W00A 007

IN THE SUPREME COURT OF FLORIDA

CASE NO. 81,740

Florida Bar No: 184170

STATE FARM FIRE & CASUALTY COMPANY,

Petitioner,

vs.

ROBERT PETERSEN,

Respondent.

FILED
SID J. WHITE
JUL 28 1993
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

ON PETITION FOR DISCRETIONARY REVIEW FROM THE THIRD DISTRICT COURT OF APPEAL OF FLORIDA

BRIEF OF PETITIONER ON THE MERITS
STATE FARM FIRE & CASUALTY COMPANY

(With Appendix)

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POINT ON APPEAL

THE DECISION OF THE THIRD DISTRICT MUST BE REVERSED, AS THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT FOR STATE FARM WHERE THE POLICY LANGUAGE CLEARLY AND UNAMBIGUOUSLY DID NOT AFFORD UM COVERAGE TO PETERSEN.

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INTRODUCTION

The Petitioner, State Farm Fire and Casualty Company, will be referred to as State Farm or the Defendant.

The Respondent, Robert Petersen, will be referred to as Petersen or the Plaintiff.

All citations to the Record on Appeal will be designated by the Letter "R."

All citations to the Supplemental Record on Appeal will be referred to as "SR."

All emphasis in the Brief is that of the writer unless otherwise indicated.

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STATEMENT OF THE FACTS AND CASE

Michael Grant and Robert Petersen each owned motorcycles which were involved in accidents with uninsured motorists. Each was insured under the same identical State Farm insurance policy. Each sued to obtain uninsured motorist coverage. In both cases the trial courts found that there was no coverage for the motorcycles since they were not listed under Grant's policy or Petersen's policy. The Fourth District Court of Appeal affirmed the finding of no coverage; while the Third District reversed, finding coverage; under identical facts, identical policy language, and with identical case law argued to both courts.

The Fourth District analyzed the case law argued to the court and concluded that the applicable statutes, precedent, and public policy compelled a finding of no coverage. Grant v. State Farm Fire and Casualty Co., 18 Fla. L. Weekly D905 (Fla. 4th DCA, April 7, 1993). The Third District simply pronounced the identical policy ambiguous, without elaborating, and found coverage. Petersen v. State Farm Fire and Casualty Company, 615 So. 2d 181 (Fla. 3d DCA 1993).

By so holding, the Third District created direct conflict with cases out of every other District and its opinion must be quashed eliminating the conflict.

The Facts

Robert Petersen owned a 1988 Ford pickup truck and a 1986 Yamaha motorcycle. State Farm issued a policy of insurance to Petersen which included uninsured motorist (UM) coverage (R 24).

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However, Petersen chose to insure only his truck under the policy, also he selected limited "U3" uninsured motorist coverage; and paid a lower premium rate (R 24-25). The Declarations Page, the policy and the Certificate of Coverage specifically name the Ford truck as the vehicle which the policy was intended to cover (R 21; SR 10). Coverage "U3" contains the following exclusion from uninsured motorist coverage:

> **When Coverage U3 Does Not Apply**
>
> THERE IS NO COVERAGE...
>
> 3. FOR BODILY INJURY TO AN INSURED WHILE OCCUPYING A MOTOR VEHICLE OWNED BY YOU, YOUR SPOUSE OR ANY RELATIVE IF IT IS NOT INSURED FOR THIS COVERAGE UNDER THIS POLICY.... (SR 26)(emphasis in original).

This limited form of uninsured motorist coverage is not found in the available "U" coverage provision; and Petersen elected not to buy the more expensive "U" coverage (R 20).

> **Who is an Insured**
> **Coverage U**
>
> **Insured** - means the **person** or **persons** covered by uninsured motorist vehicle coverage. This is:
>
> 1. the first **person** named in the declarations;
>
> 2. his or her **spouse**;
>
> 3. their **relatives**; and
>
> 4. any other **person** while occupying:
>
> a. **your car**, a **temporary substitute car**, a **newly acquired car** or a trailer attached to such **car**.
>
> Such vehicle has to be used within the scope of the consent of **you** or **your**

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spouse; or

b. a car not owned by **you**, **your spouse** or any **relative**, or a trailer attached to such a **car**. It has to be driven by the first **person** named in the declarations or that **person's spouse** and within the scope of the owner's consent.

Such other **person occupying** a vehicle used to carry **persons** for a charge is not an **insured**. This does not apply to the use on a share expense basis.

5. any **person** entitled to recover damages because of **bodily injury** to an **insured** under 1 through 4 above.

Therefore, Petersen decided to insure only his pickup truck under the State Farm policy and to have a limited form of UM coverage.

On February 22, 1991, Petersen was involved in an accident with an uninsured motorist, while he was riding his motorcycle, which Petersen did not insure under the State Farm policy. (R 19-20).

The Case

Petersen filed a declaratory judgment action seeking a determination that he was entitled to UM coverage for the accident on his motorcycle (R 2-4; 10). Petersen agreed that his motorcycle was not insured under the policy (R 11; 16). However, his position was that the term "motor vehicle" found in the above "U3" exclusionary clause did not include motorcycles; therefore he argued that there was coverage for his motorcycle anyway, because the policy did not expressly exclude UM coverage for motorcycles (R 11). In other words, he agreed that his motorcycle was not insured under the policy, but claimed that

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there was an issue as to whether he was covered for an accident with an uninsured motorist, while he was riding his motorcycle (R 11).

Basically, Petersen's stance was that, because the policy did not contain a definition for the term "motor vehicle," either in the definition section at the beginning of the policy, or in the UM coverage section, he claimed that he was entitled to UM coverage based on the definition of motor vehicle in the No-Fault section of the policy, because it did not exclude motorcycle (R 12-13). The PIP definition stated:

> **Motor Vehicle** - means a vehicle with four or more wheels that:
>
> 1. is self-propelled and is of a type:
>
> a. designed for, and
>
> b. required to be licensed for use on Florida highways; or
>
> 2. is a trailer or semitrailer designed for use with a vehicle described in 1 above.
>
> It does not include:
>
> 1. a mobile home; or
>
> 2. any motor vehicle which is:
>
> a. used in mass transit or public school transportation; and
>
> b. designed to transport more than five passengers, exclusive of the operator; and
>
> c. owned by a municipality, a transit or public school transportation authority, or a political subdivision of the state.

