017

IN THE SUPREME COURT OF FLORIDA

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Petitioner,

vs.

DANIEL MCCARTHY, JR.,

Respondent.

CASE NO.: 87,123

District Court of Appeal
1st District - No.94-3765

RESPONDENT'S ANSWER BRIEF

JACK M. ROSS, P.A.
Post Office Box 1168
Gainesville, Florida 32602
(904) 375-1000
Florida Bar No. 296759

TABLE OF CONTENTS

TABLE OF CITATIONS

FLORIDA STATUTES

SUMMARY OF THE ARGUMENT

The very clear policy of this State is that Uninsured Motorist ("UM") benefits should be available to compensate a victim for damages which exceed the amount of liability coverage available. Coverage is not to be whittled away by exclusions and exceptions. Automobile Ins. Co. of Hartford v. Beem, 469 So.2d 138 (Fla. 3rd DCA 1985). That is the exact situation in which McCarthy finds himself. Yet, even though it has collected premiums for UM coverage, State Farms seeks to avoid payment of benefits to McCarthy solely because he was a passenger in the underinsured vehicle. State Farm offers no policy justification, and there is no policy justification, for allowing State Farm to treat McCarthy differently than any other insured just because the driver of the car in which he was riding is the underinsured driver whose negligence caused his injury.

In order to avoid payment of benefits to which McCarthy is entitled, State Farm asks this Court to desert the two core principles applicable to uninsured motorist ("UM") coverage adopted twenty five years ago in Mullis v. State Farm Mutual Automobile Ins. Co., 252 So.2d 229 (Fla. 1971) and consistently followed ever since. The two principles adopted in Mullis are: 1) UM coverage is required to be provided for all persons who are insured under the policy for liability coverage, and 2) Exclusions from UM coverage which is required under the first principle are legally impermissible. For over a quarter century this Court has never wavered from those principles. State Farm offers no policy

justification for the Court to abandon its established principles in this case. Instead it seeks to mask its inability to justify its attempted UM exclusion by a coerced reading of the language of the policy and misanalysis of prior decisions of this Court.

State Farm's suggestion that McCarthy was not an insured under the liability coverage of the policy requires a ridiculous reading of the policy language. The policy provides liability coverage for all who are "using such a **car** if its use is within the scope of consent of **you** or **your spouse.**" (underlining added; bold in original). That a passenger, such as McCarthy, is using the car is obvious from the clear meaning of the English language and is supported by every Florida case which has addressed the issue.

Cases decided by this Court which uphold a UM exclusion when receipt of UM benefits would nullify a valid liability exclusion are not applicable. In those cases this Court recognized a very important policy consideration requiring that the UM exclusion be upheld: the preservation of a valid liability exclusion. No such justification exists in this case. There is no liability exclusion to preserve. Yet, State Farm asks this Court to approve, for the very first time, a UM exclusion which denies benefits to a person who is insured under the liability coverage when to do so would not nullify a liability exclusion. The Court should reject such a request.

It should be kept in mind that to affirm the District Court would not require an insurer to provide UM and liability benefits to all passengers. A carrier is entitled to exclude a passenger

from those who are insured under the liability coverage. If it does so, it could exclude the passenger from UM benefits as well. In this case State Farm, by the very clear language of its policy, insured McCarthy under the liability provisions of the policy, and, therefore, its attempt to exclude UM coverage is invalid under very clear, long standing, and oft repeated principles set forth by this Court.

ARGUMENT

I. INTRODUCTION

Insurers are required to provide UM coverage because it is the very clear policy of the State that UM benefits be available to compensate injured parties for damages in excess of the liability coverage available. Coverage is not to be whittled away by exclusions and exceptions. Automobile Ins. Co. of Hartford v. Beem, 469 So.2d 138 (3rd DCA 1985); Ellsworth v. Insurance Co. of North America, 508 So.2d 395 (Fla. 1st DCA 1987); Ch. 89-243, Laws of Florida. McCarthy falls squarely within the purposes for which the coverage is required. Yet, without any attempt to justify the exclusion, State Farm seeks to deny McCarthy benefits solely because the underinsured automobile which caused his injury was the vehicle in which he was riding. There is no rational basis for such an exclusion.

