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IN THE SUPREME COURT OF FLORIDA

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STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, ETC.,	**	
Petitioner,	**	CASE NO. 65,656
vs.	**	DISTRICT COURT OF APPEAL
SHERAN PORR, ETC.,	**	FIRST DISTRICT, NO. AO-289
Respondent.	**	
SHERAN PORR, ETC.,	**	
Petitioner,	**	CASE NO. 65,674
vs.	**	DISTRICT COURT OF APPEAL
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, ETC.,	**	FIRST DISTRICT, NO. AO-289
Respondent.	**	

ANSWER BRIEF OF RESPONDENT, AND INITIAL BRIEF OF CROSS-PETITIONER SHERAN PORR, ON MERITS

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An appeal from the First District Court of Appeal
Case No. AO-289

TOPICAL INDEX

CITATION OF AUTHORITIES

PRELIMINARY STATEMENT

The Petitioner, STATE FAPM MUTUAL AUTOMOBILE INSURANCE COMPANY, is referred to in this Brief as "STATE FARM", Insurance Carrier or Petitioner.

The Respondent, SHERAN PORR, individually, and as Personal Representative of the Estate of Robert Ray Ward, will be referred to as "PORR". Sheran Porr's minor child killed in the crash, Robert Ray Ward, will be referred to as "ROBERT" or the minor child.

References to the Appendix previously provided in Porr's Brief on Jurisdiction are designated as (App.-).

Uninsured Motorist Coverage is referred to in this Brief as UM Coverage.

In order to keep the parties clear on cross-appeal, the parties will be introduced in this section as Cross-Petitioner, etc. but thereafter above reference will also be retained for that purpose; i.e., Sheran Porr will continue to be designated as "PORR" or Respondent; the deceased minor child as "ROBERT"; and State Farm Automobile Insurance Company as "STATE FARM" or Petitioner.

STATEMENT OF THE CASE

A. Facts

Robert Ward was the minor son of Respondent, Sheran Porr, and lived with her at all times material herein. At all times material to the instant case, Sheran Porr owned three vehicles, each of which was insured under three separate policies of insurance issued by Petitioner, State Farm Insurance. (App.-A,1,2).

On August 9, 1981, Sheran Porr permitted one Glenn Spradlin to drive Sheran Porr's truck, one of the vehicles insured under one of the three separate insurance policies. Glenn Spradlin was unrelated to either Sheran Porr or Robert Ward by either blood or marriage. On that date, Glenn Spradlin did negligently operate the vehicle in an extremely careless manner by driving at high speeds and going off the roadway. When the vehicle left the road, control of the vehicle was lost and it overturned numerous times. Sheran Porr's minor son, Robert, a resident relative, class I insured, and also Glenn Spradlin were both killed in the crash. The unrelated negligent driver, Glenn Spradlin, was uninsured at the time he caused his own death and the death of the minor Robert Ward. (App.-A,1,B,1).

The mother, Sheran Porr, had purchased three separate liability insurance policies, each
with its own separate uninsured motorist coverage on the three different vehicles owned by Sheran Porr. Each

was separately paid for. All three policies on the three different vehicles were issued by State Farm Insurance Company and contained identical provisions (App.-A-1,2).

When claim was made under the liability portion of the insurance policies, State Farm Insurance Company denied liability, Coverage A, stating that the policy indicated:

> "There is no coverage:
>
> . . .
>
> 2. For any bodily injury to:
>
> . . .
>
> c. ANY INSURED OR ANY MEMBER OF AN INSURED'S FAMILY RESIDING IN THE INSURED'S HOUSEHOLD" (App.-A-3,9,10).

The three different policies had no household member exclusion clause under the uninsured motorist coverage section. In fact, State Farm Insurance Company specifically provided in its three policies the definition of an uninsured motor vehicle as:

> "A land motor vehicle, the ownership, maintenance, or use of which is:
>
> . . .
>
> b. Insured or bonded for bodily injury liability at the time of the accident; but
>
> . . .
>
> (3) The insuring company denies coverage or is

or becomes insolvent..."
(emphasis supplied) (App.-A-15).

The State Farm Insurance Company policy lastly also provided that an uninsured motor vehicle does not include a land motor vehicle which is:

"insured under the liability coverage of this policy." (emphasis supplied) (App.-A-15).

On the above facts, the Honorable First District Court of Appeal held (App.-C):

1. That Sheran Porr could not recover for the death of her son under the uninsured motorist coverage provided by the policy issued on the vehicle driven by the uninsured, unrelated, Glenn Spradlin and involved in the crash.

