IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 76,338

PATRICIA MICHELLE FRANK,

Petitioner/Plaintiff

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Respondent/Defendant.

_____/

ON APPEAL FROM THE FLORIDA DISTRICT COURT

OF APPEAL FOURTH DISTRICT

RESPONDENT'S AMENDED ANSWER BRIEF ON THE MERITS

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INTRODUCTION

In this brief, the Petitioner, PATRICIA MICHELLE FRANK, the Appellant in the lower court and Plaintiff in the trial court, will be referred to as "Petitioner" or "Plaintiff". The Respondent, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, will be referred to as "Respondent" or "Defendant".

SUMMARY OF ARGUMENT

Petitioner attempts to seek recovery of uninsured motorist benefits under a policy of insurance issued by Respondent. Petitioner, however, concedes that there is a valid exclusion from liability from coverage based upon Gibson vs. State Farm, 378 So.2d 875 (Fla. 2nd DCA 1979). Case law has upheld a policy exclusion for uninsured motorist coverage similar to the one in the case at bar. Curtin vs. State Farm, 449 So.2d 293 (Fla. 5th DCA 1984) and Barlow vs. Auto Owner's Insurance Company, 358 So.2d 1182 (Fla. 4th DCA 1978).

The Courts have consistently upheld the principles first set forth in Mullis vs. State Farm, 252 So.2d 229 (Fla. 1971) that if there is no coverage under the liability portion there is a reciprocal or lack of coverage under the uninsured motorist portions of the policy. Similarly the Courts have consistently upheld Reid vs. State Farm, 352 So.2d 1172 (Fla. 1977) and its progeny which have held that the family exclusion continues to be valid in situations such as this. State Farm vs. Palacino, 562 So.2d 837 (Fla. 4th DCA 1990); Brixius vs. Allstate, 549 So.2d 1191 (Fla. 3rd DCA 1989). Therefore, the decision of the District Court of Appeals upholding the dismissal of the claim for uninsured motorist benefits by Petitioner should be affirmed.

ARGUMENT

THERE IS NO UNINSURED MOTORIST COVERAGE AVAILABLE UNDER A POLICY OF INSURANCE WHEN A VALID EXCLUSION OF LIABILITY COVERAGE EXISTS.

Respondent agrees that the Petitioner, PATRICIA MICHELLE FRANK, had purchased both liability and uninsured motorist coverage in the sum of $100,000.00 from Respondent, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY. At the same time, Petitioner concedes that there is a valid policy exclusion for liability coverage. Gibson vs. State Farm, 378 So.2d 875 (Fla. 2nd DCA 1979). Petitioner, however, claims that she is entitled to uninsured motorist benefits and seeks recovery of uninsured motorist benefits under the same policy for which a valid liability exclusion exists. Respondent maintains, and the case law supports, the proposition that if there is a valid exclusion from liability coverage, likewise, there is a valid exclusion from uninsured motorist coverage.

In this case, the policy of insurance issued to Petitioner contains the following language:

> "An uninsured motor vehicle does not include a land motor vehicle:
>
> (1) Insured under the liability coverage of this policy."

Appellate Courts have upheld this policy language as creating a valid exclusion from uninsured motorist coverage.

Curtin vs. State Farm, 449 So.2d 293 (Fla. 5th DCA 1984) Rev. Denied. 496 So.2d 815 (Fla. 1986).

In Curtin, the Plaintiff was injured while riding as a passenger in a car owned by his father which was negligently driven by a permissive user who was a friend of the family; and in Curtin the policy of insurance which provided both liability and uninsured motorist benefits contained identical provisions as the policy of insurance issued to Petitioner.

In considering that policy language, the Fifth District Court of Appeals noted the following:

> "Appellant concedes on Appeal that he is barred from any recovery under the policy insuring the Cadillac, the car in which he is injured. The family exclusion provision at the liability portion of that policy would clearly bar his recovery there. Under the uninsured motorist vehicle coverage, he is also clearly barred by the language of the policy which provides that the vehicle insured under that policy cannot be considered to be an uninsured motor vehicle." Id. at 294.

A similar factual scenario was set forth in Barlow vs. Auto Owner's Insurance Company, 358 So.2d 1128 (Fla. 4th DCA 1978). In Barlow, Mr. Barlow was a passenger in his own vehicle which was driven by Mr. Lockwood, a friend who was not a family member. Mr. Lockwood did not have any insurance, and Mr. Barlow attempted to recover under his own

uninsured motorist policy. The Appellate Court upheld the exclusion under the uninsured motorist policy. In Barlow vs. State Farm, 358 So.2d 1128 (Fla. 4th DCA 1979), the Court placed primary alliance upon Reid vs. State Farm, 352 So.2d 1172 (Fla. 1977). In Barlow, the Court also noted that the case involved only one policy of insurance, and that consideration distinguishes cases such as the one before the Court today from the line of cases followed by Allstate vs. Boynton, 486 So.2d 552 (Fla. 1986).

