

out w/app.

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.

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ON APPEAL FROM THE FLORIDA DISTRICT COURT OF APPEAL
FOURTH DISTRICT

PETITIONER'S INITIAL BRIEF ON THE MERITS

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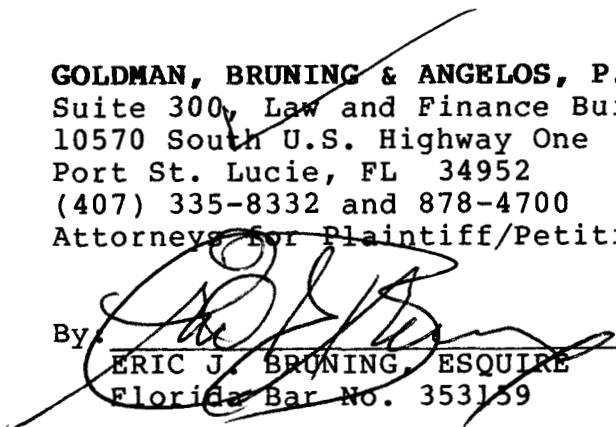
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INTRODUCTION

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".

STATEMENT OF THE CASE AND FACTS

This is an appeal of an Order dated August 3, 1987, entered by the Honorable Martha C. Warner dismissing Count III of the Plaintiff's complaint wherein the Plaintiff is seeking uninsured motorist benefits pursuant to a policy of insurance issued to her through State Farm Mutual Insurance Company.

On September 2, 1982, Patricia Michelle Frank was a passenger in a vehicle which she owned. The vehicle was insured by the Appellee, State Farm Mutual Automobile Insurance Company. On that date, the vehicle was being operated with her permission by a friend who was neither related to nor residing with the Appellant, Patricia Frank. Due to the negligence of this driver, a single-car accident resulted wherein Appellant suffered serious permanent injuries.

At the time of the accident, there was a policy of insurance in force paid for by the Appellant and issued by the Appellee providing liability limits in the sum of \$100,000.00 and uninsured motorist benefits also in the sum of \$100,000.00. Liability coverage was denied on the basis of exclusionary language within the policy of insurance. It is undisputed that this was a valid policy exclusion in light of Gibson vs. State Farm Insurance Co., 378 So. 2nd 875 (Fla. 2nd DCA 1979). Appellant then sought uninsured motorist coverage claiming that as there was no liability coverage attaching to the driver of her automobile from which she could collect, the driver, was in effect, "uninsured". State Farm refused coverage under the uninsured motorist provisions of the policy relying upon the following exclusionary language:

"An uninsured motor vehicle does not include a land

motor vehicle insured under the liability coverage of this policy."

Suit was filed by Patricia Michelle Frank seeking in Count III of her complaint recovery for uninsured motorist benefits pursuant to her policy of insurance issued by the Defendant. This count was dismissed by the Honorable Martha C. Warner, Circuit Court Judge, on the basis of the Supreme Court's decision in Reid vs. State Farm Fire & Casualty Co., 352 So. 2nd 1172 (1978). On February 7, 1989, the dismissal became part of the Final Judgment entered by the Circuit Court of the Nineteenth Judicial Circuit in and for Martin County, Florida.

On October 25, 1987, Notice of Appeal was filed in the Fourth District Court of Appeal seeking review of the Final Judgment denying the Petitioner's uninsured motorist benefits. On June 27, 1990, the Fourth District Court of Appeal affirmed the Final Judgment of dismissal on the basis and authority of its previously rendered decision of State Farm Mutual Automobile Insurance Co. vs. Palicino, 15 F.L.W. 1583 (Fla. 4th DCA June 13, 1990) (en banc).

On July 13, 1990, a Notice of Appeal was filed with the Fourth District Court of Appeal seeking the discretionary jurisdiction of the Florida Supreme Court on the basis that the Fourth District Court of Appeal's decision was expressly and in direct conflict with the decision of the Fifth District Court of Appeal in Jerningan vs. Progressive American Insurance Co., 501 So. 2nd 748

(Fla. 5th DCA 1987) rev. denied, 513 So. 2nd 1062 (Fla. 1987).

SUMMARY OF ARGUMENT

That the Petitioner, PATRICIA MICHELLE FRANK, should be permitted to collect uninsured motorist benefits from the Respondent, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, when injured while a passenger in her own motor vehicle as the result of the negligence of a non-relative driver. Further, that any policy exclusions which limit such availability of uninsured motorist benefits should be strictly construed to allow only certain important policy exclusions such as the family-household exclusion as such policy conclusions are contrary to the intentions and purpose of Section 627.72(1), Florida Statutes, which requires uninsured motorist coverage to be available to an insured who has obtained liability coverage.

ARGUMENT

THAT AN INSURED OWNER OF AN AUTOMOBILE WHO IS INJURED BY THE NEGLIGENCE OF A NON-RELATIVE DRIVER IS ENTITLED TO UNINSURED MOTORIST BENEFITS AND THAT ANY POLICY EXCLUSIONS LIMITING SUCH COVERAGE OTHER THAN THOSE HERETOFORE SUPPORTABLE UPON A PUBLIC POLICY BASIS ARE VOID.

