfeasors involved. This statement of STATE FARM is clearly inapplicable to the argument advanced by the Petitioners. It is common sense that a carrier's exposure cannot be increased beyond its applicable coverage, regardless of who is involved in the accident. In Kennelworth, the Court was attempting to determine the amount of UM coverage available to the insured under two separate insurance policies. The Second District Court of Appeals decided that the insured was entitled to the full uninsured motorist coverage under both policies, as the coverage available to the insured was not affected by the fact that there was more than one tortfeasor involved.

This holding is clearly on point with the argument advanced by the Petitioner, that the fact that there was more than one tortfeasor involved should not have prevented BAYLES from receiving the full limits of UM coverage under the STATE FARM policy. Whether or not the UM coverage available to Mrs. BAYLES exceeded the total liability coverage available to her, is immaterial here, just as the Second District Court of Appeals determined it was immaterial in Kennelworth.

2. STATE FARM next suggests that it is curious that NATIONAL LINEN, which is a tortfeasor, should advance the argument that the public policy of the State of Florida is violated by the decision under review in that the UM insurance coverage is designed for the benefit of insured persons, and not for the benefit of insurance companies or for motorists who cause damage

to others. NATIONAL LINEN does not contest that it was a jury found tortfeasor. However, NATIONAL LINEN was found to be only 20% negligent, as compared to the 80% negligence on the part of the uninsured motorist, TOOLEY. NATIONAL LINEN is advancing the same argument as BAYLES, and has argued that the statute should be interpreted for the benefit of BAYLES, and not necessarily in favor of a motorist who caused damage to others. The public policy of the State of Florida would not, in any sense, be violated if the statute were interpreted, as required, for the benefit of the insured BAYLES, which would also indirectly benefits NATIONAL LINEN. In any event, regardless of whether a proper interpretation of F.S.A. 627.727(1) would benefit NATIONAL LINEN, it is clear that this statute was intended to benefit BAYLES, and on that basis, the decision of the Fourth District Court of Appeals should be reversed.

3. STATE FARM alleges that the effects of this decision, advanced by NATIONAL LINEN, wherein insurers are encouraged to act in bad faith, wherein an insured might be encouraged to reduce his liability coverage and/or insurers being encouraged to increase their premium rates, are likewise without merit. Petitioner vehemently disputes these contention of STATE FARM.

The scenario set forth by NATIONAL LINEN was advanced merely to illustrate that the decision of the Fourth District Court of Appeals could have varied and wide-ranging effects on insurance coverage in general, and UM coverage in particular, in the State of Florida. The gist of Petitioners' argument is that a whole "Pandora's box" could be opened as a result of this decision.

It is therefore imperative for this Court to definitively establish a rule of law, in accordance with the public policy of the State of Florida, which would prohibit the possibility that scenarios of this type would be allowed to occur.

4. STATE FARM also suggests that the plethorea of cases cited by Petitioners from numerous other jurisdictions are not binding on this Court, and therefore, should not be considered. These authorities have been cited to this Court to illustrate that in nearly every jurisdiction in the United States, which has a public policy similar to or identical to that of the State of Florida, the very issue involved herein was decided in the manner proposed by the Petitioners, and contrary to the position advanced by the Fourth District Court of Appeals. While these cases are not binding on this Court, they reflect sound, reasoned opinions resulting from extensive review of these issues, and the weighing of the possible effects thereof. NATIONAL LINEN believes that these cases show the wisdom and propriety of the arguments advanced by the Petitioners, and should be used as a guide or persuasive material to be considered by this Court in rendering its decision on this issue, which is similar to or identical to the issues decided by the high courts of numerous other jurisdictions.

5. Finally, STATE FARM takes issue with NATIONAL LINEN's contention that it has been deprived of equal protection and fundamental due process by the decision of the Fourth District Court of Appeals. NATIONAL LINEN justifiably relied on the finding of the trial court that UM coverage existed under the

STATE FARM policy, and proceeded to trial in accordance with that ruling, realizing that its potential liability, if any, was minimal, and that STATE FARM would be responsible for the majority of any verdict.

