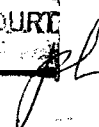


IN THE SUPREME COURT OF FLORIDA

FILED

MAR 7 1988

CLERK SUPREME COURT

BY  Deputy Clerk

JOHN CARGUILLO, as Personal
Representative of the Estate
of JOHN JOSEPH CARGUILLO, deceased,

Petitioner,

vs.

CASE NO. 71,799

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Respondent.

ANSWER BRIEF OF RESPONDENT ON CERTIFIED QUESTION

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STATEMENT OF THE CASE

We adopt the Statement of Case and Statement of Facts as set forth by the Petitioner in his brief with the following addition to the Statement of Facts.

The parties agreed that both bikes were designed for use mainly off the public roads and that neither vehicle was street legal at the time of the accident although the vehicles were titled (registered) by the State of Florida. (R 103-108).

SUMMARY OF ARGUMENT

A policy of insurance providing uninsured motorist coverage may properly define an "uninsured motor vehicle" so as to exclude a vehicle designed for use mainly off public roads except while on public roads. This definition does not violate the public policy of the State of Florida. Both the decision below and the State Farm Fire & Casualty Co. v. Becraft, 501 So.2d 1315 (Fla. 4th DCA 1986), case involved an identical issue and an identical policy provision. Further, this case and the Becraft case are consistent with the reasoning of Mullis v. State Farm, 252 So.2d 229 (Fla. 1971). The judgment below was correct.

ARGUMENT

WHETHER A VEHICLE DESIGNED PRIMARILY FOR OFF-ROAD USE CAN BE EXCLUDED FROM UNINSURED MOTORIST COVERAGE BECAUSE IT IS NOT A "MOTOR VEHICLE" WITHIN THE DEFINITION OF THE FINANCIAL RESPONSIBILITY LAW OR WHETHER SUCH AN EXCLUSION IS VOID FOR PUBLIC POLICY REASONS?

The foregoing is the question certified to this Court by the Fourth District Court of Appeal.

This case is on all fours with State Farm Fire & Casualty Co. v. Becraft, 501 So.2d 1316 (Fla. 4th DCA 1986).

The policy definition of "Uninsured Motor Vehicle" is at issue here. That definition provides:

"an uninsured motor vehicle does not include a land motor vehicle:

. . .

5. Designed for use mainly off public roads except while on public roads." (R 56-57) (Petitioner A-6).

The same definition was considered in the Becraft case. The decisions of the Fourth District Court of Appeal in both cases are consistent with the reasoning of Mullis v. State Farm, 252 So.2d 229 (Fla. 1971).

State Farm does not understand the distinction between the two cases which the Plaintiff attempts to make. In the Becraft case, the Plaintiff was attempting to establish UMI coverage based on uninsured motorist coverage provided by

his parents as a member of their household. The Claim of negligence was against the operator of the uninsured dune buggy. Similarly in this case, the Plaintiff is claiming coverage from automobiles insured in his parents' household against the uninsured operator of a dirt bike. This case is even a stronger case for the application of the definition at issue, because the tort feason's dirt bike was not licensed as had been the dune buggy. The dune buggy was represented in the trial of the Becraft case as a "dual purpose" vehicle. It could have been used on the public roads. It is obvious from the Stipulation of Facts in this case that the dirt bike, as it existed at the time of the accident, could not have been used on the public roads legally.

Although the Plaintiff relies substantially upon various obiter dicta contained in Mullis, this seminal case makes it clear that UMI coverage is the reciprocal of the Financial Responsibility Law, and that uninsured motorist coverage is intended by statute to protect the insureds to the extent of the requirements of the Financial Responsibility Law. This Court said:

"In sum, our holding is that uninsured motorist coverage prescribed by Section 627.0851 is statutorily intended to provide this reciprocal or mutual equivalent of automobile liability coverage prescribed by this Financial Responsibility Law, . . ." 252 So.2d at 237-238.

Petitioner quotes language from the Mullis case, and from Coleman v. Florida Insurance Guarantee Assoc., Inc., 13

FLW 13 (Fla., Jan. 7, 1988), which says that injury to an insured caused by an uninsured motorist may not be restricted by any conditions, locations, or circumstances.

