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IN THE SUPREME COURT OF FLORIDA

CASE NO. : 82,260

MICHAEL GRANT,

Petitioner,

vs.

STATE FARM FIRE AND CASUALTY COMPANY,

Respondent.

_____/

RESPONDENT'S AMENDED BRIEF ON JURISDICTION

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INTRODUCTION

The Petitioner seeks review of a decision of the District Court of Appeal, Fourth District of Florida, which has been certified as conflicting with that of the Third District Court of Appeal rendered in the case of Petersen vs. State Farm Fire & Casualty Company, 615 So.2d 181 (Fla. 3rd DCA 1993). The Fourth District found that "in Petersen, the Third District reaches an opposite result on virtually identical facts".

Throughout this Brief on Jurisdiction, the Respondent, STATE FARM FIRE & CASUALTY COMPANY, will be identified as "STATE FARM". The Petitioner, MICHAEL GRANT, will be identified as "GRANT".

The symbol "(A.)" will refer to the Appendix attached to the Petitioner's Brief on Jurisdiction.

All emphasis, throughout this Brief, will be supplied by the writer unless otherwise indicated.

STATEMENT OF THE CASE AND THE FACTS

GRANT initially appealed to the District Court of Appeal, Fourth District of Florida, a Summary Judgment rendered in the trial court in favor of his uninsured motorist insurance carrier, STATE FARM. (A.1).

GRANT had purchased a policy with STATE FARM which listed a 1978 Corvette as the only insured vehicle. While GRANT was operating a motorcycle owned by him, and not insured under any

policy, he was injured in a collision with an uninsured motorist. (A.1).

STATE FARM's policy insuring the Corvette contained uninsured motorist benefits of the "non-stackable" type as authorized by §627.727(9), Florida Statutes (1989).

In accordance with the statute, GRANT's STATE FARM policy contained the following exclusion to 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.3).

GRANT appealed the Summary Judgment finding no uninsured motorist coverage available to him as a result of his accident. The Fourth District Court of Appeal affirmed the lower court's finding on the basis that the public policy considerations of Standard Marine Insurance Company v. Allyn, 333 So.2d 497 (Fla. 1st DCA 1976) remained viable and applied to the situation presented in the case. (A.6).

At approximately the same time that the decision of the Fourth District Court of Appeal was announced in the case sub judice, the Third District Court of Appeal announced its decision in Petersen v. State Farm Fire & Casualty Company, 615 So.2d 181 (Fla. 3rd DCA 1993). On essentially the same set of facts, that Court reversed a Summary Judgment in favor of State

Farm finding that an ambiguity arose concerning the definition of the term "motor vehicle" as it was used in the uninsured motorist section of its policy. The Third District Court construed the ambiguity most strictly against the issuer of the policy and found that uninsured motorist coverage would, therefore, be available for the virtually identical set of facts as set forth in the case sub judice.

Based upon the acknowledged conflict with Petersen, GRANT has taken this appeal.

ISSUES ON APPEAL

I.

WHETHER THE DECISION UNDER REVIEW CONFLICTS WITH PETERSEN v. STATE FARM FIRE & CASUALTY COMPANY, 615 So.2d 181 (Fla. 3rd DCA 1993)?

II.

WHETHER THE DECISION RENDERED BELOW IS IN EXPRESS AND DIRECT CONFLICT WITH THOSE DECISIONS THAT HAVE PREVIOUSLY HELD THAT A CLASS I/NAMED INSURED IS ENTITLED TO UNINSURED MOTORIST BENEFITS REGARDLESS OF LOCATION AT THE TIME OF INJURY BY AN UNINSURED MOTORIST?

SUMMARY OF ARGUMENT, POINT I ON APPEAL

STATE FARM concurs that the case sub judice expressly and directly conflicts with the Opinion rendered by the Third District Court of Appeal in its decision in Petersen v. State

Farm Fire & Casualty Company. Accordingly, this Court has jurisdiction to entertain this appeal.

ARGUMENT, POINT I ON APPEAL

STATE FARM concurs with the decision of the Fourth District Court of Appeal that the Opinion issued in the case sub judice conflicts with that of the Third District in Petersen v. State Farm Fire & Casualty Company. In Petersen, it is agreed, the Third District reached an opposite result of virtually identical facts. Accordingly, it is submitted, this Court does have jurisdiction based upon Article V, §3(b)(3), Florida Constitution, and Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure, in that the two decisions "expressly and directly conflict" with each other on the same question of law.

SUMMARY OF ARGUMENT, POINT II ON APPEAL

GRANT urges, in his Brief on Jurisdiction, that the Opinion of the Fourth District Court of Appeal not only conflicts with the Petersen decision, but also this Court's Opinion in Mullis vs. State Farm Mutual Automobile Insurance Company, 252 So.2d 229 (Fla. 1971). Indeed, however, as will be shown, this is not the case.

