SUPREME COURT OF FLORIDA

JUAN YOUNG and ALINA YOUNG,
his wife

Petitioners,

CASE NO. 93,544

vs.

PROGRESSIVE SOUTHEASTERN
INSURANCE COMPANY,

Respondent.

ON CERTIFIED QUESTION FROM THE DISTRICT COURT OF APPEAL,
SECOND DISTRICT

BRIEF OF THE ACADEMY OF FLORIDA TRIAL LAWYERS, AMICUS CURIAE, SUPPORTING PETITIONERS' POSITION

LOUIS K. ROSENBLOUM
Fla. Bar No. 194435
LOUIS K. ROSENBLOUM, P.A.
Post Office Box 12443
Pensacola, Florida 32582-2443
(850) 436-7707

Attorney for the Academy of
Florida Trial Lawyers, Amicus
Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

CERTIFICATE OF TYPE SIZE AND STYLE

The undersigned attorney hereby certifies that this brief was prepared using a 12-point Courier non-proportionally spaced font which does not exceed 10 characters per inch.

STATEMENT OF THE CASE AND FACTS

This brief is submitted by the Academy of Florida Trial Lawyers ("AFTL"), amicus curiae, in support of petitioners' position. AFTL accepts and adopts petitioners' statement of the case and facts.

ISSUE PRESENTED FOR REVIEW

(as framed by the certified question)

IS A POLICY PROVISION WHICH EXCLUDES A VEHICLE OWNED OR OPERATED BY A SELF-INSURER FROM THE DEFINITION OF "UNINSURED MOTOR VEHICLE" FOR PURPOSES OF UNINSURED/UNDERINSURED MOTORIST COVERAGE PERMISSIBLE UNDER FLORIDA LAW AND PUBLIC POLICY?

SUMMARY OF ARGUMENT

AFTL adopts petitioners' position that a policy definition of uninsured motor vehicle that attempts to exclude self-insured motor vehicles violates Florida's established public policy favoring mandatory uninsured motorist coverage and therefore is invalid and unenforceable. Alternatively, AFTL also agrees with petitioners that Progressive's definition of uninsured motor vehicle purportedly excluding self-insured vehicles, if determined to be valid and enforceable, nonetheless should be construed broadly in favor of petitioners to provide uninsured motorist coverage under the facts of this case.

ARGUMENT

AFTL agrees with petitioners that: (1) Amica Mutual Ins. Co. v. Amato, 667 So. 2d 802 (Fla. 4th DCA 1995), rev. denied, 676 So. 2d 1368 (Fla. 1996), was incorrectly decided. Contrary to Amato's holding, a policy definition of uninsured motor vehicle that attempts to exclude self-insured vehicles violates Florida's public policy favoring mandatory uninsured motorist coverage and therefore is invalid and unenforceable. (2) Amato conflicts with this court's decision in Michigan Millers Mut. Ins. Co. v. Bourke, 607 So. 2d 418 (Fla. 1992). (3) Amato and the summary judgment affirmed below lead to unreasonable and inequitable results. (4) Amato is distinguishable based on different policy language. (5) Progressive's definition of uninsured motor vehicle purportedly excluding self-insured vehicles does not apply to the tortfeasor's vehicle in this case because the vehicle was not self-insured "as contemplated by any financial responsibility law, motor carrier law, or similar law."

A. Public Policy Favoring Mandatory Uninsured Motorist Coverage

In addition to the above arguments developed fully by petitioners' initial brief, AFTL respectfully urges this court to invalidate Progressive's self-insured vehicle exclusion based on the same public policy concerns addressed by the District Court of Appeal, Second District, in Johns v. Liberty Mut. Fire Ins. Co., 337 So. 2d 830 (Fla. 2d DCA 1976), cert. denied, 348 So. 2d 949 (Fla. 1977), where the court invalidated an analogous definition of uninsured motor vehicle which attempted to categorically exclude all government-owned vehicles. In Johns, the plaintiff-insured was