State Farm's exclusion violates the core principles of Uninsured Motorist coverage which were adopted by this Court more than twenty five years ago and which have formed the basis for every decision on UM coverage since that time. In 1971, in Mullis v. State Farm Mutual Automobile Ins. Co., 252 So. 2d 229 (Fla. 1971) the Court set forth two core principles applicable to UM coverage: 1) UM coverage is required to be provided for all persons who are insured under the policy for liability coverage, and 2) Exclusions from UM coverage which is required under the first principle are legally impermissible. Auto Owner's Ins. Co. v. Bennett, 466 So. 2d 242 (Fla. 2nd DCA 1984). Since McCarthy was

insured under the liability coverage of the policy, the First District was correct to hold State Farm's attempted UM exclusion is impermissible.

II. McCARTHY WAS COVERED UNDER THE LIABILITY COVERAGE OF GALLO'S POLICY.

A. INTRODUCTION

State Farm was not required to provide liability coverage for McCarthy. However, under its insurance contract State Farm did provide, and collected a premium for, liability coverage for McCarthy. Therefore, under the holding of Mullis, State Farm must provide UM coverage to McCarthy and the attempted exclusion of UM coverage for McCarthy is invalid. State Farm seeks to avoid this well settled rule of law by a forced reading of the language of the policy.

The clear language of the policy provides that McCarthy is an insured under the liability portion of the policy. An insured is defined by the policy to include:

> 4. any other **person** while using such a **car** if its use is within the scope of consent of **you** or **your spouse;** (bold in the policy, underlining added).

It was stipulated that McCarthy was a passenger in the car at the time of the injury. State Farm tries to avoid its statutory responsibility by the claim that "use" means "drive." Since McCarthy was not "driving the car," State Farm argues, he was not "using" the car and, therefore, was not an insured under the liability coverage. This argument is contrary to all previously

decided cases, established rules governing interpretation of insurance policies, and the common use of the English language, or as State Farm would say the common "drive" of the English language.

B. ALL PRECEDENT HOLDS THAT BEING A PASSENGER CONSTITUTES USE OF AN AUTOMOBILE

That being a passenger constitutes "use" of a car has been recognized by every appellate decision of this state that has considered the matter in interpreting an automobile policy. The Third District addressed this very question in Valdes v. Smalley, 303 So.2d 342 (Fla. 3rd DCA 1974). In that case Smalley was driving a car insured by National Ben Franklin Ins. Co. and Reserve Ins. Co. His passenger, Spradley, was insured under an auto policy written by Millers Casualty Co. Spradley and Smalley were involved in an altercation with a group which began pelting Smalley's car with rocks. As Smalley drove past the group at a speed of about 40 mph, Spradley, the passenger, threw a glass beer mug toward the crowd. The mug struck Miguel Valdes, whose father brought suit for negligence.

All three insurance companies sought, and obtained, summary judgment in the trial court on the grounds that the policies did not provide coverage because the injury did not arise "out of the ownership, maintenance or use" of the automobile. The Third District reversed the summary judgment for the insurance companies holding that the accident "originated from and was causally connected with the use of the automobile," Id. at 345, and that the passenger's act of throwing a mug from the automobile could not be

said to bear no substantial or direct relation to the use of the automobile.[1]

The Third District Court of Appeal also held in National Indemnity Co. v. Corbo, 248 So.2d 238 (3rd DCA 1971), that "use" of an automobile is broader than driving an automobile. In that case the owners' son was using their car to transport a German Shepherd watchdog. The son stopped at a drug store and left the plaintiff, a passenger, and the dog in the car where the dog bit the plaintiff.

When plaintiff brought suit the auto insurer, National Indemnity, sought summary judgement claiming that the injury did not arise out of the "use of the automobile." The trial court denied National Indemnity's motion for summary judgment and the Court of Appeal affirmed. The Third District held that "'Use' extends to any activity involved in the utilization of the covered vehicle in the manner intended or contemplated by the insured." Id. at 240. Clearly use of the vehicle as a passenger was intended and contemplated by Gallo.

In addition, when interpreting the word "use" in the PIP portion of the same policy, numerous cases have held that the term is substantially broader than the term "drive." In U.S.F.&G. v.

---

[1]This Court has held cases which hold that being a passenger does not constitute use of a vehicle for purposes of interpreting an exclusion in a homeowner's policy, West American Insurance Co. v. Silverman, 378 So.2d 28 (Fla. 4th DCA 1980); St. Paul Fire & Marine Ins. Co. v. Thomas, 273 So.2d 117 (Fla. 4th DCA 1973), are not applicable to decisions considering the extent of coverage under an automobile policy. National Ben Franklin Ins. Co. v. Valdes, 341 So.2d 975 (Fla. 1977).