In 1987, the legislature amended the Uninsured Motorist Act to allow for insurance carriers to provide uninsured motorist benefits which would not aggregate, or "stack". This

legislation, in effect, revived the law which existed between the years 1976 and 1980 prohibiting the stacking of uninsured motorist coverage. During that period of time, various decisions, in remarkably similar situations as presented in the case sub judice, held that an insured was precluded from recovering uninsured motorist benefits while operating an uninsured motorcycle at a time that uninsured motorist benefits were available on other vehicles in a household.

The case of Mullis vs. State Farm Mutual Automobile Insurance Company basically stands for the proposition that persons for whom uninsured motorist coverage was required to be provided were those persons who were covered under the liability provisions of an insurance policy.

As this court has explained in its decision in Valiant Insurance Company v. Webster, 567 So.2d 408, 410 (Fla. 1990), Mullis does not mandate that uninsured motorist coverage must be available if the liability provisions of an insurance policy do not apply to a given accident.

Here, there can be no argument that GRANT would be entitled to liability coverage under the policy covering his Corvette for the accident involving his uninsured motorcycle. Accordingly, the Opinion of the Fourth District Court does no violence to the principles enunciated in Mullis and, accordingly, this case is not in conflict with that decision.

ARGUMENT, POINT II ON APPEAL

GRANT goes further, in his Brief on Jurisdiction, an argues that not only does the case sub judice conflict with the Petersen case out of the Third District Court of Appeal, but also conflicts with the decision of this Court in Mullis v. State Farm Mutual Automobile Insurance Company, 252 So.2d 229 (Fla. 1971). As will be shown, the case below in no way conflicts with Mullis, is imminently consistent with the proposition of law contained in Mullis, and no conflict with that decision exists.

In 1987, the legislature amended the Uninsured Motorist Act of this state to add, paragraph 9, which provides in pertinent part:

> "(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 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.
>
> §627.727(9), Florida Statutes (1989).

What the legislature sought to accomplish in its changing of the Uninsured Motorist Act in this manner, was to offer non-stacking uninsured motorist coverage to the public for a reduction in premium.

Between the years 1976 and 1980, uninsured motorist coverage was subject to a similar type of non-stacking legislation. The legislature, in 1977, enacted §627.4132, Florida Statutes. This statute prohibited the stacking of uninsured motorist coverage.

In dealing with identical situations involving insured individuals riding a uninsured motorcycle at the time they were injured by an uninsured motorist, various courts of this state were not barred by Mullis in holding that an insured was precluded from recovering uninsured motorist benefits available on other vehicles in the household. See, e.g., State Farm Mutual Automobile Insurance Company v. Kuhn, 374 So.2d 1079 (Fla. 3rd DCA 1979), cert. denied, appeal dismissed, 383 So.2d 1197 (Fla. 1980); and, Indomenico v. State Farm Mutual Automobile Insurance Company, 388 So.2d 29 (Fla. 3rd DCA 1980).

In 1980, §627.4132 was amended by the legislature to omit its reference to uninsured motorist coverage. See, New Hampshire Insurance Group v. Harbach, 439 So.2d 1383 (Fla. 1983); Ch. 80-364, §1 at 1495, Laws of Fla.

During the time that the anti-stacking statute applied to Uninsured Motorist coverages, it was clear that the passage of an anti-stacking statute was a reasonable exercise of the state's undisputed authority to regulate the insurance industry in furtherance of the public welfare. Gillette v. State Farm Mutual Automobile Insurance Company, 374 So.2d 525 (Fla. 1979).

In essence, then, in its 1987 enactment, the legislature has revived the concept of the "non-stacking" of uninsured motorist coverages in situations where an insured wishes to pay a reduced uninsured motorist insurance premium. It appears manifest that the legislature has the undisputed authority to do this.

Likewise, in giving effect to the legislative intent to revive the concept of the "non-stacking" of uninsured motorist coverages, the Fourth District Court of Appeal, in its opinion sub judice, in no way conflicts with Mullis. In Mullis, this Court explained that persons for whom uninsured motorist coverage was required to be provided were the persons who were covered under the liability provisions of the automobile policy.

As explained by this Court in its decision in Valiant Insurance Company v. Webster, 567 So.2d 408, 410 (Fla. 1990):

> "Since our decision in Mullis, the courts 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. (Except with respect to occupants of the insured automobile)".

There is no argument here that GRANT would be entitled to liability coverage under the policy covering his Corvette for his operation of his uninsured motorcycle. Accordingly, it does not violence to Mullis, irregardless of the legislative

enactment, to have an exclusion in the policy which would take the accident in this case out of the ambit of uninsured motorist coverages provided.

CONCLUSION

Therefore, will STATE FARM concedes that the case sub judice is in express and direct conflict with the Opinion of the Third District Court of Appeal in its decision in Petersen v. State Farm, it seems clear that the decision of the Fourth District Court of Appeal in no way conflicts with this Court's decision in Mullis.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was mailed this 20th day of September, 1993, to: MARK R. McCOLLEM, ESQUIRE, 201 S.E. 12th Street, Ft. Lauderdale, Florida 33316. Telephone: (305) 462-8484.

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