However, reliance upon this language begs the question. The issue herein is whether or not the alleged tortfeasor was an "uninsured motorist" ab initio.

The dirt bike operated by the tortfeasor was not licensed and was not required to be licensed under § 316.605, Fla.Stat. (1981), since it was operated in an open field in an undeveloped area. Similarly, Chapter 316, Fla.Stat. could not be enforced against the operation of this dirt bike in the open field. See § 316.640, Fla.Stat. (1981), limiting traffic enforcement by any jurisdiction of the streets and highways and other places where the public has a right to travel.

With regard to Chapter 324 of the Florida Statutes, the Financial Responsibility Law provides in § 324.011, Fla.Stat. (1981), that it is the intent of that chapter to recognize the existing privilege to own or operate a motor vehicle on the public streets or highways of the State. The Fourth District Court of Appeal held in Prinzo v. State Farm, 465 So.2d 1364 (Fla. 4th DCA 1985) and Lane v. All-state Ins. Co., 472 So.2d 823 (Fla. 4th DCA 1985), that when considering the question of coverage under Florida Statute § 627.727; the Court may consider the definitions in the No Fault Act, § 627.732(1), the Traffic Control Law, § 316.003(2) and (21), the Motor Licensing Law, § 320.01(1),

and the Financial Responsibility Law, § 324.021(1); and read them in pari materia. It is clear that the State of Florida has not intruded by legislation into the operation of motor vehicles at any other place other than public ways. That is, on either public or private streets, highways, parking lots, etc.

Section 320.02(1), Fla.Stat. (1981), provides that registration is required only for motor vehicles which shall be operated or driven upon the highways of the State. At the time of the accident involved here in 1982, the statute also required registration of vehicles which shall be maintained in the State. The current version of § 320.02(1), Fla.Stat. (1985), specifically provides that no registration is required for any motor vehicle which is not operated on the roads of this State during the registration period.

The uninsured dirt bike involved in this case did not meet the definition of "motor vehicle" which is defined inter alia in § 320.01(1)(a), Fla.Stat. (1981), as a motorcycle operated over the public streets and highways of this State and used as a means of transporting persons or property over the public streets and highways. In this connection, see Sherman v. Reserve Ins. Co., 350 So.2d 349 (Fla. 4th DCA 1977), a case involving PIP coverage. Therein, the Court ruled that an automobile which has been rendered inoperable due to mechanical failure or defect does not fall within the definition of a motor vehicle and is, therefore,

neither required to be registered and licensed nor to carry No Fault insurance. See also, Quanstrom v. Standard Guaranty Ins. Co., 504 So.2d 1295 (Fla. 5th DCA 1987). Cf., Staley v. Florida Farm Bureau Ins. Co., 328 So.2d 241 (Fla. 1st DCA 1976). Contra Williams v. Leatherby Ins. Co., 338 So.2d 70 (Fla. 3d DCA 1976) and Tapscott v. State Farm, 330 So.2d 475 (Fla. 1st DCA 1976).

Similarly, § 316.003(64), Fla.Stat. (1981), provides a definition of vehicle as being one which may be transported or drawn upon a highway. Section 324.021(1), Fla.Stat. (1981), defines a motor vehicle as being every self-propelled vehicle which is designed and required to be licensed for use upon a highway. Section 627.733, Fla.Stat. (1981), provides that every owner or registrant of a motor vehicle required to be registered and licensed (emphasis added) in this State shall maintain security (referring to the required PIP benefits).

Contrast a vision of dirt bike operation to the operation of a motor vehicle upon the public ways of this State. It comes readily to the mind's eye. The dirt bike cyclist becomes airborne as he hurtles over a bump or hillock. When he makes a sharp change of direction, his cleated tires throw a breaking wave of dirt high in the air. As the rider does a "wheelie", the bike resembles a rearing stallion. This mental imagery is far from the mind's response to the word "motorist".