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The definition section at the front of the policy defined the term "car" as:

> ...a land motor vehicle with four or more wheels which is designed for use mainly on public roads....
>
> (SR 14).

In the liability section of the policy, coverage exists for damages "caused by accident resulting from the ownership, maintenance or use of your car..." or the insured's use of a "newly acquired car, a temporary substitute car, or a non-owned car" (SR 17). In other words, liability coverage is only extended to accidents arising out of the insured's ownership, use or maintenance of a "car" as defined in the policy (SR 17). That is why there was no dispute in the trial court below that Petersen's motorcycle was not insured under the policy.

The policy defined various terms, which are used throughout the policy, and these defined terms appear in bold face italics wherever they are used (SR 14). The term "motor vehicle," as used in the UM section of the policy, does not appear in bold italics (SR 24). Conversely, the defined term "car" appears in bold italics throughout the liability section and the UM section (SR 14).

Petersen argued that the policy, by its express terms, did not exclude his motorcycle from UM coverage (R 13). He further argued that the policy was not ambiguous, and that it must be given full effect (R 13). Therefore, Petersen contended, there was no need for the court to resort to rules of construction for

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interpretation of the policy (R 13).

Petersen asserted that the definition of the term "motor vehicle" found in the No-Fault section should control whether or not there was UM coverage (R 12-13). The No-Fault section defines the term "motor vehicle" to mean a vehicle "with four or more wheels" (SR 20).

In other words, Petersen argued that the policy provision which excluded his motorcycle from No-Fault coverage, gave him UM coverage for his motorcycle, even though he stipulated that the policy did not provide liability insurance.

The parties filed Cross-Motions for Summary Judgment (R 10-23). The trial judge granted State Farm's Motion and entered a Final Judgment finding no UM coverage for the motorcycle accident (R 32-35). The trial judge made the following findings:

> 1. On February 22, 1992 [sic - 1991], Plaintiff, ROBERT PETERSEN, was operating a 1986 Yamaha motorcycle when he collided with another vehicle.
>
> 2. Plaintiff, ROBERT PETERSEN, contracted with Defendant, STATE FARM, for a policy of insurance which listed his 1988 Ford Pickup Truck as the insured vehicle. The 1986 Yamaha motorcycle was not insured under this policy.
>
> 3. The insurance policy issued by Defendant, STATE FARM, included uninsured/underinsured motorist coverage. Plaintiff, ROBERT PETERSEN, selected "U3 non-stacking" uninsured motorist coverage versus "U stacking" uninsured motorist coverage.
>
> 4. The Plaintiff, ROBERT PETERSEN, paid a lower premium due to his selection of "U3 non-stacking" uninsured motorist coverage.

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5. Plaintiff, ROBERT PETERSEN, allegedly sustained damages while operating his 1986 Yamaha motorcycle on February 22, 1991 and seeks coverage under the above policy of insurance.

6. The insurance policy issued by Defendant, STATE FARM, to Plaintiff, ROBERT PETERSEN, regarding the "U3 non-stacking' [sic] coverage, states the following:

> There is no coverage...for bodily injury to an insured while occupying a motor vehicle owned by you...if it is not insured for this coverage under this policy....
>
> * * *

6. [sic] Florida Statute §627.727(9) permits insurers to offer policies of uninsured motorist coverage containing conditions and limitations which the insured has the option to accept.

7. [sic] The Florida statutary [sic] definitions regarding motor vehicles and definition section within the Plaintiff's insurance policy, to be read in pari materia, define a motorcycle as a motor vehicle.

Based on the above findings of fact, it is ORDERED AND ADJUDGED:

1. That the Defendant's Motion for Summary Judgment is GRANTED. The Court finds that the motorcycle operated by Plaintiff, ROBERT PETERSEN, on February 22, 1991 is a "motor vehicle" and therfore, the insurance policy's "U3 non-stacking" exclusion provision does apply. Plaintiff, ROBERT PETERSEN, selected "U3 non-stacking" uninsured motorist coverage for which he payed [sic] a lower premium. Additionally, Plaintiff chose to insure only his 1988 Ford Pickup Truck under his policy of insurance with Defendant, STATE FARM. The Florida Statutes and the definition section within Plaintiff's policy of insurance define a motorcycle as a "motor vehicle' [sic]. Therefore, the policy is to be construed against the Plaintiff, ROBERT PETERSEN, and

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in favor of the insurer, Defendant, STATE FARM.

2. Plaintiff, ROBERT PETERSEN's Motion for Summary Judgment is DENIED.

Petersen appealed to the Third District Court of Appeal, restating his argument that the express language of the State Farm policy provided coverage for the Yamaha, but now contending for the first time on appeal that the policy was ambiguous. The Third District reversed, finding that the policy was ambiguous, because the court found that the definition of the term "motor vehicle" found in the No-Fault section of the policy made it "unclear" whether the No-Fault definition applied. Petersen, supra.

State Farm sought jurisdiction in this Court to settle the obvious direct and express conflict with Grant, supra, where the Fourth District was presented with identical facts, identical insurance policies, and identical arguments, but reached the totally opposite, but correct legal result.

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SUMMARY OF ARGUMENT

The trial court's ruling finding no UM coverage on an uninsured motorcycle was correct and was in accordance with the applicable statutes and case law, and must be reinstated.