As expected, NATIONAL LINEN was found only to be 20% negligent, and STATE FARM, standing in the shoes of TOOLEY, responsible for the remaining 80% of the award. Naturally, BAYLES could collect all of the verdict from NATIONAL LINEN or from STATE FARM, with the other given the opportunity to recoup its excessive payment from the other tortfeasor. The decision of the Fourth District Court of Appeals effectually releases STATE FARM and seeks to hold NATIONAL LINEN liable for 100% of the award, when it was only, at best, found to be 20% negligent.

Both STATE FARM and NATIONAL LINEN were given due process at the trial level, the trial court determined coverage under the policy, and the jury returned a proper verdict. STATE FARM, after inviting such decision, is released from any and all liability by the Fourth District Court of Appeals, and NATIONAL LINEN is now subject to the untenable position of total liability for the award, when its actual negligence was found to be merely 20%.

NATIONAL LINEN submits that at the very least, the Fourth District Court of Appeals should have ordered a new trial, in order to protect the rights of NATIONAL LINEN, as it certainly would have proceeded differently, if it had been determined that BAYLES had no UM coverage under the STATE FARM policy. Accordingly, if this Court affirms the District Court's finding that

the trial court erroneously ruled that UM coverage existed, this unforeseen error forces the Petitioner to make contribution beyond its own pro rata share of the total liability, which is a denial of fundamental due process. See, F.S.A. §768.312(b), F.S.A. §768.313(a), and Pensacola Interstate Fair, Inc. vs. Popovich, 389 So.2d 1179 (Fla. 1980). Accordingly, fundamental fairness requires that NATIONAL LINEN be given a new trial, or that it be determined that NATIONAL LINEN cannot be liable for more than its pro rata share of the entire liability.

II. WHETHER STATE FARM COMMITTED INVITED ERROR BY DENYING PLAINTIFF'S RIGHT TO ARBITRATION AND REQUESTING THAT THE ISSUES OF UNINSURED MOTORIST COVERAGE AND LIABILITY BE DETERMINED BY THE CIRCUIT COURT.

In response to this argument, the Respondent inaccurately categorizes the argument of the Petitioner. STATE FARM contends that the gist of NATIONAL LINEN's argument is that STATE FARM acquiesced in having the trial court determine both coverage and liability, and that they therefore committed invited error. This is clearly a misstatement by STATE FARM of the position of the Petitioner.

As indicated by the transcript excerpts included in Petitioners' Brief, STATE FARM did not merely acquiesce to having the trial court determine both coverage and liability, but in fact, REQUESTED that the trial court dispose of these issues, after trial counsel for NATIONAL LINEN had indicated that the proper course of action would be to arbitrate the various issues. In Florida, under the doctrine of invited error, a party cannot successfully complain of an error for which he, himself, is responsible, or of a ruling that he has invited the trial court to make. County of Volusia vs. Nyles, 445 So.2d 1043 (Fla. 5 DCA 1985), Bould vs. Touchette, 349 So.2d 1181 (Fla. 1977), Hawkins vs. Perry, 1 So.2d 620 (1949), Hunter vs. Employers' Mutual Liability Insurance Company, 427 So.2d 199 (Fla. 2 DCA 1982), Keller Industries, Inc. vs. Morgart, 412 So.2d 950 (Fla. 5 DCA 1981), and Gray vs. Brake, 440 So.2d 1297 (Fla. 5 DCA 1983).

Accordingly, because trial counsel for STATE FARM, Mr. Winburn, requested that the issues of uninsured motorist and

liability be determined by the circuit court, STATE FARM committed invited error, and is estopped from contesting the findings of the trial court on appeal.

CONCLUSION

Petitioners, NATIONAL LINEN and MATTHEW NELSON DRUMMET, submit that the arguments advanced by the Respondent, STATE FARM are without merit, and accordingly, based on the reasons set forth in the Brief of the Petitioners, NATIONAL LINEN SERVICE and MATTHEW NELSON DRUMMET in Case No: 66,362, and the Brief of the Petitioners, SHERYL BAYLES and MARVIN BAYLES in Case No: 66,348, as well as the amicus Brief of the Academy of Florida Trial Lawyers, in Case No: 66,348, that the decision of the Fourth District Court of Appeals be reversed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief of Appellees 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, Ft. Lauderdale, FL 33302; and Jay Halpern, Esquire, Kayfetz, Poses & Halpern, P.A., 44 West Flagler Street, #2400, Miami, FL 33130, this 7th day of March, 1985.

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