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
SEP 7 1993
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

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

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

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REPLY ARGUMENT

There can be no question that Petersen's motorcycle is a "motor vehicle" as a matter of law, and that, just as there is no liability or PIP coverage under the State Farm policy for accidents involving Petersen's insured motorcycle, there is no UM coverage either. Grant, infra, is directly on point, finding no UM coverage under the identical facts and policy provision; and must be affirmed and the Opinion below quashed.

Petersen's position before this Court overlooks controlling authority which is totally dispositive of the issue in this case. The law is so overwhelmingly against Petersen that he has chosen to merely ignore it.

Instead, notwithstanding the fact that he acknowledges that there was no PIP or liability coverage for his motorcycle under the State Farm policy, Petersen argues that the exact same provision which operates to exclude his motorcycle from PIP coverage extends UM coverage for his motorcycle. Petersen's argument defies logic, as well as settled precedent.

Petersen's alternative theory is that, if the PIP definition does not apply (and it does not), State Farm had a duty to define every word used in the policy, and that any word left undefined is automatically legally ambiguous. In short, Petersen's theory is that one must abandon any semblance of common sense when reading an insurance policy, and pretend that he does not comprehend English. However, settled Florida law dictates that common sense is a mandatory element of contract construction.

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Petersen repeatedly asserts that the definition of the term "motor vehicle" found in the No-Fault section of the policy must control, whether or not there is UM coverage for an accident involving his uninsured motorcycle. Petersen insists that, under the PIP definition, his motorcycle is not a motor vehicle, despite the fact that he acknowledges that he was involved in a "vehicular accident" while riding it (Brief of Respondent on the Merits, 7).

Petersen also asserts that he is entitled to UM coverage even though he has never disputed in fact that there is no liability coverage for his Yamaha under the policy in question. That Petersen is reduced to presenting these arguments demonstrates that the Third District's decision in this case must be quashed.

Petersen acknowledges that the Third District's opinion in this case is in direct and express conflict with Grant v. State Farm Fire And Casualty Company, 18 Fla. L. Weekly D905 (Fla. 4th DCA April 7, 1993), but then argues that there is "no authority" for the proposition that the PIP definitions do not apply to UM claims. Petersen accordingly makes an ineffective attempt to distinguish cases which indeed say this, Standard Marine Insurance Company v. Allyn, 333 So. 2d 497 (Fla. 1st DCA 1976) and Prinzo v. State Farm Mutual Automobile Insurance Company, 465 So. 2d 1364 (Fla. 4th DCA 1985). Petersen contends that this Court should carve out a distinction between what constitutes a motor vehicle for the purposes of determining UM coverage, based

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on whether the "motor vehicle" in question was operated by the UM claimant, or an uninsured motorist.

This semantic distinction among motor vehicles depending on who is driving, as asserted by the Plaintiff, does not exist, and contradicts the clear policy of the courts and the legislature of this state, that the only time a motorcycle is not a motor vehicle is for the purposes of a PIP claim. See, Grant, supra; Standard Marine, supra; Indomenico v. State Farm Mutual Auto. Insurance Company, 388 So. 2d 29, 30 (Fla. 3d DCA 1980); see also, §316.003(21) and (22), Fla. Stat. (1991); §324.021, Fla. Stat. (1987).

That is why the State Farm policy contains a definition of the term "motor vehicle" tracking Fla. Stat. §617.732 in the PIP portion of the policy and only in that portion. Petersen does not even attempt to address the fact that the term "motor vehicle" is set forth in bold italics as a defined term in the No-Fault section of the policy, but does not appear in bold italics as a defined term anywhere else in the policy. Of course, this is yet another point of fact and law totally against Petersen which he has chosen to ignore rather than address.

Petersen has not cited one case which permits a definition in the PIP portion of a policy to be applied to a UM claim. In Dorrell v. State Fire And Casualty Company, 221 So. 2d 5 (Fla. 3d DCA 1969), cited by Petersen, the policy contained a definition of the term "automobile." Dorrell, 6. Of course, the issue in the present case is not whether Petersen's motorcycle is an

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"automobile." Nevertheless, the court in Dorrell found that a motorcycle was an "automobile" as the term was defined "in the pertinent provision of the policy" (emphasis in the original). Dorrell, 6.

Petersen cites Dorrell for the proposition that a definition from the liability portion of a policy may be applied in a UM claim. However, the applicability of definitions from the liability portion of a policy for the purpose of a UM claim is not the same as the applicability of a PIP definition. See, Standard Marine, supra; Grant, supra; Indomenico, supra.