By statute, insurers are permitted to offer optional insurance provisions, which limit UM coverage to vehicles insured by the policy, for a lower premium. In this case, Petersen chose such coverage, and paid a lower premium to insure his pickup truck only. Therefore, there was no liability or UM coverage on his uninsured motorcycle, as correctly determined by the trial court below and the Fourth District Court of Appeal in Grant.

The policy expressly does not provide UM coverage for a "motor vehicle," such as the motorcycle owned by the insured, which is not insured under the policy. Petersen chose this coverage. Now he seeks to circumvent the limited coverage he purchased, by arguing that the P.I.P. definition of the term "motor vehicle," which also excludes motorcycles, must control to provide coverage for his motorcycle, which he chose not to insure.

However, the definition in the No-Fault section, which excludes PIP coverage for motorcycles, clearly does not apply to extend UM coverage, under any reasonable reading of the policy, especially when Petersen conceded he had no liability coverage on the motorcycle. Moreover, the No-Fault definition found in the No-Fault section of the policy simply tracks the definition required by the No-Fault statute, and Florida courts have

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consistently held that this definition, even when found within an insurance policy, cannot control in UM cases as a matter of law and public policy.

The term "motor vehicle" does not appear in the UM section in bold italics, and is not one of the defined terms in the policy for the purposes of UM coverage. Therefore, it must instead be given its everyday, ordinary meaning. The Appellant's Brief filed in the Third District referred to Petersen's motorcycle as having been involved in a "vehicular accident," and even referred to it as a "vehicle," and it hardly requires any mental gymnastics to conclude that a motorcycle is a "motor vehicle," and excluded from UM coverage in this policy.

Moreover, reading all of the Florida Statutes in pari materia, it is apparent that all the statutes defining motor vehicle include motorcycles. The only statute which does not include a motorcycle within the definition of a "motor vehicle" is the No-Fault statute; where the legislature has made it clear that P.I.P. coverage is not to apply to motorcycles. The courts have also held that the P.I.P. statute cannot apply to UM cases.

Because the plain ordinary meaning of the term "motor vehicle" includes a motorcycle, there is no UM coverage for Petersen's uninsured motorcycle under the policy, and the Third District's decision must be reversed, and Summary Judgment for State Farm must be reinstated.

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ARGUMENT

THE DECISION OF THE THIRD DISTRICT MUST BE REVERSED, AS THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT FOR STATE FARM WHERE THE POLICY LANGUAGE CLEARLY AND UNAMBIGUOUSLY DID NOT AFFORD UM COVERAGE TO PETERSEN.

The Third District has created direct and express conflict with Grant, supra, and the Grant opinion should be approved, finding no UM coverage for an uninsured motorcycle. The Third District in finding coverage, ignored a plethora of legal authority, as well as the fact that Petersen undisputedly knew that he did not pay for the coverage he nonetheless sought.

The Fourth District examined the identical State Farm policy, and heard the identical legal arguments from both sides on the same facts. The Fourth District addressed the issue on the merits, and resolved the question of coverage favorably to State Farm, finding no UM coverage. The Third District, in contrast, chose to declare the exact same policy ambiguous, and declined to address the real merits.

The opinion of the Third District strongly suggests a willingness to summarily declare a policy ambiguous, and refused to apply common sense in reading the policy, just because the policy did not define every single term it contained. In other words, the Third District has basically refused to apply the everyday meaning of a term not expressly defined in the policy, resulting in an "automatic" ambiguity. It is urged that, if such a rule of law prevails, insurance companies will be forced to attach glossaries to their policies which are far more voluminous

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than the policies themselves.

In Grant, the Fourth District was presented with a scenario indistinguishable from the present case. The insured in that case owned a Corvette and a motorcycle. However, exactly as Petersen chose to insure only his truck, Grant elected to insure only his Corvette under his State Farm policy, by also purchasing the less expensive U-3 coverage. Grant, D906. The Fourth District refused to find the policy ambiguous, and correctly held that there was no UM coverage for Grant's motorcycle/motor vehicle.

Interestingly, the Fourth District relied on two Third District decisions to find that a motorcycle was a motor vehicle for purposes of UM coverage. Grant, 906, State Farm Mutual Automobile Insurance Company v. Kuhn, 374 So. 2d 1079 (Fla. 3d DCA 1979), cert. denied, appeal dismissed, 383 So. 2d 1197 (Fla. 1980); infra; Indomenico v. State Farm Mutual Auto Insurance Company, 388 So. 2d 29, 30 (Fla. 3d DCA 1980). The Grant court began with Standard Marine Insurance Company v. Allyn, 333 So. 2d 497 (Fla. 1st DCA 1976), which directly rejected the PIP definition of motor vehicle for purposes of UM coverage.

> We do not perceive that the legislature, by enacting the Florida Automobile Reparations Reform Act, intended to exclude those motor vehicles...from the umbrella of uninsured motorists. The statutory definition of a "motor vehicle found in the financial Responsibility Act is far more consonant with the public policy of this state as to uninsured motorist than the "PIP" definition in the instant policy.... 333 So. 2d at 499 (footnotes omitted) (emphasis added).
>
> Grant, D906.

The Fourth District then found that the Third District had

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used this same reasoning to deny coverage to a policy holder in Kuhn.

> Robert Kuhn had two separate insurance policies; one for his truck and one for his motorcycle. The policy for his truck included UM coverage, but in the policy for his motorcycle, Kuhn specifically rejected UM coverage. Id. at 1080.
>
> While riding his motorcycle, Kuhn was involved in an accident with an uninsured motorist and later submitted a claim for UM benefits under his truck policy. Id. State Farm denied coverage, and the trial court granted a summary judgment in favor of Kuhn. Id. On appeal, the Third District reversed that summary judgment, holding that Kuhn was restricted to the coverage in the policy issued on the motorcycle since the motorcycle was involved in the accident, not the truck, Id. at 1081.
>
> Citing section 627.4132, Florida Statutes (1977), which prohibits the stacking of UM coverage, the court held, "[h]aving rejected uninsured motorist coverage thereon [his motorcycle], he is not entitled to the uninsured motorist benefits provided for in his truck policy under the plain terms of the statute." 374 So.2d at 1081. Accord Indomenico v. State Farm Mut. Auto Ins. Co., 388 So.2d 29, 30 (Fla. 3d DCA 1980).
>
> We note in passing that since Indomineco and Kuhn were decided, section 627.4132 has been amended to omit its reference to UM coverage. See New Hampshire Ins. Group v. Harbach, 439 So.2d 1383, 1385 (Fla. 1983); Ch. 80-364, §1 at 1495, Laws of Fla. In our view, the reasoning in the foregoing cases and the public policy considerations of Allyn remain viable and continue to be applicable to the situation presented by the instant case.
>
> Grant, D906.