2. That Sheran Porr could recover under the uninsured motorist coverage on the two vehicles not involved in the crash that resulted in the death of her son.

Respondent (and Cross-Petitioner) contends that the District Court of Appeal's decision allowing recovery for the death of her son as to the vehicles not involved in the crash is proper and (on Cross Petition) that the decision not allowing recovery for the death of her son as to the vehicle involved in the crash is in error.

ARGUMENT

POINT I

THE HONORABLE SUPREME COURT SHOULD NOT BY CASE LAW FURTHER EXPAND OR PROVIDE FOR A FURTHER EXCEPTION AS URGED BY THE INSTANT INSURANCE CARRIER TO LEGISLATIVELY DELINEATED UNINSURED MOTORIST BENEFITS, NOWHERE ALLOWED BY STATUTE, WHERE THE DISTRICT COURT OF APPEAL HAS RULED CONSISTENT WITH PRIOR CASE LAW DECISIONS THAT A MOTHER MAY RECOVER DAMAGES FOR THE DEATH OF HER MINOR CHILD CAUSED BY A NEGLIGENT, UNRELATED, UNINSURED DRIVER UNDER TWO UNINSURED MOTORIST COVERAGES ON TWO VEHICLES OWNED BY THE MOTHER AND NOT INVOLVED BY THE FATAL CRASH.

As the point on appeal is stated by State Farm Mutual Automobile Insurance Company (hereinafter State Farm) in obviously conclusory argument, Respondent has no hesitation whatsoever in stating the opposite viewpoint. As indicated in the Statement of Facts, the mother, Sharon Porr was the owner of three vehicles, each with its own separate insurance policy purchased from State Farm. Each of the separate policies had its own uninsured motorist coverage. On August 9, 1981, the unrelated Glen Spradlin was permitted to drive one of the vehicles, a truck. On that date and with Sharon Porr's minor child, Robert Ward, as a passenger, as Glen Spradlin so negligently operated the vehicle that it left the roadway, overturned numerous times, and ejected both Glen Spradlin and Robert Ward. Both Glen Spradlin and Robert Ward were killed.

The District Court of Appeal held on these facts that the

mother could recover for the death of her minor child under the uninsured motorist coverage protection she had purchased for herself and her family on the two policies covering the two vehicles not involved in the accident. While the insurance carrier that sold Porr these two policies (in addition to the one that covered the vehicle involved in the fatal crash) urges in its stated point on appeal that Porr cannot recover under any three of the separate uninsured motorist policies sold by them to her, Respondent would respectfully disagree and note instead that the District Court of Appeal's holding that the mother could recover at least on the two uninsured motorist coverages sold to her is entirely consistent with this Court's holding in Reid v. State Farm Fire and Casualty Company, 352 So.2d 1172 (Fla. 1977) in Mullis v. State Farm Mutual Automobile Ins. Co., 252 So.2d 229 (Fla. 1971), in Salas v. Liberty Mutual Fire Ins. Co., 272 So.2d 1 (Fla. 1972) and with decisions of all District Courts of Appeal ruling as to policies covering vehicles not involved in the accident. See, eg., Curtin v. State Farm Mutual Automobile Insurance Company, 449 So.2d 293 (Fla. 5th DCA 1984); Lee v. State Farm Automobile Insurance Company. 339 So.2d 670 (Fla. 2nd DCA 1976). See also Johnson v. State Farm Fire and Casualty Company, 451 So.2d 898 (Fla. 1st DCA 1984).

In questions analyzing the scope or extent of availability of uninsured motorist coverage to an insured, one must always start with the proposition that uninsured motorist coverage

(hereinafter UM coverage) in Florida is a creature of statute properly enacted by the duly elected Florida State Legislators. See, eg., Salas v. Liberty Mutual, 272 So.2d 1 (Fla. 1972) This reminder that we are dealing with a coverage created by statute is highly significant because such insurance coverage cases before the Courts require a focus on both the applicable policy provisions and any applicable statutory provisions. The statutory provisions simply are and become a part of the policy. Mullis, supra, @ 234. Where the insurance coverage at issue is statutorily mandated and delineated, this dual approach is even more significant in that the insurance carrier may sell more than the minimum required by statute, but the insurance carrier may not sell less than the amount or extent of coverage required. This is true for either no-fault benefits, workers' compensation benefits, uninsured motorist benefits, or any other form of statutorily mandated and delineated coverage. See, eg., Boden v. Atlantic Federal Savings and Loan Association, 396 So.2d 827 (Fla. 4th DCA 1981). Although at times the litigants or even the courts may justifiably question the wisdom of the extent of insurance coverage mandated by proper statutory enactment of the Legislators, it is nevertheless true that delineation of the insurance coverage is a proper function of the Legislature. It is further well established in Florida that remedial legislation to redress a legislatively perceived ill is to be liberally construed so as to advance the manifest legislative intent.