Daly, 384 So.2d 1350 (Fla. 4th DCA 1980), plaintiff, a passenger in the back of a pickup truck, was injured when he was blown from the truck by a heavy wind. Affirming the award of PIP benefits the Court of Appeal stated, "There is no question that the injury arose out of the use of the pickup truck...." Id. at 1350. See also, GEICO v. Novak, 453 So.2d 1116 (Fla. 1984) (Use of automobile includes being shot while occupant of a parked auto); Protective National Ins. Co. of Omaha v. Bergouignan, 335 So.2d 871 (Fla. 3rd DCA 1976) (Passenger entitled to PIP benefits). It makes no sense to suggest the word "use" means only "drive" in one portion of the policy but includes use as a passenger in another portion of the same policy

C. THE PRIMARY RULE OF CONTRACTUAL INTERPRETATION ESTABLISHES THAT MCCARTHY WAS INSURED UNDER THE LIABILITY PORTIONS OF THE STATE FARM POLICY

The first rule of contractual interpretation is that words should be given their plain meaning. Texas Trailer Corp. v. McIlwain, 579 So.2d 237 (Fla. 1st DCA 1991); Gibbs vs. Air Canada, 810 F.2d 1529 (11th Cir. 1987). This is particularly true of interpretation of insurance policies which are statutorily required to be "readable." Fla. Stat., 627.4145. One need not be trained in the law to recognize that the word "use" is substantially broader than the word "drive" and to use a car encompasses many more activities than to drive a car. Use as a passenger is as much a use of the vehicle as driving the car. Indeed, the passenger can be the primary user of the vehicle with the driver driving only to

accommodate the passenger's use.

D. COMMON USAGE OF THE ENGLISH LANGUAGE REVEALS THAT A PASSENGER USES AN AUTOMOBILE

One does not require legal authority to understand that riding as a passenger constitutes use of a car. Common usage of the English language reveals that a passenger uses a car for transportation as much as the driver. Webster's New Collegiate Dictionary defines "use" as, "to put into action or service: avail oneself of: EMPLOY." BLACK'S LAW DICTIONARY, Revised Fourth Edition, defines "use" as, "To make use of, to convert to one's service, to avail one's self of, to employ." There can be no doubt that Mccarthy made use of the vehicle, availed himself of its service, and/or employed the vehicle. McCarthy used the vehicle. As one who used the vehicle with Gallo's permission he is insured under the liability provisions of the policy and the attempt to exclude him from UM coverage under the policy is impermissible under Mullis.

III. THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IS CONSISTENT WITH THIS COURT'S DECISIONS IN REID, BRIXIUS, AND SMITH v. VALLEY FORGE

State Farm incorrectly attempts to rely on this Court's prior decisions in Reid v. State Farm Fire and Casualty Co., 352 So.2d 1172 (Fla. 1977); Brixius v. Allstate Insurance Co., 589 So.2d 236 (Fla. 1991); and Smith v. Valley Forge Ins. Co., 591 So.2d 926 (Fla. 1992). In each of those cases there was a valid policy

reason to allow the UM exclusion. All of those cases allow an exclusion to UM coverage only when the failure to do so would invalidate a valid liability exclusion. As accurately pointed out by the First District in Warren v. Travelers Ins. Co., 650 So.2d 10082, 1082 (Fla. 1st DCA 1995), "[T]hese cases support only the narrower proposition that, where a valid policy exclusion bars recover of liability benefits (and the policy excludes the insured vehicle from the definition of an uninsured vehicle), an injured person can not claim that the vehicle is uninsured as to herself so as to recover uninsured motorist benefits in lieu of liability benefits."

The First District's analysis is correct. While Reid, Brixius, and Valley Forge address policy provisions similar to the provision in this policy, they do so under factual situations in which to invalidate the exclusion would nullify a valid liability exclusion. Each of the opinions is specifically limited to the facts presented and expressly states that the basis of the ruling is to avoid the nullification of a valid liability exclusion.

In Reid the Court addressed a case in which the Plaintiff could not obtain liability benefits because of the family-household exclusion to the liability coverage. She sought to avoid this exclusion by claiming the exclusion rendered the automobile an uninsured vehicle as to her. This Court specifically limited its acceptance of the UM exclusion to the narrow facts of the case. "We recognize, as a general rule, that an insurer may not limit the applicability of uninsured motorist protection....On the other

hand, we say that the particular restriction on uninsured motorist coverage in the present case is not against public policy and is not void. To hold otherwise in this case would completely nullify the family-household exclusion." Id. at 1173-1174 (emphasis added).