The Third District apparently rejected the same case, which State Farm argued in Petersen.

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In Grant, the appellate court also noted that in a slightly different context the Fifth District had also resolved the issues of the unstated assumption that a motorcycle was a motor vehicle for purposes of UM coverage. Nationwide Mutual Fire Insurance Company v. Phillips, 609 So. 2d 1385 (Fla. 5th DCA 1992). At least the Third District conceded that the term motor vehicle could "arguably" mean a motorcycle "given its normal everyday usage." Petersen, 182.

None of this relevant case law was even mentioned by the Petersen court. Petersen, 182. Rather, the Third District relied on a 26 year old decision from this court on ambiguity and a case that held a tow truck was not an automobile. National Automobile Insurance Association v. Brumit, 98 So. 2d 330 (Fla. 1957); Ceron v. Paxton, infra. Grant's well reasoned opinion based on established law and public policy should be affirmed and Petersen quashed.

By statute, an insurance company is permitted to exclude from uninsured motorist coverage, any accident occurring while an insured occupies a vehicle owned by him, but not insured under the subject insurance policy. Florida Statute §627.727(9)(d) (Supp. 1990) states:

> (9) Insurers may offer policies of uninsured motorist coverage containing policy provisions, in language approved by the department, establishing that if the insured accepts this offer:
>
> * * *
>
> (d) The uninsured motorist coverage provided by the policy does not apply to the named

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> insured or family members residing in his household who are injured while occupying any vehicle owned by such insureds for which uninsured motorist coverage was not purchased.

Therefore, the legislature has clearly authorized insurers to offer optional coverage, such as the "U3 non-stacking" coverage in the present case, which limits UM coverage to an insured vehicle. Petersen conceded below that he opted for "U3" coverage and that his motorcycle was not insured under the policy.

Petersen simultaneously argued in his Brief in the Third District that the policy was both ambiguous and unambiguous. He urged that the policy "unambiguously" defined a "motor vehicle" as having four or more wheels, and that the "U3" exclusion therefore did not apply to his Yamaha. Conversely, he also claimed for the first time on appeal that, if the term was ambiguous, the policy had to be construed against State Farm. Plainly, it cannot be both clear and unclear.

Of course, Petersen explicitly argued to the trial judge that "there is no need to resort to rules of judicial construction" to interpret the "unambiguous" language of the policy (R 13). The trial judge agreed with this, and found that Petersen's motorcycle was a "motor vehicle" under the U3 coverage Petersen bought, and since this motor vehicle was undisputedly not insured under the State Farm policy, there was no UM coverage on it either. After having lost in the trial court, he argued for the first time on appeal that the policy was "ambiguous," and

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must be "construed strictly against State Farm." The two provisions in question are the U3 non-stacking UM coverage Petersen selected and the definition of motor vehicle found in the P.I.P. section of the policy:

> **When Coverage U3 Does Not Apply**
> THERE IS NO COVERAGE...
>
> 3. FOR **BODILY INJURY** TO AN **INSURED** WHILE **OCCUPYING** A MOTOR VEHICLE OWNED BY **YOU, YOUR SPOUSE** OR ANY **RELATIVE** IF IT IS NOT INSURED FOR THIS COVERAGE UNDER THIS POLICY. This does not apply to an **insured occupying a newly acquired car** which has no uninsured motor vehicle coverage applicable to it.
>
> . . .
>
> **Motor Vehicle** - means a vehicle with four or more wheels that:
>
> 1. is self-propelled and is of a type:
>
> a. designed for, and
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> b. required to be licensed for used on Florida highways; or
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> 2. is a trailer or semitrailer designed for use with a vehicle described in 1 above.
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> It does not include:
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> 1. a mobile home, or
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> 2. any motor vehicle which is:
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> a. used in mass transit or public school transportation; and
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> b. designed to transport more than five passengers, exclusive of the operator; and
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> c. owned by a municipality, a transit or public school transportation authority, or a political subdivision of the state.

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Petersen argued that the P.I.P. definition of motor vehicles, which excluded motorcycles from no-fault coverage, applied to the U3 Uninsured Motorist Section. His theory was that the P.I.P. definition excluded motorcycles, so motorcycles were somehow exempt from the UM exclusion; therefore, there was UM coverage on his uninsured motorcycle. The trial judge disagreed; as a motorcycle is a motor vehicle and since the Petersen motor vehicle was undisputedly not insured, it was not entitled to UM coverage. Summary Judgment was accordingly granted in favor of State Farm.

On appeal to the Third District, Petersen mainly relied on Valdes v. Prudence Mutual Casualty Company, 207 So. 2d 312 (Fla. 3d DCA 1968) for his position that the policy "unambiguously" does not exclude his motorcycle from UM coverage. Valdes involved a policy which contained an exclusion, which stated that UM coverage did not apply where a named insured was not "occupying an automobile (other than an insured automobile) owned by a named insured." Valdes, 313. Contrary to Petersen's contentions below, it is unclear from a reading of the opinion whether the term "automobile" was defined as a vehicle with four wheels in the policy at issue in Valdes.

