OA 8-27-86 047

IN THE
SUPREME COURT
OF FLORIDA

NO. 68,124

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Petitioner,

v.

LOUIS G. PRIDGEN, CANDY PRIDGEN,
ANTHONY SUMNER, and EARLE SUMNER,

Respondents.
/

APPELLEE'S REPLY BRIEF

JOSEPH M. RIPLEY, JR., P.A.

JOSEPH M. RIPLEY, JR., ESQUIRE
128 E. Forsyth Street, Suite 401
Jacksonville, Florida 32202
904/356-6879

Attorney for Appellees/Respondents

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PRELIMINARY STATEMENT

This cause is before the Court to review the decisions of the First District Court of Appeal in Louis G. Pridgen, Candy Pridgen, Anthony Sumner, and Earle Sumner v. Bill Terry's Incorporated, State Farm Mutual Automobile Insurance Company, and Williams Royall, III, 10 F.L.W. 2474 (Fla. 1st DCA November 8, 1985), in which the District Court followed Fireman's Fund Insurance Company v. Boyd, 45 So.2d 499 (Fla. 1950); Collins v. Royal Globe Insurance Co., 368 So.2d 941 (Fla. 4th DCA 1979); Massachusetts Fire and Marine Insurance Company v. Cagle, 214 Ark. 189, 214 S.W. 2d 909 (1948); Reserve Insurance Co. v. Interurban Transit Lines, 105 Ga.App. 278, 124 S.E. 2d 998 (1962); Great American Insurance Co. v. Gusman, 80 Ga. App. 471, 56 S.E. 2d 319 (Ga. Ct. App. 1949); Phaholyothin v. State Farm Mutual Automobile Insurance Co., 104 Ill. App. 3d 322, 432 N.E. 2d 972 (Ill. App. Ct. 1982); Edwards v. State Farm Mutual Automobile Insurance Co., 296 N.W. 2d 804 (Iowa 1980); Modern Sounds & Systems, Inc. v. Federated Mutual Insurance Co., 200 Neb. 46, 262 N.W. 2d 183 (1978).

The parties will be referred to by name, Appellant/-Petitioner as State Farm and Appellee/Respondents as Pridgen and/or Sumner. The following symbols will be utilized:

SYMBOL	EXPLANATION
(R.p.page #)	Record on Appeal
(D.name p.page #)	Deposition from Trial Court

STATEMENT OF THE CASE AND FACTS

William S. Royall, III, (hereinafter referred to as Royall), a defendant in the Trial Court below, was employed by Defendant, Bill Terry's Incorporated as an automobile salesman between the months of June and October, 1982. In August, 1982, Royall induced Pridgen to transfer possession and title to Sumners' 1978 Pontiac Firebird automobile to Royall for the purpose of resale and as a down payment on a new automobile for Pridgen. Pridgen also orally agreed to transfer possession and title of his 1978 Chevrolet Camaro automobile to Royall, with the amount received to be applied as a down payment on a new automobile for Pridgen.

Royall failed to perform his part of the oral agreement and subsequently sold the 1978 Pontiac Firebird and 1978 Chevrolet Camaro, using the proceeds of the sales to pay off his own personal debts, which he had been doing for a number of years previously. (D. Royall, p.10).

On January 21, 1983, Royall pled guilty and was adjudicated guilty of two counts of Grand Theft, pursuant to Section 812.014, Fla. Stat. (R.p.1-15).

Prior to the above, State Farm issued and delivered to Pridgen and Sumner, two policies of automobile liability insurance providing coverage for the 1978 Pontiac Firebird and 1978 Chevrolet Camaro (R.p.28-36). Both policies were in full force and effect at the time of the thefts by Royall. Each

policy contains "Coverage D", providing comprehensive coverage for loss of the vehicle, to include loss caused by theft. Pridgen and Sumner made timely claims for the proceeds of the insurance policies as a result of Royall's theft, but were denied coverage by State Farm based upon an exclusionary clause, stated:

> There is no coverage for:
> * * *
> 3. Loss to any vehicle due to:
> * * *
> d. Conversion, embezzlement or secretion by any person who has the vehicle due to any lien, rental, or sales agreement.