The Petitioner, Patricia Michelle Frank, had purchased both liability coverage and uninsured motorist coverage in the sum of \$100,000.00 from the Respondent, State Farm Mutual Automobile Insurance Company. On the basis of this court's decision in Reid vs. State Farm Fire & Casualty Co., 352 So. 2nd 1172 (Fla. 1977), the Petitioner's claim for uninsured motorist coverage was dismissed by Circuit Court Judge Martha Warner.

The Reid case, however, is factually distinguishable from the circumstances at bar. In Reid the court upheld the denial of uninsured motorist coverage where the Plaintiff was injured while a passenger in an automobile driven by her sister. It was held that in this case "an uninsured motorist vehicle" may not be the vehicle defined in the liability policy as the insured motor vehicle because of "to hold otherwise in this case would complete nullify a family household exclusion". In the case at bar, however, the family household exclusion is not at issue as the individual driving the Petitioner's vehicle was not a relative, but merely a friend of the Petitioner.

Ten years after this court's decision in Reid, the Fifth District Court of Appeal issued its decision in Jernigan vs. Progressive American Insurance Co., 501 So. 2nd 748 (Fla. 5th DCA 1987) which is precisely on point to the case at bar. Jernigan was a passenger in a vehicle owned by him, but driven by an uninsured

friend. As a result of the driver's negligence, a one-car collision occurred in which the driver was killed and Jernigan was seriously injured. Jernigan filed a claim for uninsured motorist benefits under his policy; however, Progressive denied coverage on the basis of an exclusion denying coverage for any bodily injury sustained by a person "while occupying a motor vehicle owned by you..." 501 So. 2nds 748 at 750.

The Fifth Circuit in Jernigan examined the Supreme Court's decision in Reid and found that the Supreme Court's later decision and reasoning in Allstate Insurance Company vs. Boynton, 486 So. 2nd 552 (Fla. 1986) was controlling. In Boynton, the Supreme Court held that a vehicle is insured in the context of uninsured motorist coverage only where the insurance in question is available to a particular plaintiff. 486 So. 2nd at 555. the Jernigan Court stated:

"Clearly under the Boynton definition of an 'uninsured vehicle', a vehicle can be insured and uninsured under the same policy. The definition of uninsured motor vehicle in the present policy is contrary to the Boynton test. The exclusion of the policy before us operates to deny the plaintiff coverage in a circumstance where he has been injured by the negligence of an unrelated operator of a vehicle as to which no liability insurance is available. Thus, to the extent that these policy provisions have denied the plaintiff protection for injuries caused by an uninsured motorist, we must declare them invalid as contrary to the public

policy expressed in §627.727, Florida Statutes."

501 So. 2nd at 751.

The Court in Jernigan specifically concluded that their holding was consistent with Reid. Reid, the Court reasoned, was distinguishable as recovery there was being sought by relatives of the negligent driver. Recovery under the circumstances, as the Court stated, "would render the family exclusion meaningless". 501 So. 2nd 748 at 751. The Court in Jernigan concluded the following:

"In the present case, however, the plaintiff was not injured by a family member. Neither did the policy exclude liability coverage for injuries caused by friends of the insured. Thus, declaring the uninsured motorist exclusion invalid does not defeat any valid liability exclusion. The plaintiff is legally entitled to recover from the operator of the motor vehicle which caused his injuries. Accordingly, under Boynton, the insurer is required by law to provide uninsured motorist benefits to its insured." 501 So. 2nd at 751 and 752.

As in Jernigan, the statutory exclusions of State Farm's policy are contrary to public policy and should be held invalid. Absent valid reasonable exclusions such as those supported in Reid and in Allstate Insurance Co. vs. Boynton, 486 So. 2nd 552 (Fla. 1986) availability of uninsured motorist benefits circumstances such as these should be supported. The public policy behind Florida Statutes, §627.727(1) is designed to provide insurance coverage to those who are

otherwise legally entitled to recover damages as if the tortfeasor had carried liability insurance. Had the driver of the Petitioner's vehicle carried liability coverage, clearly there would have been no public policy to prevent Petitioner from making a claim under such coverage. There exists, therefore, no valid or useful purpose in denying coverage to an automobile owner who is injured while a passenger in her vehicle driven by an uninsured non-family member. An insured in such a case could, and did, reasonably expect to be protected in this situation by the purchase of both liability and uninsured motorist benefits. Absent the clear legislative directive to the contrary or public policy mandate by the court, the Petitioner's uninsured motorist protection benefits should be available.

CONCLUSION

That the policy provisions of the Respondent precluding the Petitioner from making a claim under her uninsured motorist benefits are void against public policy and the intended purpose of Florida Statutes, §627.727(1). The decision of the District Court of Appeal, Fourth District, confirming the lower court's Motion to Dismiss in favor of the Respondent should be reversed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the foregoing was mailed this 7th day of December, 1990, to the Clerk of Court, Supreme Court of the State of Florida, 500 South Duval Street, Tallahassee, Florida, 32399-1925, and a copy of same mailed to Richard C. Singer, Esquire, 1286 South Florida Avenue, Suite 1, Rockledge, Florida, 32955.

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