The plaintiff in Valdes was involved in an accident with an uninsured motorist while he was riding his Vespa motor scooter and sought UM coverage under the policy. Valdes, 313-314. The insurer defended on the basis that the motor scooter was an "automobile" for the purposes of the foregoing policy exclusion.

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Valdes, 314. Relying on a similar case decided in Iowa, Westerhausen v. Allied Mutual Insurance Company, 258 Iowa 969, 140 N.W.2d 719 (1966), the Third District held that a motor scooter was not an "automobile," as automobile was defined as a four-wheeled vehicle, and that accordingly, there was UM coverage. Valdes, 314-315.

Nevertheless, Valdes cannot compel the same result in the present case. The exclusion in Petersen's State Farm policy in this case did not exclude UM coverage for a named insured occupying an "automobile." It excluded coverage for damages incurred by the insured "while occupying a motor vehicle" owned by the insured and not covered under the policy." While Valdes clearly stands for the proposition that a motor scooter is not an "automobile," it does not compel the conclusion that a motorcycle is not a "motor vehicle." Indeed, an automobile is a type of motor vehicle, but not all motor vehicles are necessarily automobiles.

Again, it is unclear from the opinion in Valdes whether or not the policy in that case actually contained a definition of the term "automobile," as it states that there was an "identity of policy clauses and definitions" between the policy in Valdes and the Iowa case. Valdes, 314. Nowhere in that opinion is there more than that mere inference that the policy contained a definition of the term "automobile."

On the other hand, the Third District's express holding in Valdes was that "the word 'automobile' as that term is used in

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the exclusionary clause of the policy in question" did not include the motor scooter operated by the plaintiff. Valdes, 314-315. Notably, there opinion does not state that the holding that there was UM coverage was based on a definition found in the policy. It appears that there was no such definition in the policy. Therefore, the holding was based on the "use" of the word in the exclusionary clause. Valdes, 314-315.

Accordingly, the Valdes court evidently applied the "everyday" meaning of the term, for if there was a definition of the term "automobile" in the policy, the court would have said so and put the definition in the opinion, if that was the basis for the decision. On the other hand, if there was such a definition in the policy, it is clear that the basis for the decision in Valdes is the context in which the term "automobile" was used in the exclusionary clause. The bottom line to Valdes is that, regardless if there was a definition of the term in the policy or not, all would agree that a motor scooter simply is not an "automobile." That is not to say that a motorcycle is not a motor vehicle.

Petersen and the Third District also relied on Ceron v. Paxton National Insurance Company, 537 So. 2d 1090 (Fla. 3d DCA 1989). Nonetheless, just as in Valdes, it does not appear that the term "automobile" is defined in the policy in that case either. Accordingly, just as Valdes merely stands for the entirely reasonable proposition that a motor scooter is not an automobile, Ceron only holds that a tow truck is not an

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"automobile" either. Ceron, 1091.

The fact that the policy in Valdes did not contain any definition of the term "automobile" is confirmed by the Third District's subsequent opinion in Dorrell v. State Fire And Casualty Company, 221 So. 2d 5 (Fla. 3d DCA 1969). In Dorrell, the parties stipulated that the plaintiff would be entitled to UM benefits if the vehicle the plaintiff was riding on was an "automobile." Dorrell, 6.

The policy in Dorrell contained a definition of the term "automobile," which was identical to the one in the Iowa case, Westerhausen, supra; except that it did not limit the definition to a vehicle with four wheels. Dorrell, 6. The court therefore found that a motorcycle was an "automobile" as the term was defined "in the pertinent provision of the policy" (emphasis in the original); citing to Valdes for the propositions of law, but citing to the Westerhausen case for the definition itself. Dorrell, 6. It is abundantly clear that the Valdes court relied on the definition found in the Iowa Westerhausen policy, in order to find that a motor scooter was not an "automobile"; and that the Dorrell court relied on a definition found "in the pertinent provision of the policy," to find a motorcycle fell within the term automobile. Dorrell, 6.

In the present case, the issue is not whether a motorcycle is an "automobile," but whether it is a "motor vehicle," and the answer is yes! That Petersen would agree with this was borne out below in several passages in the Appellant's Brief filed in the

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Third District, where Petersen stated that he was involved in a "vehicular accident" while riding his Yamaha (Appellant's Brief, 2), and where he continually refers to the motorcycle as a "vehicle" (Appellant's Brief, 4; 7). If a motorcycle is concededly a "vehicle," it hardly requires any great leap of faith to conclude that, in the common usage of the term, as well as common sense, that a motorcycle is a "motor vehicle."

Furthermore, if Valdes is to be applied to the present case, the context in which the term "motor vehicle" is used must be examined. The definition section in the State Farm policy provides definitions for various terms which are used throughout the policy, which are in bold face italics wherever they are used (SR 14). The term "motor vehicle," as used in the UM section of the policy, does not appear in bold italics (SR 24). Conversely, the term "car" appears in bold italics throughout the liability section and the UM section (SR 24).

The definition section at the front of the policy defines the term "car" as:

> ...a land motor vehicle with four or more wheels which is designed for use mainly on public roads....
>
> (SR 14).

In the liability section of the policy, coverage exists for damages "caused by accident resulting from the ownership, maintenance or use of your car..." or the insured's use of a "newly acquired car, a temporary substitute car, or a non-owned car." (SR 17)(emphasis in original). In other words, liability coverage is only extended to accidents arising out of the

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insured's ownership, use or maintenance of a "car" as defined in the policy (SR 17). Accordingly, there is no liability insurance coverage on Petersen's motorcycle under the policy and Petersen admitted this below.

Similarly, in the UM section, "U3" coverage provides UM benefits for various persons occupying "**your car**, a **temporary substitute car**, a **newly acquired car**," etc. (R 24)(emphasis in original). The "U3" exclusion expressly does not apply to "an **insured occupying** a **newly acquired car**," but only to "**an insured occupying** a motor vehicle owned by **you**..." (R 26)(emphasis in original). The term "motor vehicle" does not appear in bold italics in the UM section. Obviously, if the exclusion was supposed to apply to a vehicle with four or more wheels only, the exclusion would have said "car," instead of "motor vehicle."

