O/a 8-27-86

SUPREME COURT OF FLORIDA

Case No. 68124

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner,

vs.

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

Respondents.
_____/

PETITIONER'S REPLY BRIEF

MATHEWS, OSBORNE, McNATT, GOBELMAN & COBB

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ARGUMENT

I. THE DISTRICT COURT ERRED IN REVERSING THE TRIAL COURT'S ENTRY OF SUMMARY JUDGMENT IN FAVOR OF STATE FARM.

A. THE DISTRICT COURT OF APPEAL ERRONEOUSLY RULED THAT THE EXCLUSIONARY CLAUSE IN QUESTION WAS AMBIGUOUS.

The exclusionary language in question is clear and unambiguous and is not subject to the interpretation given it by either the District Court of Appeal or the respondent. The language provides coverage for the general category of loss caused by theft but specifically excludes coverage for loss due to conversion by a person who has the automobile due to a sales agreement.

The respondent has argued that inclusion of coverage for theft cannot be consistent with the exclusion of coverage for conversion. Respondent argues that because conversion is a form of theft and because theft is not defined in the policy of insurance, a "reasonable insured is not sure as to what State Farm excludes from coverage."

It is respectfully submitted that the exclusionary language is clear and unambiguous. While the general category of theft is within the coverage afforded by the policy, the specific subcategory of theft known as conversion is specifically and unambiguously excluded from coverage. While the District Court of Appeal placed great weight on a

distinction between criminal and non-criminal conversion, the policy language in question makes no such distinction. Accordingly, any conversion is specifically excluded from coverage and no ambiguity exists. The district court's injection of a requirement of lawful possession for the application of the conversion exclusion constituted error.

The policy language excludes coverage for all losses caused by conversion, regardless of the nature of the possession or the intent of the party committing the conversion. The Fifth Circuit Court of Appeal decision in Balough, Inc. v. Pennsylvania Millers Mutual Fire Insurance Co., 307 F.2d 894 (5th Cir. 1962), supports this conclusion. The court therein specifically rejected the argument that the intent of the party receiving the property converted was critical. Id. at 895-6. The respondents' attempt to distinguish Balough cannot change the court's holding. Although, as stated by respondents, the policy in Balough excluded coverage for loss caused by theft, it also excluded coverage for loss caused by conversion. The court held that the issue was whether the subject property was entrusted or delivered to the person who eventually effected the theft or conversion and not whether the person receiving the property conceived of the dishonest plan before or after he received possession of the property. Id. at 897.

Application of the rule of law enunciated in Balough to the facts of the instant case mandates reversal of the

District Court of Appeal decision under review. As stated in Balough, the state of mind of the person effecting the conversion is immaterial. The sole question is whether the property was entrusted or delivered to the person eventually committing the conversion. If the property is delivered or entrusted to another person, any resulting loss is specifically excluded from coverage. The court in the instant case created an ambiguity by interjecting into the exclusionary language a requirement that the converter obtain lawful possession of the property. By so doing, the court improperly focused upon the intent of the converter and not the intent of the person entrusting or delivering the property as required by Balough.

Similarly, the respondents' attempt to distinguish the Third District Court of Appeal decision in Paris v. State Farm Mutual Automobile Insurance Co., 365 So.2d 439 (Fla. 3d DCA 1978), is erroneous. As stated by the First District Court of Appeal in the instant case, Paris and the instant case are in direct and express conflict. In Paris, the court applied a conversion exclusion similar to that in the instant case to exclude coverage for a loss caused by the conversion of the insured vehicle by a salesman under a conditional sale agreement. The court in Paris focused on the intent of the insured to voluntarily transfer possession of the vehicle to the salesman for the purpose of resale. Similarly, in the present case there can be no doubt that the Pridgens and

Sumners voluntarily transferred their vehicles to William Royal for resale. Accordingly, the facts of the present case clearly fall within State Farm's exclusion and are directly analogous to the facts presented in the Paris case.

Contrary to respondents' assertions, the Paris case did not address whether there was a deception regarding the transfer of possession of the subject vehicle to the salesman who ultimately committed the conversion. The court therein focused on the intent of the insured, rather than the intent of the salesman in obtaining possession of the automobile.

Further, the respondent erroneously argues that the Paris decision is in conflict with Collins v. Royal Globe Insurance Co., 368 So.2d 941 (Fla. 4th DCA 1979). Said argument is incorrect in that the exclusionary language interpreted in Collins specifically excluded coverage for losses due to conversion by any person in lawful possession of the automobile. 368 So.2d at 942. In the instant case, as in Paris, the subject policy language does not restrict the exclusion to losses caused by conversion by any person in lawful possession. Rather, the exclusion specifically and unambiguously excludes losses due to conversion by any person who has the automobile under any sale agreement. Accordingly, the cases are distinguishable. The district court's reliance upon Collins in finding that the exclusionary clause in the instant case only excluded coverage where the converter has lawful possession of the vehicle was, therefore, erroneous.

B. THE DISTRICT COURT OF APPEAL ERRONEOUSLY RELIED UPON CITED CASE AUTHORITIES.

The district court clearly overlooked the specific language used in the exclusionary clauses in the cases cited in support of its decision in the instant case. It is submitted that all but one of the cited cases support petitioner's position that the subject exclusion applies to exclude coverage of any conversion when the converter has the vehicle under a sales agreement.

Although the District Court herein cited Fireman's Fund Insurance Co. v. Boyd, 45 So.2d 499 (Fla. 1950), for the proposition that the word "theft" should be given the usual understanding accorded to it by persons in ordinary walks of life, the court appears to have overlooked the exclusionary language at issue which is materially different from that in the instant case. Specifically, the exclusion in Boyd excluded losses due to conversion by any person in lawful possession of the automobile under a bailment lease, conditional sale or other encumbrance. 45 So.2d at 500. As stated above, in the instant case the exclusion did not require a lawful possession as interpreted by the district court.