Both Brixius and Smith v. Valley Forge involved factual situations in which to invalidate the exclusion would nullify a valid liability exclusion. In upholding the exclusion, both cases explicitly relied on the reasoning of Reid that to do otherwise would nullify a valid liability exclusion. In Valley Forge this Court expressly quoted its decision in Reid, "[T]o hold otherwise in this case would completely nullify the family-household exclusion." Smith v. Valley Forge at 927, quoting Reid at 1174. The Brixius Court also expressly relied on the rationale in Reid that to void the exclusion would nullify a valid liability exclusion. "Even the *Jernigan* court recognized the viability of *Reid* in a situation where allowing recovery of uninsured motorist benefits would defeat a valid liability exclusion contained in the same policy." Brixius at 238.

Consider again the policy of the state that UM coverage be available to compensate the injured for damages above the available liability limits and that the insurance company may exclude that coverage only in rare circumstances. In Reid, Brixius, and Valley Forge this Court found that preservation of a valid liability exclusion was a sufficient justification for the exclusion under the facts of those case. That justification is not present under the facts of this case. There is no liability exclusion to be

nullified. State Farm offers no additional policy reasons which would justify the exclusion it seeks to enforce contrary to twenty five years of jurisprudence. Therefore, the decision of the First District Court of Appeal should be affirmed.

III. THIS COURT SHOULD DISAPPROVE THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL IN BULONE.[2]

The decision of the Second District Court of Appeal in Bulone v. United States Automobile Association, 660 So. 2d 399 (Fla. 2nd DCA 1995) is faulty in two regards. First, requiring UM coverage under the facts of this case does not prevent the insurer from issuing a policy which validly excludes a passenger from UM coverage if desired by the customer. Secondly, the fact that the policy provides greater benefits to guest passengers than members of the insured's family, which appeared to concern the Second District, is quite common.

The Bulone court's primary concern seems to be that to allow a passenger to recover UM benefits for the negligence of the underinsured driver would require car owners to purchase UM coverage for their passengers. This fear seems to overlook the fact that there is no requirement that a policy provide UM benefits to a passenger. UM benefits are required to be provided to the passenger only if that passenger is an insured under the liability portion of the policy. In this case McCarthy clearly is an insured under the liability portion of the policy and is entitled to UM

---

[2]Bulone v. United States Automobile Association, 660 So.2d 399 (2nd DCA 1995).

benefits. However, an insurer is entitled to issue a liability policy which does not include a passenger as an insured, and, under that policy, could exclude UM coverage for that passenger.

Secondly, the court's concern that the insured would provide greater coverage to an unrelated passenger than a family member is misplaced in the context of this case. In fact, under the terms of this policy, whatever the decision on this issue, the insured provides greater coverage to McCarthy, who has recovered liability benefits, than to family members who are excluded from those benefits.

There are very valid policy reasons for excluding insurance coverage to family members. Those policy reasons are present whether the claim is made under the UM or liability provisions of the policy. However, those policy reasons do not apply to unrelated passengers. They do not apply in the UM context any more than the liability context. What does apply is the policy that UM coverage be available to cover any damages above the liability limits and not be excluded for those who are insured under the liability coverage. Those policy considerations are well established and longstanding and should not be abandoned in this case.

State Farm asks this Court to allow it to circumvent that clear policy by upholding, for the very first time, an exclusion to UM coverage for a person covered under the liability coverage when the UM coverage will not nullify a valid liability exclusion. Such a ruling would be a complete reversal of more than 25 years of

jurisprudence implementing clear UM policy and is a step McCarthy urges this Court not to take.

IV. CONCLUSION

Under the clear terms of the policy McCarthy is an insured under the liability coverage. Under a longstanding, well established policy, repeatedly articulated by this Court, any attempt to exclude him from UM benefits is unenforceable. Cases which uphold an exclusion for those who are not entitled to liability benefits in order to avoid nullifying the liability exclusion are not applicable to this case. What is applicable is the clear policy of the state that UM benefits should be available to compensate an injured party for damages beyond the limits of liability coverage. That is the exact situation in which McCarthy finds himself, and State Farm should be required to provide the benefits to which he is entitled.

CONCLUSION

For the reasons set forth above the decision of the First District Court of Appeal should be affirmed.

Respectfully submitted,

JACK M. ROSS, P.A.
Post Office Box 1168
Gainesville, Florida 32602
(904) 375-1000
Florida Bar No. 296759

JACK M. ROSS
Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to G. Michael Burnett, Esq., Taylor, Day & Rio, 10 South Newman Street, Jacksonville, Florida 32202 this 4 day of April, 1996.

OF COUNSEL