Conversely, the No-Fault section of the policy like the statute itself, contains a definition of the term "motor vehicle" which limits the term to vehicles with four or more wheels, and throughout the No-Fault section the term appears in bold italics. As used in the No-Fault section, the term functions to deny Petersen No-Fault benefits for an accident resulting from the ownership, maintenance, etc. of his motorcycle.

Nevertheless, despite conceding that his motorcycle is not insured under the policy, and despite the inescapable fact that neither No-Fault benefits, nor liability coverage, is afforded him for an accident involving his motorcycle, Petersen relied on a provision in the policy which denies No-Fault coverage for his

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motorcycle, to obtain UM coverage on it, which he undisputedly did not pay for.

Among other things, the fact that there is no liability coverage under the policy for Petersen's motorcycle is dispositive of this case. Valiant Insurance Company v. Webster, 567 So. 2d 408 (Fla. 1990). In Valiant, this Court held that the key to a determination of the existence of UM coverage was whether or not the vehicle in question was entitled to liability coverage for a particular accident. Valiant, 410. This Court held that a wrongful death claimant was not entitled to UM coverage under his own policy because his liability coverage would not have applied. Valiant, 410-411.

By the same token, it is undisputed in the present case that Petersen would not have been entitled to liability coverage for the accident, because he was occupying his motorcycle, which was not covered. Of course, it is well settled that UM coverage is intended to provide a motorist with UM coverage in the amount equal to the liability coverage he carried, because he carried that liability coverage. Mullis v. State Farm Mutual Automobile Insurance Company, 252 So. 2d 229, 232 (Fla. 1971). The reciprocity that forms the underpinnings of UM coverage is notably absent in this case, and there is absolutely no public policy whatsoever which compels coverage under these circumstances. Valiant, 410, citing Mullis, 232.

Even so, because there is no definition for the term "motor vehicle" in the definition section at the front of the policy,

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the term "motor vehicle" does not appear in bold italics in the UM section. The common sense definition of the term must be applied, as the court in Valdes did; regardless of the presence of a definition found in the No-Fault section, which is certainly not the "pertinent provision of the policy" for the purposes of this UM claim; as contemplated by Dorrell. This is precisely what the Fourth District held in Grant, supra.

Moreover, common sense simply dictates that a motor vehicle is a vehicle with a motor regardless of the number of wheels. Because the legislature did not specifically define the term "motor vehicle" for the purposes of UM law, the definitions provided under the No-Fault Act, Traffic Control Law, the Motor Vehicle Licenses Law, and the Financial Responsibility Law must be read in pari materia to define the term "motor vehicle" for the purposes of Fla.Stat. §627.727 (1990), the UM statute; Grant, supra; Prinzo v. State Farm Mutual Automobile Insurance Company, 465 So. 2d 1364 (Fla. 4th DCA 1985).

Florida Statute §316.003(21)(1991) defines a "motor vehicle" as "any self-propelled vehicle not operated upon rails or guideway, but not including any bicycle or moped." Therefore, a motorcycle is a motor vehicle.

Florida Statute §316.003(22)(1991) defines a "motorcycle" as "[a]ny motor vehicle having a seat or saddle for the use of the rider and designed to travel on not more than three wheels in contact with the ground, but excluding a tractor or a moped."

Florida Statute §316.003(21)(1991) defines a "motor vehicle"

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as "[e]very device, in, upon, or by which any person or property is or may be transported or drawn upon a highway, excepting devices used exclusively on stationary rails or tracks." Once again, a motorcycle is a motor vehicle.

Florida Statute §324.021(1987) defines a "motor vehicle" as:

> Every self-propelled vehicle which is designed and required to be licensed for use upon a highway, including trailers and semitrailers designed for use with such vehicles, except traction engines, road rollers, farm tractors, power shovels, and well drillers, and every vehicle which is propelled by electric power obtained from overhead wires but not operated upon rails, but not including any bicycle or moped. However, the term "motor vehicle" shall not include any motor vehicle as defined in s. 627.732(1) when the owner of such vehicle has complied with the requirements of ss. 627.730-627.7405....

Again, a motorcycle is a motor vehicle. The Grant court based its decision on the fact that, for the purposes of the Financial Responsibility Law, a motorcycle is a motor vehicle. Grant, D906. In so holding, the court expressly refused to apply the definition of the term motor vehicle contained in §627.732(1) to UM cases. Grant, D906. The plaintiff Grant asserted the exact same argument as Petersen did in the present case, that the statutory No-Fault definition found in the PIP section of the exact same policy applies to UM claims. There is no coverage for Petersen's uninsured motorcycle as a matter of well settled Florida law. Grant, D906.

Petersen relied upon Fla. Stat. §§316.209(1), 627.732(1), and 627.041(8) below, in an attempt to establish that a

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motorcycle is not a motor vehicle. Section 316.209 merely refers to both motor vehicles and motorcycles. Petersen chose to ignore the express definitions contained in §316.003, which apply when using Chapter 316.

In addition, §627.041(8) defines "motor vehicle insurance," not "motor vehicle," and it merely refers to "any other four-wheeled motor vehicle," which is simply another variety of a motor vehicle as broadly defined by statute. This section defines a "policy," not a "motor vehicle."

Finally, §627.732(1)(1986) also relied on by Petersen below, contains a definition of the term motor vehicle, which is for all purposes identical to the definition found in the No-Fault portion of the State Farm policy; since this is part of the no-fault statute. Notably, the definition in §627.732(1) expressly has limited applicability, for it is expressly limited "[a]s used in §§ 627.730-627.7405," the No-Fault Law. All of this is simply the legislature's express intent that P.I.P. benefits do not apply to motorcycles, which is why State Farm tracks this exact language and intent in its no-fault provisions.