(R.p.28-36).

Pridgen and Sumner filed suit in the Trial Court below, for damages arising out of the theft of their vehicles (R.p.1-15). Subsequent thereto, Bill Terry's Incorporated and State Farm filed Motions to Dismiss (R.p.16-19). Thereafter, Pridgen and Sumner filed a Motion for Default as against Royall, with a default being entered on May 3, 1984 (R.p.22-23), Bill Terry's Incorporated and State Farm thereafter moved for Summary Judgment (R.p.25-27).

State Farm asserted that the policies of insurance excluded coverage when an automobile is voluntarily transferred under a sales agreement and a conversion occurs. The Trial Court entered a Summary Final Judgment as and for State Farm, which was the subject of the District Court's Review.

The issue on appeal was "whether the Trial Court properly decided by summary judgment that the policies' exclusions, as set out above, bar coverage of the losses the Appellants sustained." Pridgen, et al v. State Farm, et al, 10 F.L.W. at 2474 (Fla. 1st DCA November 8, 1985). The District Court found that the exclusionary clause was ambiguous in that, the word "conversion", as applied to the facts at bar, is included in Florida's Anti-Fencing Act Sections 812.012 and 812.037, Fla. Stat. as one means of carrying out a theft. The exclusionary clause is ambiguous, as it does not clearly state whether conversion pertains to a taking which is accomplished by fraudulent inducements. Pridgen at 2474.

In reversing the Trial Court, the District Court stated:

> In the absence of additional language specifying the intent of the insurer, we regard the words used in the exclusionary clause to be ambiguous. Pridgen at 2476.

State Farm thereafter moved the District Court of Appeal for a rehearing, which was denied.

State Farm subsequently filed a jurisdictional brief to the Supreme Court of Florida seeking review of the First District Court of Appeals' decision. This Court accepted jurisdiction of this cause on April 21, 1986, with oral arguments scheduled for Wednesday, August 27, 1986, at 9:00 A.M.

SUMMARY OF ARGUMENT

The First District Court of Appeal correctly followed case law in reversing a summary finding by the lower trial Court that held an exclusion in State Farm's policy of automobile insurance excluded coverage for theft. The District Court ruled that the exclusionary clause was ambiguous in the absence of additional language specifying the intent of the insurer.

State Farm's automobile policy provided comprehensive coverage for theft, yet excluded coverage for conversion pursuant to a sales agreement. In the case at bar, Mr. Pridgen transferred title and possession of his two automobiles to Royall. Royall fraudulently obtained possession of these automobiles by fraud and deceit and was eventually convicted of two counts of grand theft, criminally. Pridgen and The First District Court of Appeal contend that the exclusionary clause is ambiguous in that theft has been included in coverage yet not defined and the types of theft to be excluded are not clearly specified. Further, a thief cannot enter into a contractual sales agreement as the necessary "meeting of the minds" is missing; therefore, if no sales agreement was entered into, no exclusion could have applied.

The District Court correctly applied all relevant case law in determining that the exclusionary clause was ambiguous. Where there is ambiguity in an exclusionary provision, the provisions must be construed in favor of the insured as against

the insurer. The case law applied clearly sets out the principal that no legal sale of an automobile can exist where the taker obtains possession and/or title by fraud. That the fraud would vitiate the entire transaction. And finally, where the term theft is undefined in an insurance policy, the usual understanding accorded to it should be used. The Florida Anti-Fencing Act clearly sets forth the criteria for theft, which includes conversion. State Farm's automobile insurance policy is unclear as to what specific types of conversion are excluded from coverage and therefore an ambiguity exists.

As stated, the First District had three (3) separate grounds for reversal, where only one was needed.

Based on the above, it is clear that the decision under review should be affirmed.