injured in a collision with a vehicle owned by the City of St. Petersburg and negligently operated by a city employee. Plaintiff's policy issued by Liberty Mutual included an uninsured motorist endorsement which excluded government-owned vehicles from the definition of uninsured motor vehicle. In the insured's claim for uninsured motorist benefits, the trial judge applied the exclusion and granted summary judgment in favor of the insurer. The second district reversed and squarely held that a policy definition of uninsured motor vehicle that attempts to exclude government-owned vehicles is contrary to public policy and therefore unenforceable under the venerable principles of construction established by Mullis v. State Farm Mut. Auto. Ins. Co., 252 So. 2d 229 (Fla. 1971). In Mullis, this court underscored the strong public policy established by Florida's uninsured motorist coverage law, section 627.727, Florida Statutes, and held:

> The public policy of the uninsured motorist statute (Section 627.0851)[now section 627.727] is to provide uniform and specific insurance benefits to members of the public to cover damages for bodily injury caused by the negligence of insolvent or uninsured motorists and such statutorily fixed and prescribed protection is not reducible by insurers' policy exclusions and exceptions any more than are the benefits provided for persons protected by automobile liability insurance secured in compliance with the Financial Responsibility Law.
>
> Insurers or carriers writing automobile liability insurance and reciprocal uninsured motorist insurance are not permitted by law to insert provisions in the policies they issue that exclude or reduce the liability coverage prescribed by law for the class of persons insured thereunder who are legally entitled to recover damages from owners or operators of motor vehicles because of bodily injury.

Mullis, 252 So. 2d at 233. Mullis was more recently reaffirmed and revitalized by this court in Government Employees Ins. Co. v. Douglas, 654 So. 2d 118 (Fla. 1995), and remains the preeminent uninsured motorist authority in Florida, mandating that any policy provision which attempts to limit or restrict uninsured motorist coverage is contrary to public policy and unenforceable. Following the rationale of Mullis, Florida courts have consistently and unhesitatingly invalidated policy provisions and exclusions which attempted to undermine that public policy objective. See, e.g., Government Employees Ins. Co. v. Douglas (exclusion of coverage while occupying vehicle owned by insured but not covered under the policy); Salas v. Liberty Mut. Fire Ins. Co., 272 So. 2d 1 (Fla. 1972)(exclusion limiting coverage to certain operators of the insured vehicle); New Hampshire Ins. Co. v. Knight, 506 So. 2d 75 (Fla. 5th DCA 1987)(provision requiring insured to fully exhaust tortfeasor's liability coverage before uninsured motorist benefits become available); Progressive American Ins. Co. v. Glenn, 428 So. 2d 367 (Fla. 3d DCA 1983)(exclusion for injuries sustained while occupying a motorized vehicle with fewer than four wheels); First National Ins. Co. of America v. Devine, 211 So. 2d 587 (Fla. 2d DCA 1968)(exclusion limiting coverage of underage drivers); Forbes v. Allstate Ins. Co., 210 So. 2d 244 (Fla. 3d DCA 1968)(exclusion limiting coverage while insured is occupant of public conveyance).

The Johns court wisely recognized that "the uninsured motorist statute was enacted to provide relief to innocent persons who are injured through the negligence of an uninsured motorist, and such

liability is not to be 'whittled away' by exclusions and exceptions." Johns, 337 So. 2d at 831. The same rationale should be applied to invalidate Progressive's self-insured vehicle exclusion in the instant case.

B. Government-owned Vehicle Anomaly

The foregoing analysis of the Johns decision discloses a potential anomaly concerning the treatment of government-owned vehicles in uninsured motorist cases. If Amato and the decision below are approved, vehicles owned by the federal government will be treated differently from vehicles owned by the state of Florida and other governmental entities self-insured pursuant to section 768.28(15)(a), Florida Statutes, for purposes of uninsured motorist coverage. If a motorist is injured by the negligent operation of a vehicle owned by the federal government, the injured motorist can recover uninsured motorist benefits because vehicles owned by the federal government are neither insured nor self-insured. This result obtains even though the federal government's ability to pay damages is (using the language from Amato) "theoretically infinite". On the other hand, if the same motorist is injured by the negligent operation of a state-owned vehicle self-insured pursuant to section 768.28(15)(a), Amato would bar that motorist completely from recovering uninsured motorist benefits. This seemingly anomalous result provides additional justification for disapproving Amato and its progeny, including the case at bar and Comesanas v. Auto-Owners Ins. Co., 700 So. 2d 118 (Fla. 2d DCA 1997).