Equally relevant is the portion of §324.021, excerpted above, which expressly does not include motor vehicles as defined in §627.732(1) where the owner of the vehicle has complied with the No-Fault Law. Therefore, for the purposes of the Financial Responsibility Law, the definition of "motor vehicle" specifically and explicitly excludes the vehicles defined as "motor vehicles" in §627.732(1), and therefore includes

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motorcycles.

Accordingly, for the purposes of uninsured motorist claims, Florida appellate courts have consistently held parties are presumed to have entered into contracts of insurance with reference to statutes, and statutory provisions thereby become a part of such a contract. Standard Marine, supra. Moreover, the courts have consistently stated that:

> The statutory definition of a "motor vehicle" found in the Financial Responsibility Act [§324.021(1), supra] is far more consonant with the public policy of this state as to uninsured motorist than the "PIP" definition in the instant policy....
>
> Standard Marine, 499 [footnote omitted]; see also, Grant, D906; Indomenico v. State Farm Mutual Auto Insurance Company, 388 So.2d 29, 30 (Fla. 3d DCA 1980).

Similarly, in Carquillo v. State Farm Mutual Automobile Insurance Company, 529 So. 2d 276 (Fla. 1988), this court applied the definition of the term "motor vehicle" as found in §324.021(1), and held that a motorcycle designed for off-road use was not a motor vehicle. Carquillo, 278. Of course, it is undisputed that Petersen's motorcycle was designed and licensed for use on public roads, and was therefore a "motor vehicle" as contemplated by §324.021, the statute which necessarily controls as a matter of well established Florida law. Carquillo, supra; Standard Marine, supra.

The significance of all of the foregoing is that when all of the statutes are read in pari materia, as they must be, the only time a motorcycle is not a "motor vehicle" is under the No-Fault

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law. Grant; Standard Marine; Indomenico; supra. Furthermore, the courts have refused to apply the No-Fault definition of "motor vehicle" to UM cases to find coverage. This case has nothing to do with a PIP claim.

The definition in the No-Fault section of the State Farm policy is irrelevant to Petersen's UM claim and cannot control this UM case under Florida case law. Standard Marine, supra. The Grant court reaffirmed the continuing vitality of the public policy considerations which serve to confine the applicability of the No-Fault statutory definitions to No-Fault cases. Grant, D906, citing Kuhn, supra, (motorcycle was a vehicle under former §627.4132, citing Standard Marine); Reynolds v. State Farm Mutual Automobile Insurance Company, 437 So. 2d 195 (Fla. 3d DCA 1983).

Petersen also relied on a per curiam affirmance in State Farm v. Hatcher, 592 So. 2d 1098 (Fla. 5th DCA 1992). Of course, a per curiam affirmance has no precedential value, and the trial judge's order in that case similarly cannot properly be persuasive to this Court of Appeal. Department of Legal Affairs v. District Court of Appeal, 5th District, 434 So. 2d 310 (Fla. 1983). Even if it had any such value, that case is distinguishable based on at least one important aspect: the issue of an alleged ambiguity in the policy was raised in the trial court. Petersen cannot complain that the trial judge erred by not finding that the policy was ambiguous; when Petersen argued in the trial court below that the language was clear; for litigants are not permitted to raise issues for the first time on appeal.

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Cabral v. Diversified Services, Inc., 560 So. 2d 246 (Fla. 3d DCA 1990); Ashley v. Ocean Roc Motel, Inc., 518 So. 2d 943 (Fla. 3d DCA 1987), review denied, 528 So. 2d 1181 (Fla. 1988).

More specifically, litigants are prohibited from advancing theories on appeal which were not argued to the trial court. Perkins v. Scott, 554 So. 2d 1220 (Fla. 2d DCA 1990); Wagner v. Nottingham Associates, 464 So. 2d 166 (Fla. 3d DCA 1985), review denied, 475 So. 2d 696 (Fla. 1985). Nevertheless, Petersen asked the Third District to reverse the trial judge's granting of Summary Judgment on an alternative basis which he never presented below. Petersen cannot contend that the trial judge erred in not finding the policy to be ambiguous, when he never sought such a finding. In fact, Petersen expressly asked the trial court not to apply the rules of construction he asserted on appeal. Nevertheless, the Third District held that the trial court erred by not declaring the policy ambiguous.

In addition, the trial judge in State Farm v. Hatcher found that the policy in that case was simultaneously (i.e., "either") ambiguous and/or unambiguous (SR 6-7). Needless to say, this is a legal impossibility, and such an order which contains inconsistent findings, which essentially nullify each other cannot be persuasive; the policy cannot be "a little bit ambiguous."

"Ambiguity" means, for the purpose of contract construction:

> "reasonably capable of being understood in more that one sense. Test for determining whether a contract is "ambiguous" is whether reasonable persons would find the contract

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subject to more than one interpretation."
Black's Law Dictionary, 41 (5th Ed., 1983).

In other words, the policy is only ambiguous if reasonable persons would disagree as to whether Petersen's Yamaha is a "motor vehicle."

As Petersen argued to the trial court, the provisions of the State Farm policy are clear and require no "construction." The terms of an insurance policy are not to be construed in favor of the insured, unless they cannot be clearly ascertained by ordinary rules of construction. Beasley v. Wolf, 151 So. 2d 679 (Fla. 3d DCA 1963). It is axiomatic that if the contract is clear and unambiguous there is no need for construction and the language will be given its natural meaning. Ranger Insurance Company v. Harrell, 286 So. 2d 261 (Fla. 2d DCA 1973); Saha v. Aetna Casualty & Surety Company, 427 So. 2d 316 (Fla. 5th DCA 1983). It is also well settled that terms in an insurance policy should be given their everyday meaning, as understood by the "man-on-the-street." Sanz v. Reserve Insurance Company of Chicago, Illinois, 172 So. 2d 912 (Fla. 3d DCA 1965); Fountainbleau Hotel Corp. v. United Filigree Corporation, 298 So. 2d 455 (Fla. 3d DCA 1974); Security Insurance Company of Hartford v. Commercial Credit Equipment Corporation, 399 So. 2d 31 (Fla. 3d DCA 1981).