Where a conflict arises between the legislatively delineated insured motorist coverage and the purposes behind that act on the one hand and insurance company attempts to draft policies so as to reduce or eliminate the coverage required by a statute, the legislative required coverage will control and the insurance carrier's attempts to eliminate or reduce that coverage will be held void as the legislatively required and delineated coverage takes precedence, we should begin our analysis by looking first to the legislatively required coverage and thereafter examine the specifics of the instant insurance policy.

The purpose of the legislatively prescribed UM coverage is "to protect persons who are injured, as opposed to protecting the insurance carrier or the uninsured motorist." State Farm v. Diem, 358 So.2d 39 (Fla. 3rd DCA 1978). UM coverage came into existence out of society's demand to compensate the innocent victim injured as a consequence of the negligent and financially irresponsible motorist. It is to provide the same protection that the public would have had if the negligent motorist had carried applicable liability coverage. Boulnois v. State Farm, 286 So.2d 264 (Fla. 4th DCA 1973). As UM coverage is a form of personal insurance, whenever bodily injury is inflicted on a named insured or a member of his household by the negligence of an uninsured motorist, "under whatever conditions, locations, or circumstances any of such insureds happen to be in at the time, they are covered by uninsured motorist liability insurance."

Mullis v. State Farm Mutual Automobile Insurance Company, 252 So.2d 229 @ 233 (Fla. 1971). The intention of the legislature, as mirrored by multiple decisions of all of the courts of Florida, "is plain to provide for the broad protection of the citizens of this State against uninsured motorists. As a creature of statute rather than a matter for contemplation of the parties in creating insurance policies, the uninsured motorist protection is not susceptible to the attempts of the insurer to limit or negate that protection." Salas, supra, 272 So.2d 1 (Fla. 1972). This is true although the whittling away of the statutorily defined uninsured motorist coverage "might" arguably have reduced the premiums in a multitude of situations.

As the remedial intent and purpose of the Florida Legislature in enacting the uninsured motorist act was clear, the response by Florida Courts to efforts on the part of insurance carriers drafting exclusionary language and exceptions in their adhesion contracts has been, for the most part, consistently clear. Thus, the unquestionable general rule has been "that an insurer may not limit the applicability of uninsured motorist protection." Reid, supra, In line with this, multiple efforts by various insurance companies attempting to draft in exclusions and exceptions to "whittle away" at the broad coverage required by the Legislature have been turned aside. See, eg., McDonald v. S. E. Fidelity, 373 So.2d 94 (Fla. 2d DCA 1979) (voided clause excluding insured driving owned but non-insured

vehicle); Johns v. Liberty Mutual, 337 So.2d 830 (Fla. 2d DCA 1976) (voided clause excluding a vehicle owned by government body as a UM vehicle); Mullis, supra, Salas, supra, Travelers Indemnity v. Powell, 206 So.2d 244 (Fla. 1st DCA 1968) and Hines v. Wausau, 408 So.2d 772 (Fla. 2d DCA 1982) (voided family exclusion - non liability clause as directly applying to UM coverage), and See, Hodges v. National Union, 249 So.2d 679 (Fla. 1971) (13 cases cited therein for proposition that insurance carriers cannot limit legislative UM coverage contrary to statute). Obviously, the purpose of this remedial UM legislation is to be effectuated by the courts.

To put the strong public policy predicates of the UM statute into perspective for the instant insurance company, one need only look to such key cases as Mullis, supra, and Salas, supra. In Mullis, supra, as in the instant case, the insurance carrier provided UM coverage to class I insureds including the son of the named insured Richard Mullis. Thereafter however, the insurance carrier sought to limit the UM coverage by providing a specific exclusion that UM coverage would not apply if bodily injury was received by an insured while occupying a particular kind of vehicle. In Mullis, supra, the vehicle would be one that was not an "insured automobile". In voiding this proposed exclusion which sought to limit where the class I insured had to be in order to recover, statutory UM benefits, the Supreme Court noted that:

> "The public policy of the Uninsured Motorist Statute (§627.0851) 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 person 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." (emphasis court's and supplied). Id. @ 233, 234.