C. Underinsured Motorist Coverage

Amato and the decision below also conflict with the concept of underinsured motorist coverage. A vehicle is classified as "underinsured" when the tortfeasor's bodily injury liability limits are less than the damages sustained by the injured party. See § 627.727(3)(b), Fla. Stat. (1997). When a person is injured by the negligence of a motorist covered by an automobile liability insurance policy with bodily injury liability limits of $100,000, the injured party is entitled under Florida law to recover uninsured motorist benefits to the extent the injured party's damages exceed $100,000. Such underinsured motorist coverage realistically acknowledges that the tortfeasor's policy limits impose a practical limitation on damages recoverable from that individual. Indeed, recovery against a driver's individual assets is a rare occurrence.

In the case of a government-owned vehicle self-insured under section 768.28(15)(a), the self-insured limit of $100,000 stated in the certificate of self-insurance likewise serves as a practical limitation on the injured party's recovery. Although the injured party can file a legislative claims bill to satisfy a judgment against the governmental entity in excess of $100,000, the success of a claims bill depends on the vagaries of politics and is just as speculative as executing on the individual assets of a private citizen. Thus, for purposes of recovering underinsured motorist benefits, there is no rational basis to treat an insured motorist with $100,000 liability limits differently from a self-insured motorist with the same liability limits (whether self-insured under section 768.28(15)(a) or section 324.171, Florida Statutes).

D. Summary

Uninsured and underinsured motorist coverage continues to represent "the only meaningful protection available to Floridians who daily are subjected to misguided missiles on the highways of this state." Ferrigno v. Progressive American Insurance Co., 426 So. 2d 1218, 1219 (Fla. 4th DCA 1983). For this reason, and acknowledging Florida's strong public policy as expressed in Mullis, uninsured motorist coverage should always be construed to provide the broadest possible coverage, and courts should remain vigilant to protect Floridians from insurance company attempts to restrict the applicability of uninsured motorist coverage and to further "whittle away" the valuable benefits legislatively conferred upon the victims of the negligence of uninsured or inadequately insured motorists. Based on these principles, the provision of the Progressive policy that attempts to arbitrarily exclude self-insured vehicles from the definition of uninsured motor vehicle is repugnant to established public policy and should be declared void and unenforceable by this court. Alternatively, the policy provision should be construed to yield the broadest possible coverage in favor of petitioners.

CONCLUSION

The certified question should be answered in the negative and the decision of the district court quashed. AFTL further submits that Amato and Comesanas should be disapproved.

Respectfully submitted:

LOUIS K. ROSENBLOUM
Fla. Bar No. 194435
LOUIS K. ROSENBLOUM, P.A.
Post Office Box 12443
Pensacola, Florida 32582-2443
(850) 436-7707

Attorney for the Academy of
Florida Trial Lawyers

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to George A. Vaka, Esquire, Fowler, White, Gillen, Boggs, Villareal & Banker, P.A., attorneys for respondent, Post Office Box 1438, Tampa, Florida 33601-1438, Charles P. Schropp, Schropp, Buell & Elligett, P.A., attorneys for petitioners, 401 East Jackson Street, Suite 2600, Tampa, Florida 33602-5226, and Anthony T. Martino, Esquire, Clark, Charlton & Martino, P.A., attorneys for petitioners, 3407 West Kennedy Boulevard, Tampa, Florida 33607, by U.S. Mail this 23rd day of September, 1998.

LOUIS K. ROSENBLOUM
Fla. Bar No. 194435
LOUIS K. ROSENBLOUM, P.A.
Post Office Box 12443
Pensacola, Florida 32582-2443
(850) 436-7707

Attorney for the Academy of
Florida Trial Lawyers