IN THE SUPREME COURT OF FLORIDA

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner,

v.

DANIEL McCARTHY, JR.,

Respondent.

CASE NO. 87,123

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

REVIEW OF A CERTIFIED QUESTION OF THE FIRST DISTRICT COURT OF APPEAL

REPLY BRIEF OF PETITIONER STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

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PRELIMINARY STATEMENT

In this brief, the petitioner, State Farm Mutual Automobile Insurance Company, will be referred to as "State Farm." The respondent, Daniel McCarthy, Jr., will be referred to as "McCarthy." The driver of the only vehicle involved in the accident at issue, Clyde Matthew Gallo, will be referred to as "Gallo." References to the record on appeal will be to the page(s) on which the reference appears, as follows: "(R. _____)". The terms "uninsured motorist" or "underinsured motorist" will be referred to herein as "UM."

The answer brief filed in this matter by McCarthy will be referred to as "Answer Brief" followed by a page reference.

ARGUMENT

I. STATE FARM'S POLICY PROVISION WHICH EXCLUDES FROM THE DEFINITION OF "UNINSURED MOTOR VEHICLE" ANY MOTOR VEHICLE "INSURED UNDER THE LIABILITY COVERAGE OF THE POLICY" SHOULD BE GIVEN FULL FORCE AND EFFECT THUS DISALLOWING McCARTHY FROM RECOVERING BOTH LIABILITY AND UNINSURED MOTORIST BENEFITS UNDER THE SAME STATE FARM POLICY IN THE SINGLE CAR ACCIDENT IN THIS MATTER.

The State Farm policy in this matter excludes from the definition of "uninsured motor vehicle" any motor vehicle which is "insured under the liability coverage of this policy." Thus, under the express language of the State Farm policy, McCarthy could not recover UM benefits under the same policy which insured the car in which he was riding as a passenger and under which he had already recovered liability benefits. However, McCarthy seeks to avoid State Farm's clear UM policy exclusion by asserting that said exclusion is contrary to the public policy set forth by this Court in Mullis v. State Farm Mutual Automobile Ins. Co., 252 So. 2d 229 (Fla. 1971). Specifically, McCarthy asserts that Mullis prohibits a policy of insurance from excluding from UM coverage all persons who are insured under said policy for liability coverage. (Answer Brief p. 1, 4) McCarthy then makes the unprecedented argument that he was insured as a potential tortfeasor under the liability portion of Gallo's State Farm policy due to the fact that he was "using" Gallo's car as a passenger. (Answer Brief p. 2, 5).[1]

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[1]Interestingly, McCarthy asserts in his answer brief that State Farm seeks to avoid payment of UM benefits to him despite the fact that State Farm had collected premiums from him for UM and liability coverage. (Answer Brief p. 1, 5) As the facts in this matter clearly indicate, McCarthy was as a passenger in a vehicle owned and operated by Gallo when Gallo lost control of his

Gallo's State Farm policy defines an "insured" under the liability portion of the policy in the following manner:

> **Who is an insured?**
>
> When we referred to **your car**, a **newly acquired car** or a **temporary substitute car**, **insured** means:
>
> 1. **you**;
> 2. **your spouse**;
> 3. the **relatives** of the first **person** named in the declarations;
> 4. any other **person** while using such a **car** if its use is within the scope of consent of **you or your spouse**; and
> 5. any other **person** or organization liable for the use of such **car** by one of the above **insureds**.

Page 6 of the State Farm policy. (R. 63-91) (Emphasis in policy.)[2]

In his answer brief, McCarthy focuses on provision 4 of the above-referenced policy provision and argues that, because he was a passenger in Gallo's car at the time of the accident, he was "using" Gallo's car within the scope of consent of Gallo and, therefore, was an insured under the liability portion of Gallo's

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automobile resulting in a single car accident injuring McCarthy. (R. 63) Gallo had an insurance policy with State Farm on his vehicle which provided $100,000.00 in bodily injury liability coverage and $100,000.00 in UM coverage. (R. 63) The parties settled McCarthy's liability claim for the $100,000.00 policy limits. (R. 2, 37, 64) The only issue remaining in this matter is McCarthy's alleged entitlement to payment under the UM portion of Gallo's State Farm policy. (R. 64) It is clearly erroneous to assert that McCarthy paid any premiums for any type of coverage under State Farm's policy of insurance with Gallo.