It is patent that all of the statutes which define

"motor vehicle" or "vehicle" are limited by definition to those operated upon the public ways of the State of Florida. In addition to the cases cited above, the decision in Bedgood v. Hartford Accident Indemnity Co., 384 So.2d 1363 (Fla. 1st DCA 1980) and Martin v. Nationwide Mutual Fire Ins. Co., 235 So.2d 14 (Fla. 2d DCA 1970), substantiate the proposition that the legislature did not intend to enact legislation governing vehicles which were not operated upon the public highways and byways of the State of Florida.

The Becraft case decided that the exclusionary clause which is involved in this case is not void for public policy reasons. In other words, State Farm could properly exclude from coverage a vehicle primarily designed for use off the public highways when it was being used off the public roads as it was here. The cases upon which Plaintiff relies simply do not reach this issue. In Progressive American Ins. Co. v. Glenn, 428 So.2d 367 (Fla. 3d DCA 1983), the issue involved the nature of the motor vehicle being ridden by the injured who claimed benefits. That issue does not exist in this case. Even though the Plaintiff in this case was riding a dirt bike which was itself uninsured, State Farm agrees that under Mullis the Plaintiff could claim coverage while riding his dirt bike if it had been struck by a standard automobile, for example.

Plaintiff claims that Allstate v. Almgreen, 376 So.2d 1184 (Fla. 2d DCA 1979), represents a case which is in direct conflict with the Becraft case. However, that Court

specifically stated as follows: "Since we find that Appellant's policy provides coverage, we do not address whether statute requires coverage in this instance." 376 So.2d at 1186. The issue in that case had to do with an exclusion in the Allstate policy which was substantially different than that in the State Farm policy involved here.

State Farm agrees that the obiter dictum in the Almgreen case is contrary to the decision in the Becraft case. However, the Second District Court of Appeal in that case also states that it had previously held that the Financial Responsibility Laws are not to be read in pari materia to the uninsured motorist laws. This would appear to be dictum which directly conflicts with the Mullis case.

The decisions of the Fourth District Court of Appeal are consistent with the Mullis case in this regard. As stated above in Prinzo, Judge Downey made it clear that since the legislature neglected to define motor vehicle in Florida Statute § 627.727 (the UMI statute) the definitions provided under the No Fault Act § 627.732(1), the Traffic Control Law §§ 316.003(2) and (21), the Motor Vehicle Licensing Law § 320.02(1), may be referred to for a definition of motor vehicle for purposes of the uninsured motorist coverage. It would appear obvious that under those definitions the dirt bike being operated by the Plaintiff was not a "motor vehicle" or "vehicle" which the legislature has sought to regulate.

When these facts are considered from a public policy

viewpoint, this Court may properly consider the proliferation of dirt bikes and dune buggies and other off-road vehicles. These vehicles are maintained and operated virtually free of any governmental regulation of any kind. They constitute an unacceptable risk to automobile casualty insurers. For example, the extreme youth of some operators; the adverse ambience of operating conditions; the use of vehicles inherently unsafe under any conditions; and the unpoliced alcohol consumption of many operators are all part and parcel of the use of off-road recreational vehicles. A carrier who receives a premium based only on the underwriting risks of the normal operation of a family vehicle has every right and reason to exclude the prospect of claims arising from this unexpected, unpredictable and dangerous exposure. Nor should State Farm policyholders bear the increased cost of insuring this activity which is not otherwise subject to any public regulation.

As has been shown in the foregoing, there is no Florida public policy concerning either operation or insuring of off-road vehicles. In the absence of such public policy to the contrary, the parties may enter into such insurance contracts as they please. Hanover Insurance Co. v. Bramlett, 228 So.2d 288 (Fla. 1st DCA 1969); Zipperer v. State Farm, 254 F2d 853 (5th Cir. 1958).

CONCLUSION

There is no public policy which requires a contrary result. The decision below should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished to J. MARK MAYNOR, ESQ., Beverly & Freeman, 823 North Olive Avenue, West Palm Beach, FL 33401 by mail this 29th day of February, 1988.

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By: 

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