Similarly, in Great American Insurance Co. v. Gusman, 56 S.E.2d 319 (Ga. 1949), the policy of insurance excluded coverage for losses due to a conversion by any person in lawful possession of the automobile under a bailment, lease,

conditional sale or other encumbrance. 56 So.2d at 319. As stated above, the policy language in the instant case does not require the converter to have lawful possession of the vehicle. Rather, coverage is excluded for all losses due to conversion, whether possession is obtained by lawful or unlawful means.

The respondents have subtly pointed out that the petitioner has not addressed the district court's reliance upon the case of Reserve Insurance Co. v. Interurban Transit Lines, 124 So.2d 498 (Ga. 1962). In that case, the court rejected the argument that the loss of the automobile was due to a conversion and therefore within the exclusionary clause of the policy. The court held that the original taking was unlawful and constituted a theft and, therefore, the alleged thief did not acquire any interest in the automobile and the loss was not due to a conversion. Id. at 500.

The petitioner is unable to meaningfully distinguish Reserve from the facts of the instant case. Petitioner does, however, respectfully submit that, like the district court decision in the instant case, Reserve was incorrectly decided. The correct interpretation of the policy language in question is governed by the Balough and Paris decisions.

The respondents also contend that Baxter Motors, Inc. v. Iowa Hardware Mutual Insurance Co., 146 N.E.2d 797 (Ill. 1958), supports the district court holding. Such contention is

incorrect. The Baxter Motors decision supports a finding that the loss considered herein is specifically excluded by the unambiguous conversion exclusion language. In Baxter Motors, the court expressly held that loss due to a conversion by a person entrusted with possession of an automobile is excluded, notwithstanding the fact that possession is fraudulently induced. Id. at 800. The Baxter Motors court rejected a requirement of lawful possession and supports the trial court's grant of summary judgment on behalf of petitioner in the instant case.

Contrary to the assertion of the respondents, the case of Modern Sounds & Systems, Inc. v. Federated Mutual Insurance Co., 26 N.W.2d 183 (Nev. 1978), does not lend support to the district court's decision. In that case, the loss at issue was caused by the conversion of an automobile by the buyer in a direct sale as opposed to a middle man in a resale situation. Accordingly, Modern Sounds is clearly distinguishable from the instant case wherein State Farm sought to exclude losses due to conversions under resale situations.

In response to the respondents' claim that the petitioner "goes off on a contorted tangent in trying to argue that there are different kinds of conversion," the petitioner asserts that it, in fact, criticized the district court's perceived distinction between criminal and non-criminal conversion. Petitioner asserted that there was no material

distinction between criminal and non-criminal conversion as applied to the exclusion at issue.

Petitioner submits that the plain meaning of the contractual language excluding coverage for losses caused by conversion excludes all losses caused by conversion. The district court erred in placing significance on the moment at which a converter develops the wrongful intent to convert. Petitioner submits that the issue of intent on the part of the converter is irrelevant to a determination as to whether a conversion has occured for purposes of the exclusion under this policy. The district court's finding of an ambiguity based upon its perceived distinction between criminal and non-criminal conversion is unsupported by law and constitutes error.

Petitioner reasserts that the district court misinterpreted Phaholyothin v. State Farm Mutual Automobile Insurance Co., 432 N.W.2d 972 (Ill. App. Ct. 1982), Edwards v. State Farm Mutual Automobile Insurance Co., 296 N.W.2d 804 (Iowa 1980), and Modern Sounds, supra. In each of the cited cases, the plaintiff delivered possession of an automobile to a buyer who wrongfully refused to pay for the vehicle. None of the cases involved a transaction whereby a converter was a party who was given the vehicle for the express purpose of resale. Edwards, Modern Sounds and Phaholyothin each hold that an exclusion, similar to that in the present case, is not

applicable when the converter is a buyer in a direct sale as opposed to a "middle man" in a resale situation. Accordingly, these cases correctly point out that the exclusion in the instant cas is intended to apply to the increased risk when a vehicle is transferred to a third party for the purpose of resale. This is exactly the factual situation presented in the instant case wherein Pridgen and Sumner transfered their vehicles to William Royal for resale. Clearly, the courts in Edwards, Modern Sounds and Phaholyothin would have found the exclusion to be applicable in the instant case.

C. THE DISTRICT COURT ERRED IN HOLDING THAT THE CONVERSION EXCLUSION WAS APPLICABLE TO NON-CRIMINAL CONVERSION, BUT WAS NOT APPLICABLE TO A CRIMINAL CONVERSION.

The final point made by the respondents is that the respondents were fraudulently induced into transferring the vehicles. Accordingly, it is asserted that there was no valid sales agreement and that the exclusion does not apply.

In making this argument, the respondents fail to recognize that a fraudulently induced transfer of possession can result in a conversion. In Balough v. Pennsylvania Millers Mutual Fire Insurance Co., supra, the court held that when a party voluntarily and intentionally turns possession of property over to another, the property has been entrusted to another as that term is used in an exclusion for conversion by a person entrusted with the property. Under this analysis, the

fact that a party has fraudulently induced the transfer of the property is immaterial to the application of the exclusion.

Further, a conversion occurs whether the converter forms the intent to convert at the time possession is transferred or at a later time. As to the applicability of the exclusion in the instant case, the precise moment at which the intent to convert is formed is immaterial. In either case, a conversion has occurred and coverage is unambiguously excluded.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail to Joseph M. Ripley, Jr., Esquire, 128 East Forsyth Street, Jacksonville, Florida 32202 this 18th day of June, 1986.

Attorney