Petersen also relies on Ceron v. Paxton National Insurance Company, 537 So. 2d 1090 (Fla. 3d DCA 1989). Nonetheless, Ceron only stands for the totally logical proposition that a tow truck is not an "automobile." Ceron, 1091. Florida law provides that the PIP definition of "motor vehicle" cannot be applied to a UM claim. Petersen's continuing reference to the PIP definition as the "express" definition must be viewed in that proper context; as must his continuing reliance on cases involving the definition of the term "automobile."

Petersen also completely ignores Fla. Stat. §627.727(9)(d) (Supp. 1990), a statute directly on point, which expressly provides for an exclusion exactly like the one which excludes coverage in the present case. Petersen has never addressed §627.727(9)(d) from the inception of this case. Fla. Stat. §627.727(9)(d) (Supp. 1990) states:

> (9) Insurers may offer policies of uninsured motorist coverage containing policy

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> 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 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.

Accordingly, in Petersen's policy, Coverage "U3" contains the following exclusion of 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.... (A 17)(emphasis in original).

It is clear that Petersen is attempting to create an ambiguity, by contending that he is unsure of whether his motorcycle is a "motor vehicle," in order to obtain coverage he knowingly did not buy.

Petersen argues that, because he was a "Class I" insured under the State Farm policy, he is automatically entitled to UM coverage for an accident involving his uninsured motorcycle, under Mullis v. State Farm Mutual Automobile Insurance Company, 252 So. 2d 229 (Fla. 1971). However, a "Class I" insured is only entitled to UM coverage only if the policy in question provides liability coverage for the accident. Mullis, supra; Valiant Insurance Company v. Webster, 567 So. 2d 408 (Fla. 1990).

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Petersen accordingly has never denied that he was not entitled to liability coverage under the policy. This is because 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....
>
> (A 5).

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." (A 8)(emphasis in original). 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 (A 8). Accordingly, there is no liability insurance coverage on Petersen's motorcycle under the policy, and Petersen admitted this below. There is also no liability coverage because the motorcycle is not insured under the policy.

Moreover, Mullis, while still good law, was decided long before the Legislature enacted §627.727(9)(d), which permitted the exact exclusion at issue in this case; giving Petersen the choice of paying a lower premium for less coverage than was available under Mullis. Petersen has not seen fit to cite or otherwise address §627.727(9)(d) even once, in either of his Briefs in the Third District, or in his Brief on the Merits in this Court. Therefore, while Mullis is still good law, the Legislature has allowed UM coverage to be limited to specific

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vehicles, precisely as was done in the present case, for a lower premium.

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, supra. Therefore, in the absence of liability coverage for an accident involving the motorcycle, the "Class" analysis does not apply, for there is a complete lack of the reciprocity which forms the underpinnings of Mullis.

In other words, if Petersen had been in an accident with his motorcycle which injured someone else, he would have been an uninsured motorist himself. Where it is undisputed that there would not have been any liability coverage for an accident involving Petersen's motorcycle which injured another, there is truly no public policy which would justify extending free UM coverage to Petersen under the facts of this case.

In addition, Petersen ignores the fact that the trial judge's Order finding that there was no coverage expressly reflected that Petersen knowingly chose the less expensive "U3 Nonstacking" coverage (R 32-35). Indeed, the Record reflects that Summary Judgment was entered because there was no evidence to the contrary, and that it was undisputed (and the Record is still undisputed) that Petersen knowingly selected U3 coverage over the more expensive U coverage; which Petersen is attempting to get in this litigation. There is simply no evidence to the contrary.

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In order to avoid Summary Judgment, it was up to Petersen to present evidence that he did not knowingly insure only his truck. Johnson v. Gulf Life Insurance Company, 429 So. 2d 744 (Fla. 3d DCA 1983); Colon v. Lara, 389 So. 2d 1070 (Fla. 3d DCA 1980); Landers v. Milton, 370 So. 2d 368 (Fla. 1979). It is not enough for the opposing party merely to assert that an issue does exist, Harvey Building, Inc. v. Haley, 175 So. 2d 780 (Fla. 1965) or to raise paper issues, Colon, supra. The Record establishes that Petersen never raised the issue of any lack of knowledge in the trial court and raised it for the first time in his Reply Brief in the Third District. This position is clearly waived.