ARGUMENT

1. THE DISTRICT COURT OF APPEAL CORRECTLY REVERSED THE TRIAL COURT'S ENTRY OF SUMMARY JUDGMENT AGAINST THE RESPONDENT/ APPELLEE.

A. **The District Court of Appeal Correctly Ruled That the Exclusionary Clause of the Automobile Insurance Issued by State Farm Was Ambiguous.**

As to State Farm's point A, the District Court found the exclusionary clause to be ambiguous. Counsel for State Farm has implied that the District Court is re-defining the term conversion and rewriting to their exclusionary clause. However, the District Court points out clearly that State Farm included coverage for theft while in the same breath excluding coverage for conversion. Conversion is a form of theft under Florida's Anti-Fencing Act, Section 812.014(1)(a)&(b), Fla. Stat. as stated:

> (1) A person is guilty of theft if he knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either temporarily or permanently:
> (a) Deprive the other person of a right to the property or a benefit therefrom.
> (b) Appropriate the property to his own use or to the use of any person not entitled thereto. (emphasis added)

Section 812.012(2)(c) and (d)1. defines obtains or uses as:

> (c) Obtaining property by fraud, willful misrepresentation of a future act, or false promise.
> (d)(1) Conduct previously known as stealing; larceny; purloining, abstracting; embezzlement;

misapplications; misappropriation; conversion; or obtaining money or property by false pretense, fraud, or deception; ...

Royall's theft of the two (2) automobiles was by a fraudulent or willful misrepresentation of a future act. State Farm does not define theft in their policy of insurance and therefore a reasonable insured is not clear as to what State Farm excludes from coverage. Where there is any ambiguity in exclusionary provisions, such provisions must be construed in favor of an insured as against the insurer who chose the language. Fireman's Fund Insurance Co. v. Boyd, 45 So.2d 499 (Fla. 1950); Collins v. Royal Globe Insurance Co., 368 So.2d 941 (Fla. 4th DCA 1979).

As the First District Court of Appeal in the case subjudice holds, the exclusionary clause is not free from ambiguity and does not "clearly exclude loss caused by a situation wherein one, by false pretense is entrusted by the owner with both possession and title to an automobile for the purpose of sale." Pridgen at 2475.

Counsel for State Farm cites its case of Balogh, Inc. v. Pennsylvania Millers Mutual Fire Insurance Co., 307 F.2d 894 (5th Cir. 1962), in its proposition that the intent of the party delivering possession is critical. As pointed out on previous occasions, Balogh, cannot even remotely apply to the case at bar. The 5th Circuit relied upon an exclusion in the insured's insurance policy which excluded coverage for "loss ... caused by or resulting from sabotage, theft, conversion, or other act or

omission of a dishonest character." (emphasis added). Balogh at 896. It is clear that the policy specifically excluded the state of mind of the thief. Further, the issue in Balogh was whether property was entrusted or delivered, not as in the case at bar, whether the policy of insurance was ambiguous in including theft and excluding conversion, or in other words, whether the exclusionary clause applied "to situations wherein a sales agreement is the result of the would-be purchaser's fraudulent inducements, or to situations in which a vehicle is first legally obtained and then is later converted by the intended buyer.". Pridgen at 2475.

As to the Paris v. State Farm Mutual Automobile Insurance Co., 365 So.2d 439 (Fla. 3d DCA 1978), that State Farm relies so heavily on, the Pridgen decision by the First District Court clearly states that Paris is distinguishable from the facts subjudice. Paris contained no theft inclusion for coverage, only whether a loss had been created by the situation involved. Loss was defined as a direct and accidental loss of or damage to a motor vehicle. The 3rd District found a loss not to have occurred. This however is clearly in conflict with the broad construction placed upon theft, where undefined in an insurance policy. How can an insurance policy include theft, yet exclude conversion when left undefined? Paris, further appears to imply that there was no deception regarding the transaction that was in compliance with the agreement between the parties. In the case at bar, there was a deception regarding the transaction. Royall

had no intention to use the proceeds from the sale to purchase an automobile for Pridgen, but to use the monies for his own debts. (D. Royall,p.10 & 24). Where a thief intends to steal at the time of possession of property and the representations made were to induce delivery, the thief can never acquire lawful possession of the vehicle. Collins v. Royal Gobal Insurance Co., 368 So.2d 941 (Fla. 4th DCA 1979) at 942.