[2]"You" or "your" is defined in the policy to mean "the named insured or the named insured shown on the declarations page." Page 4 of the State Farm policy.

policy. (Answer Brief p. 6) McCarthy then argues that, because he is an insured under the liability portion of Gallo's policy, he cannot be excluded from UM coverage under that same policy because of the public policy set forth in Mullis. (Answer Brief p. 4-5) Without conceding that McCarthy's interpretation of Mullis is accurate, his assertion that he is covered under the liability portion of Gallo's policy has absolutely no support in the applicable statutes or the case law. In fact, this argument has not been raised by an injured passenger in any of the several cases dealing with issues very similar to those presented to this Court in this matter.

McCarthy cites to several cases to support his argument that he was "using" Gallo's car as a passenger and, therefore, was covered under the liability portion of Gallo's State Farm policy. (Answer Brief p. 6-8) None of these cases interpret the policy language at issue herein. Instead, all of these cases analyze whether or not the incident in each situation "[arose] out of the ownership, maintenance, or use of the owned automobile." Valdes v. Smalley, 303 So. 2d 342, 343 (Fla. 3d DCA 1974); National Indem. Co. v. Corbo, 248 So. 2d 238, 239 (Fla. 3d DCA 1971); United States Fidelity and Guaranty Co. v. Daly, 384 So. 2d 1350 (Fla. 4th DCA 1980); Government Employees Ins. Co. v. Novak, 453 So. 2d 1116, 1119 (Fla. 1984); Protective Nat'l Ins. Co. of Omaha v. Bergouignan, 335 So. 2d 871, 872 (Fla. 3d DCA 1976).

It is important to note that Daly, Novak, and Bergouignan were all cases addressing whether or not personal injury protection

(PIP) benefits were payable. This analysis is completely different and irrelevant to the issue now before this Court. In Novak, this Court indicated that the clause "arising out of the use of a motor vehicle" was framed in general, comprehensive terms such that it expressed the intent to effect broad coverage. Novak, 453 So. 2d at 1119. Additionally, the Novak Court stated that "[s]uch terms should be construed liberally because their function is to extend coverage broadly." Id. These PIP cases involve language which has no relevance to McCarthy's assertions. Additionally, the cases were bound by rules of construction appropriate to PIP cases which have absolutely no application here.

Similarly, Valdes and Corbo dealt with the sole issue of whether or not the injuries sustained therein "arose out of the use" of a vehicle. Valdes, 303 So. 2d at 343; Corbo, 248 So. 2d at 239. These cases had nothing to do with the issue of whether an innocent passenger is insured for liability purposes under the policy covering the vehicle involved and its driver. The quotes from these cases cited in McCarthy's answer brief are clearly taken out of context and have no bearing on the issues herein.

McCarthy's assertion that he was covered under the liability portion of Gallo's policy was specifically rejected in Bulone v. United Services Automobile Assoc., 660 So. 2d 399 (Fla. 2d DCA 1995). The Bulone court's holding arose out of virtually identical facts to those herein. Id. In Bulone, the court had before it a completely faultless passenger who was injured in a one car accident and subsequently brought claims against the driver's

insurance policy for liability and UM benefits. Id. at 400. The driver's insurer immediately paid its liability policy limits but asserted that Ms. Bulone was excluded from obtaining UM benefits. Id. After analyzing the facts and circumstances before it, the Bulone court disagreed with the First District Court of Appeal's decision in Travelers Ins. Co. v. Chandler, 569 So. 2d 1337 (Fla. 1st DCA 1990), and wrote as follows:

> [Chandler] was actually decided on language more generous than the statutory requirements. The opinion explains that Chandler should receive uninsured motorist coverage because he was "covered" under the bodily injury liability policy. **Chandler was a passenger and not a permissive user. He was not covered by the liability policy as a potential tortfeasor, but merely collected benefits under that coverage as a claimant.** The cases relied upon by the Chandler court involve a separate issue of coverage for Class I insureds.

Id. at 402 n. 5. (Emphasis added.)

In the case now before the Court, it is clear that McCarthy, like Ms. Bulone, was a claimant passenger in Gallo's vehicle seeking recovery, and was not a permissive user (and thus potential tortfeasor) of said vehicle. McCarthy was not covered under the liability portion of Gallo's State Farm policy. Therefore, even if this Court were to agree with McCarthy's interpretation of Mullis, Mullis would have no application to State Farm's UM exclusion herein. State Farm's UM exclusion should be given full force and effect and McCarthy should be denied entitlement to UM benefits under Gallo's policy.

CONCLUSION

Based upon the foregoing citations to authorities and arguments set forth herein and in State Farm's initial brief, the trial court erred in ruling that McCarthy was entitled to UM coverage under its policy issued to Gallo. The trial court's ruling in this regard should be reversed and this cause should be remanded for the entry of an order in accordance therewith.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Jack M. Ross, Esquire, P.O. Box 1168, Gainesville, Florida 32602, by U.S. mail, this 8th day of May, 1996.

Attorney