The Fourth District Court of Appeal felt that distinction critical in the decision of State Farm vs. Palacino, 562 So.2d 837 (Fla. 4th DCA 1990). In Palacino, the Court distinguished Allstate vs. Boynton, noting that in Boynton there were two separate policies involved, and in the case at bar, similar to Palacino, there was only one policy involved. The Courts have continued to uphold as valid Reid vs. State Farm, 352 So.2d 1172 (Fla. 1977) which held that a vehicle cannot be both insured and uninsured under the same policy. State Farm vs. Palacino, 562 So.2d at 837; Brixius vs. Allstate Insurance Company, 549 So.2d 1191 (Fla. 3rd DCA 1989).

This matter was recently reconsidered by the Fourth District Court of Appeals in Allstate Insurance Company vs. Baker, 543 So.2d. 847 (Fla. 4th DCA 1989). In Baker, the

Fourth District Court of Appeals, again, upheld the continuing validity of the household exclusion when a child was injured while riding as a passenger in their automobile while it was driven by a family friend with permission by the insured. The case at bar is factually indistinguishable.

Respondent maintains that the Court in Jernigan vs. Progressive American, 501 So.2d 748 (Fla. 5th DCA 1987) would uphold the exclusions set forth in the policy of insurance issued to Petitioner because there is another bar to recovery involved under the terms of the policy of insurance itself. The policy of insurance issued to Petitioner provides that uninsured motorist coverage does not include a land motor vehicle insured under the liability coverage of this policy. As noted previously, this provision has been repeatedly upheld as valid and provides a bar to recover under the uninsured motorist provisions of the policy of insurance issued to the Petitioner. Curtin vs. State Farm, 449 So.2d 293 (Fla. 5th DCA 1984); State Farm vs. Palacino, 562 So.2d 837 (Fla. 4th DCA 1990)

Since Appellant is not entitled to legally recover under the liabilty provisions of her own policy, then she similarly would be barred from recovering under the uninsured motorist provision of her policy. This principle was initially set forth in the case Mullis vs. State Farm, 252 So.2d 229 (Fla. 1971).

While Mullis vs. State Farm, 252 So.2d 229 (Fla. 1971), was decided under different statutory provisions, the principles of Mullis are still valid. In Mullis, the Court noted:

> "... That uninsured motorist coverage ... is statutorally intended to provide the reciprocal or mutual equivalent of automobile liability coverage."

Mullis set forth the principle of law that if there is no coverage under the liability portions of a policy of insurance, there would be an equal or reciprocal lack of coverage under the uninsured motorist provisions of a policy of insurance. If there was coverage under the liability sections, then there would also be coverage under the uninsured motorist provisions of the policy. Mullis at 237-238.

As noted previously, Petitioner concedes that there is no coverage under the liability portions of the provisions of this policy; and since there is no liability coverage available to Petitioner, there is similarly an absence of coverage under the uninsured motorist provisions of the policy based upon the principles enunciated in Mullis. Therefore, the resulting exclusion from uninsured motorist coverage set forth in the policy provided to Petitioner is a valid exclusion from uninsured motorist benefits.

This principle as set forth in Mullis was recently upheld by the Supreme Court in Valiant Insurance Company vs. Webster 567 So.2d 408 (Fla. 1990). In Webster the Supreme

Court took jurisdiction based upon a perceived conflict with Mullis vs. State Farm, 252 So.2d 229 (Fla. 1971). In reaffirming Mullis, the Court noted that all automobile insurance policies must offer uninsured motorist coverage as broad as Section 627.727(1) requires. They answered a question as to whether there was coverage under this statutory provision in the negative.

In reaffirming the continued validity of Mullis the Supreme Court noted:

> "Since our decision in Mullis, the Court's have consistently followed the principle that if the liability portions of an insurance policy would be applicable to a particular accident, the uninsured motorist provisions would likewise be applicable; whereas, if the liability provisions did not apply to a given accident, the uninsured motorist provisions of that policy would also not apply ..." Citations omitted.

The Court went on to note that Mullis specifically holds that the statute requires only that uninsured motorist coverage must be provided when there is liability coverage. As noted previously, since there is a valid exclusion from liability coverage there, likewise, would be no uninsured motorist coverage.

CONCLUSION

Since by the terms of the policy of insurance there is no liability coverage afforded, and Petitioner concedes that point, there is an equal or reciprocal lack of coverage under the uninsured motorist provisions of the policy based upon the authority set forth in Mullis vs. State Farm 252 So. 2d. 229 (Fla. 1971) and its progeny. Petitioner concedes that there is a valid liability exclusion, and the plain language of the policy provides that there is a valid exclusion from uninsured motorist coverage also. Therefore, based upon the authority as set forth in Mullis vs. State Farm. 252 So.2d 229 (Fla 1971); and Reid vs. State Farm, 352 So.2d 1172 (Fla. 1977), and the cases that have consistently upheld those principles, the Opinion of the Appellate Court affirming the dismissal of the Complaint by the trial court should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail delivery this 2nd day of January, 1991, to: ERIC J. BRUNING, ESQUIRE, Suite 300, Law and Finance Building, 10570 South U.S. Highway One, Port St. Lucie, Florida 34952.

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