Paris conflicts with Collins, in that, in the Paris decision it appears that the insured was found to have given possession to the abscunder. Yet, if the Court had followed the Collins case, the question would first be whether the abscounder intended to steal the vehicle from the onset, as in the case at bar and a different decision would have been reached.

Had State Farm wished to exclude certain types of loss it could have done so unambiguously by excluding loss from any fraudulent scheme, trick, or other such language.

B. The District Court of Appeal Correctly Relied Upon Its Cited Cases from the State of Florida and Sister States.

Counsel for State Farm appears to be under the delusion that the First District Court has misinterpreted every case they cited and followed. He misunderstands their well reasoned logic.

In Fireman's Fund Insurance Co. v. Boyd, 45 So.2d 499 (Fla. 1950), the First District Court only applied the rule that where theft is undefined in a clause providing coverage for theft, "theft should be given the usual understanding afforded it by persons in the ordinary walks of life.". Pridgen at 2475.

That where there is any ambiguity in an exclusionary provision, the provision must be construed in favor of the insured. Fireman's Fund at 501. This point is clearly the law in Florida, as previously cited. In Great American Insurance Co. v. Gusman, 80 Ga. App. 471, 56 S.E. 2d 319 (Ga.Ct.App. 1949), the policy of insurance under discussion included theft and excluded conversion under a bailment lease or conditional sale, as in the case at bar. The Court was quite clear in its decision that a jury might find that the person did not gain possession under a bailment lease or conditional sale, but that possession was obtained by trick or fraud, making the person guilty of larceny. The original intent of the person obtaining possession was the issue. The issue was not lawful possession as State Farm implies, but whether one had some interest in the property. Where coverage exists for theft but not losses due to conversion or embezzlement by any person in lawful possession of the automobile under a bailment lease, conditional sale, mortgage or other encumbrance, "the exclusionary clause will only apply to one having some interest in the property." Gusman at 319.

The Pridgendecision by the District Court also cited the case of Reserve Insurance Co. v. Interurban Transit Lines, 105 Ga. App. 278, 124 S.E. 2d 498 (1962), which State Farm fails to argue against. There the policy of automobile insurance included coverage for theft but excluded coverage for loss due to conversion, embezzlement or secretion by any person in possession of the automobile under a bailment lease, conditional sale,

purchase agreement, mortgage or other encumbrance.". Reserve at 499. The Court held that where the original taking was unlawful and a theft, the thief acquired no interest in the automobile and therefore the exclusionary clause would not apply. This case is precisely on point to the case at bar. A thief obtained possession of an automobile pursuant to a rental agreement and the automobile was never seen from again. The insurance company argued that on the complaint's face the loss of the automobile was due to a conversion and therefore fell within the exclusionary clause of the policy. This the Court did not agree with as set forth hereinabove. We regret that State Farm's counsel failed to share his unique reasonsing analysis regarding this case.

Massachusetts Fire & Marine Insurance Co. v. Cagle, 214 Ark. 189, 214 S.W. 2d 909 (1948), was another case wherein theft was included in coverage and the exclusionary clause stated "this policy does not apply: ... to loss due to conversion, embezzlement or secretion by any person in lawful possession of the automobile under a bailment lease, conditional sale, mortgage or other encumbrance." Cagle at 909. Lawful possession was not the entire issue in Cagle as counsel would lead one to believe. The insured delivered to a thief an automobile, yet at the time of delivery the thief knew the check for payment for same would be worthless. The Court held that there was never actually any sale

of the automobile, in that the thief's fraud vitiated the entire transaction. Again, this is precisely the point alluded to throughout this appeal.