Furthermore, despite his continued assertion that he is a "Class I" insured, there is truly no dispute that Petersen was not entitled to PIP or liability coverage for his motorcycle. Therefore, the Record is totally devoid of facts which would indicate that Petersen's choice of U3 coverage for a lower premium was anything less than knowing.

Therefore, based on the undisputed fact that Petersen was not entitled to PIP or liability coverage for his motorcycle, the issue in this case squarely boils down to whether or not Petersen's motorcycle was a "motor vehicle" for the purposes of the above exclusion. The only remaining avenue for any finding that the policy afforded UM coverage for an accident involving Petersen's motorcycle would be a finding that the term "motor vehicle" was ambiguous, simply because it was not specifically defined.

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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 every day 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).

It is well settled that the language of an insurance contract should be read in the light of the skill and experience of ordinary people and resort should not be made to uncommon meanings nor contextual distortion. Midwest Mutual Insurance Company v. Santiesteban, 287 So. 2d 665 (Fla. 1973); Morrison Assurance Company v. School Board of Suwannee County, 414 So. 2d 581 (Fla. 1st DCA 1982); Stewart v. State Farm Mutual Insurance Company, 316 So. 2d 598 (Fla. 1st DCA 1975).

The policy language in this case is plain and unambiguous on its face, leaving no room for construction. The policy clearly

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and unambiguously states that the only motor vehicle which is included under the special "U3" coverage, as well as PIP and liability coverage, is Petersen's Ford truck. That is why Petersen decided to seek coverage for his motorcycle on the novel proposition that it is not a "motor vehicle."

Of course, as a matter of well established Florida law, under both statutes and case law, a motorcycle is a motor vehicle. 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, supra. The pertinent statutes provide as follows:

(1) Fla. Stat. §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.

(2) Fla. Stat. §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."

(3) Fla. Stat. §316.003(75) (1991) defines a "vehicle" as "[e]very device, in, upon, or by which any person or

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excepting devices used exclusively on stationary rails or tracks." Once again, a motorcycle is a motor vehicle.

(4) Fla.Stat. §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. Of course, since the plaintiff 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. Grant, D906.

Petersen still relies upon Fla. Stat. §§316.209(1), 627.732(1), and 627.041(8), in his attempt to establish that a motorcycle is not a motor vehicle. Section 316.209 merely refers to both motor vehicles and motorcycles, and essentially forbids any motor vehicle, including other motorcycles, to deprive a

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motorcycle of full use of a lane. Petersen still chooses to totally ignore the above 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) 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.

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

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> uninsured motorist than the "PIP" definition in the instant policy....
>
> Standard Marine, 499 [footnote omitted]; see also, Grant, D906; Indomenico, 30.

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. Conversely, Petersen cannot cite a single case which applied the statutory definitions which he relies upon in order to declare that a motorcycle on the road is not a motor vehicle. 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 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 undisputedly 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, State Farm Mutual Automobile Insurance Company v.

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Kuhn, 374 So. 2d 1079 (Fla. 3d DCA 1979)(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 has cited no authority to the contrary.

Petersen cites State Farm Mutual Automobile Insurance Company v. Pridgen, 498 So. 2d 1245 (Fla. 1986) 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. Pridgen, 1249. Like Dorrell, even a cursory reading of Pridgen reaffirms the rule of construction which requires a reading of the entire contract, placing each term in the proper context.

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. 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. Pridgen, 1248-49. Accordingly, the exclusion applied, and there was no coverage for the loss.

The bottom line is that Petersen argues that he is entitled to UM coverage for the accident with his motorcycle, even though

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he undisputedly is not entitled to any other type of coverage for the motorcycle under the policy. Needless to say, Florida statutes, case law, and settled public policy dictate an opposite result to that reached by the Third District in this case. Based on the foregoing, the decision of the Third District in this case must be quashed and the Fourth District's decision in Grant must be approved.

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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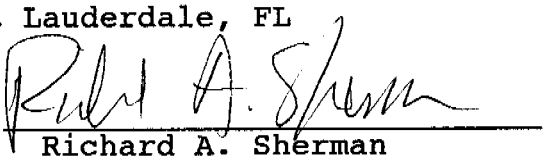
By: 
Richard A. Sherman

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 2nd day of September, 1993 to:

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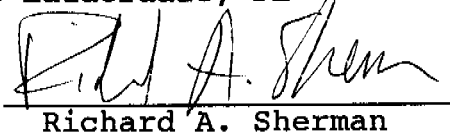
By: 
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