Therefore, the term "motor vehicle" must be given its everyday, common sense meaning. In Johnson v. Unigard Insurance Company, 387 So. 2d 1058 (Fla. 5th DCA 1980), the homeowners policy at issue contained an exclusion for "motor vehicles,"

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which were defined as land vehicles "designed for public roads." Johnson, 1060. The court held that this clearly included a three-wheeled vehicle which had a license tag and which was driven on the interstate. Johnson, 1060. See also, Allstate Insurance Company v. Caronia, 395 So. 2d 1221, 1222 (Fla. 3d DCA 1981)(appellate court reversed finding of coverage, as "a two-wheeled motorcycle is obviously a land vehicle" for purposes of exclusion in homeowner's policy); Tomlinson v. State Farm Fire and Casualty Company, 579 So. 2d 211 (Fla. 2d DCA 1991).

Petersen cited State Farm Mutual Automobile Insurance Company v. Pridgen, 498 So. 2d 1245 (Fla. 1986) below for the proposition that an ambiguity in an insurance policy must be construed against an insurer. However, in that case, the Supreme Court quashed a finding by the First District that the policy in that case was ambiguous. State Farm v. Pridgen, 1249. The controversy in that case revolved around the meaning of the term "conversion" as contained in an exclusion in the policy which did not cover a "loss to any vehicle due to ...conversion, embezzlement, or secretion by any person who has the vehicle due to any lien, rental or sales agreement." State Farm v. Pridgen, 1246.

The plaintiff's car had been taken as a trade-in by a car dealer, but a salesman had sold the car and kept the money for his own use. State Farm v. Pridgen, 1246-1247. The policy in that case covered the loss of a car due to "theft" with the above exceptions. State Farm v. Pridgen, 1246. The First District had

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held that the exclusion was ambiguous because a "conversion" was included as a means of carrying out a "theft" under Florida's Anti-Fencing Act, and the exclusion in the insurance policy did not clearly indicate whether it was directed at a "taking which is accomplished by fraudulent inducement" or at circumstances where the vehicle is initially legally obtained and then later converted. State Farm v. Pridgen, 1247-1248.

This Court first restated the rule that the policy is not to be construed against the insurer unless there was a genuine ambiguity in the policy. State Farm v. Pridgen, 1248. The Court then proceeded to look to Black's Law Dictionary, Webster's New Collegiate Dictionary, Florida Statutes, and case law to define various terms in the exclusion. State Farm v. Pridgen, 1248-1249.

The Court held that, while the provision could have been "drafted...with more precision," that fact alone did not compel a finding that the exclusion was ambiguous or otherwise uncertain. State Farm v. Pridgen, 1248. Instead, the Court found that the "plain meaning" of the term "conversion," as it was used in conjunction with the terms "embezzlement" and "secretion" implied the requisite "criminal intent to appropriate the property for one's own use" as the Court found had occurred in that case. State Farm v. Pridgen, 1248-49. Accordingly, the exclusion applied, and there was no coverage for the loss.

Similarly, in the present case, the term "motor vehicle" appears throughout the UM portion of the policy in conjunction

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with the bold, italicized term, "car," which is defined in the policy as a "land motor vehicle with four or more wheels...." Obviously, by using the term "motor vehicle" opposite the term "car," the drafters of the policy intended "motor vehicle" to mean something other than a "vehicle with four or more wheels," or else the exclusion would have said "car," not "motor vehicle." State Farm v. Pridgen supports reinstatement of Summary Judgment for State Farm.

The insurance policy should receive a reasonable, practical and sensible interpretation. Saha, supra. Although, ambiguity should be resolved against the insurer, this principle applies only when there exists a genuine inconsistency, uncertainty or ambiguity in the meaning after resort to the ordinary rules of construction. Denman Rubber Manufacturing Company v. World Tire Corporation, 396 So. 2d 728 (Fla. 5th DCA 1981); Saha, supra. The courts cannot rewrite insurance contracts and adding meaning that is not present and otherwise reach results contrary to the intention of the parties. Excelsior Insurance Company v. Pomona Park Bar & Package Store, 369 So. 2d 938 (Fla. 1979). In this case, it is undisputed that Petersen did not insure his motorcycle under the State Farm policy, and he did not pay for UM coverage on it.

In Saha, supra, the Fifth District was given the task of defining what vacant land, owned by or rented to any insured other than "farmland" meant. The appellant contended that farmland was not defined in the policy and therefore was

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ambiguous and had to be resolved in the appellant's favor. Saha, 317. The appellate court found no ambiguity in the terms used and looked to the ordinary dictionary definition of farmland, as well as Black's Law Dictionary definition to determine whether the land in question was "farmland." Saha, 317. Based on these definitions, the trial court was affirmed in its determination that the land in question, which was being used at the time of the incident was farmland and thus, excluded from coverage. Saha, 317. Under case law, common usage statutory definitions, and the dictionary, a motorcycle is a motor vehicle, as the trial judge correctly found.

Accordingly, it would strain credibility to conclude that a motorcycle is not a "motor vehicle" within the everyday meaning of the term. Petersen knew that he was not purchasing UM coverage for his motorcycle, when he selected "U3 non-stacking" coverage, paying a lower premium as a result. Consequently, Petersen's motorcycle falls within the "U3" exclusion, and there is no UM coverage, as a matter of law.

Therefore, the decision of the Third District must be reversed, and Summary Judgment in favor of State Farm must be reinstate.

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CONCLUSION

There is no question that a motorcycle is a "motor vehicle" as a matter of law and was excluded from UM coverage, the Decision of the Third District must be reversed, and Summary Judgment for State Farm must be reinstated.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 26th day of July, 1993 to:

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