Again, in Baxter Motors Inc. v. Iowa Hardware Mutual Insurance Co., 15 Ill.App.2d 524, 526, 146 N.E. 2d 797 (1958), the District Court did not interpret the holding of the case. The First District Court only uses Baxter as an example on how to place language in an exlusionary clause so that it will be unambiguous. The clause under discussion in Baxter was quite clear in excluding "loss resulting from either the insured voluntarily parting with title and possession of any automobile if induced so to do by any fraudulent scheme, trick, device, false pretense, or from embezzlement, conversion, secretion, theft..." (emphasis added). Baxter at 797. Theft and conversion are both excluded.

In Modern Sounds & Systems, Inc. v. Federated Mutual Insurance Company, 200 Neb. 46, 26 N.W.2d 183 (1978), the insured transferred title to a thief who wrote a check later dishonored. The policy of insurance included coverage for any loss caused by theft and excluded coverage for loss "due to conversion ...under a bailment lease, conditional sale ... or other encumbrance." Modern Sounds at 185. The Court held that "An insurance policy should be interpreted in accordance with reasonable expectations of the insured at the time of the contract....In cases of doubt, it is to be liberally construed in favor of the insured." Modern Sounds at 184. Again, there is no

definition of theft in the policy and its definition would therefore be much broader in meaning than conversion. Where an insured is fraudulently and wrongfully induced to transfer his automobile to another, a theft has occurred. The critical issue in the case was the intent of the thief at the time he took title.

Finally, State Farm goes off on a contorted tangent in trying to argue that there are different kinds of conversion, based upon the criminal intent involved not as pointed out by the District Court that to include theft and exlude conversion an ambiguity is created. The First District Court holds, quite correctly that in criminal theft, there must be a felonious intent, regardless of whether formally labled larceny, conversion or embezzlement. See Adams, III v. State of Florida, 443 So.2d 1003 (Fla. 2d DCA 1983). Since a conversion can be by criminal or noncriminal means, it is unclear under State Farm's policy which they are trying to exclude in view of the inclusion of theft in the policy coverage. Pridgen at 2476.

Under Florida's Anti-Fencing Act of 1977, it is clear that there must be an intent by the wrongdoer to obtain or use the property of another, which includes a conversion. Section 812.014 and 812.012, Fla. Stat. The exlusionary clause under review fails to specify what types of theft are excluded. State Farm would have one exclude all types of theft if their reasoning were correct. However, it is quite clear that they included the term theft, which as previously discussed would include the

broadest definition allowed. Therefore the First District Court could not determine whether State Farm's policy would exclude any conversion or only non-criminal conversion. Pridgen at 2476.

State Farm wrote the policy and they had the means of specifically stating what was to be included and excluded. Where they have failed to do so, as here, the exclusionary clause is deemed ambiguous. Fireman's Fund Insurance Co. v. Boyd; Collins v. Royal Globe Insurance Co., 45 So.2d 499 (Fla. 1950).

State Farm appears to try and distinquish Edwards v. State Farm Mutual Automobile Insurance Co., 296 N.W. 2d 804 (Iowa 1980); Modern Sounds & Systems, Inc. v. Federated Mutual Insurance Co., 200 Neb. 46, 262 N.W. 2d 183 (1978); Collins v. Royal Globe Insurance Co., 368 So.2d 941 (Fla. 4th DCA 1979), one does not exist. In Edwards, title and possession of an automobile was delivered to a thief in return for a check, which was later returned insufficient funds. The policy insured against theft but "excluded coverage if the vehicle was under a conditional sale, purchase agreement, mortgage, or other encumbrance". Edwards, at 805. Theft was not defined in the policy of insurance at issue. Where the meaning of an exclusion is not clear, it must be interpreted most favorably to the insured. Edwards at 806, 809. Edwards held that the exclusion of coverage subject to a "purchase agreement" contemplates possession of the automobile by one party and an

interest evidenced by either title or lien or encumbrance by the other. Edwards at 808. In the case at bar, the thief did not obtain any interest in the automobiles.

Phaholyothin, involved the delivery of an automobile and title to a thief, who in turn gave the insured a forged check. The policy of insurance provided for theft and excluded coverage for "Loss to any vehicle due to: (d) Conversion, embezzlement or secretion by any person who has the vehicle due to any lien, rental, or sales agreement." (emphasis added) Phaholyothin at 973. The Court noted, as in the case at bar, theft was not defined in the policy. The definition of an ambiguous writing was "one capable of being understood in more senses than one.", as in the case at bar. Phaholyothin at 974. The Court held that "although the transfer of possession may be classified as a conversion, it definitely was not a conversion by a person who had "the vehicle due to any lien, rental or sales agreement" as required by the exlusion. And, although a conversion, the taking was definitely a theft." Phaholyothin at 975. Thus, the Court found the exclusionary clause not applicable.

A thief is a thief and if certain classes of thieves or types of theft are not to be covered, the insurer must specifically exclude such losses in clear language. Collins v. Royal Globe Insurance Co., 368 So.2d 941 (Fla.4th DCA 1979).

C. A Theft Cannot Enter Into A Sales Agreement When The Intent of the Parties Differ.

In the case of Security Insurance Company of Hartford v. Investors Diversified Limited, 407 So.2d 314 (Fla. 4th DCA 1981), a customer/thief requested the dealer/insured to be allowed to try out a fork lift before purchase. The dealer allowed the fork lift to be taken by the customer's agent. The fork lift was never returned. It was held that it was never the dealer's state of mind to entrust the fork lift to a thief, and the controlling law in Florida is Collins v. Royal Globe Insurance Company, 368 So.2d 941 (Fla. 4th DCA 1979), stating again a "thief is a thief." Security at 316. Consent in handing over property must be unclouded by fraud or duress. It is more than the voluntary handing over of the property. Security at 316. As with the case at bar, Appellants never intended to enter into a sales agreement with a thief, could not have consented to the transaction and therefore no valid sale could have existed where the transfer of the vehicles was induced by fraudulent means.

"A contract is an agreement between two or more persons which creates an obligation to do or not to do a particular thing." Black's Law Dictionary (5th Ed. 1979) at 291. One of the essential elements in a contract is that there must be a 'meeting of the minds' between the two contracting parties. Where one party fraudulently misrepresents his intent to perform his obligation to the other unknowing party, who justifiably relies upon the misrepresentations, a 'meeting of the minds' cannot exist.

Since it was never the state of mind of the Appellants to enter into an agreement with a thief, there was no mutuality of agreement, and hence no contract.

CONCLUSION

The First District Court of Appeal correctly ruled that the exclusionary clause under State Farm's Insurance Coverage was ambiguous. Where the term theft is undefined in the policy, a broad definition is to be given to the term. It is unclear in State Farm's exclusion of conversion pursuant to a sales agreement as to whether this exclusion refers to criminal and/or non-criminal conversion where theft would require a felonious intent and is included in coverage.

A thief cannot enter into a sales agreement. Where the meeting of the minds between the parties do not exist, a sales agreement cannot be entered. It is well understood that Pridgen would never had entered or consented to any agreement with a thief.

The First District Court correctly interpreted relevant case law in reversing the trial court's order granting summary judgment and we would respectfully request that this Court affirm the decision of the First District Court of Appeal herein.

Respectfully submitted,

JOSEPH M. RIPLEY, JR., ESQUIRE
Attorney for Appellees/Respondents
128 E. Forsyth Street, Suite 401
Jacksonville, Florida 32202
904/356-6879

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Harris Brown, Esquire, and Robert B. Guild, Esquire, Attorneys for Appellant, 1500 American Heritage Life Building, Jacksonville, Florida 32202, by mail, this 30th day of May, 1986.

JOSEPH M. RIPLEY, JR., ESQUIRE