Further, the Supreme Court noted that "it is not the intent of the Statute to limit coverage to an insured by specifying his location or the particular vehicle he is occupying at the time of injury." (emphasis court's) Id. @ 234. Thereafter, the Supreme Court noted cases indicating that a "non-liability clause" as well as other type clauses indicating what type of vehicle an uninsured motorist could not be in in order to collect were all void as against the UM benefits prescribed and fixed by law which could not be whittled away by efforts to draft "non-liability clauses" or "location clauses" or "type of vehicle clauses" or other type clauses contrary to the benefits to be provided by Statute. Id at 235, 236. Repeatedly, the Supreme

Court stressed that uninsured motorist coverage is supposed to provide that protection which would have been available to an injured party just as if the negligent motorist had carried automobile liability insurance which was reachable by the injured party. Then stated the court:

> "To achieve this purpose, no policy exclusions contrary to the Statute of any of the class of family insureds are permissible since uninsured motorist coverage is intended by the Statute to be uniform and standard motor vehicle accident liability insurance for the protection of such insureds thereunder as "if the uninsured motorist had carried the minimum limits" of an automobile liability policy...
> ...Richard Lamar Mullis is a member of the first class; as such he is covered by uninsured motorist liability protection issued pursuant to §627.0851 whenever or wherever bodily injury is inflicted upon him by the negligence of an uninsured motorist. He would be covered thereby whenever he is injured while walking, or while riding in motor vehicles, or in public conveyances, including uninsured motor vehicles (including Honda motorcycles) owned by a member of the first class of insureds. Neither can an insured family member be excluded from such protection because of age, sex, or color of hair." (emphasis court's) Id. @ 238.

That the Supreme Court meant what it said in Mullis, supra, was promptly demonstrated in Salas, supra. In that case, Sylvia Salas, the minor daughter of the named insured, Raymond Salas, and a resident of her father's household, was involved in an automobile accident while riding as a passenger in an uninsured vehicle owned and operated by her brother, Raymond Salas, Jr., who was also a resident of the father's household. Sylvia Salas,

in that case, made a claim against her father's uninsured motorist coverage based on the gross negligence on the part of her brother Raymond. In that case, as contrasted with the instant case, a household exclusion clause was specifically provided in the uninsured motorist coverage provision of the father's policy itself. Although the Trial Court judge and subsequently the District Court of Appeal upheld the validity of the family-household exclusion clause in the uninsured motorist section, the Florida Supreme Court promptly responded:

> "The above quoted "family-household" exclusion patently attempts to narrow or limit the uninsured motorist coverage, contrary to the purpose and intent of the Florida Statute §627.0851, F.S.A." (emphasis supplied) Id. @ 3.

Further, the Supreme Court also postulated what would occur if Raymond Salas, Jr. had had automobile liability insurance coverage so that the car was "insured", although the insurance company would thereupon deny coverage based on the family-household exclusion clause. The insurance carrier's argument was that if Sylvia had been excluded under such a family-household exclusion when the car was thus insured, that there would be no uninsured benefits available. Again the Florida Supreme Court responded:

> "Such an interpretation of Florida Statute §627.0851, F.S.A., would be contrary to the intention of the Legislature, as interpreted by earlier decisions of this Court, to create a broad protection of insureds from the negligence of uninsured motorists' negligence." (emphasis supplied)

Repeating itself, the Florida Supreme Court noted that uninsured motorist protection "is not susceptible to the attempts of the insured to limit or negate that protection" and reversed the District Court of Appeal and lower court. Id. @ 5.

Obviously, the Supreme Court of Florida has already considered the instant case as to the two policies covering vehicles not directly involved in the fatal crash. Certainly if uninsured motorist protection would be extended from the Salas father's uninsured motorist coverage on a vehicle not involved in the wreck in that case where a family-household member himself was negligent and where a household exclusion clause was directly in the uninsured motorist coverage provision, then a fortiori, coverage should be extended in the instant case where claimant has done more to protect herself and her family by properly purchasing uninsured motorist coverage on all three of her vehicles through separate policies and where the negligent, uninsured driver was unrelated. It would be a logical absurdity indeed to penalize Respondent Porr for actually purchasing UM coverage on the vehicle involved in the fatal crash when, pursuant to the specific holding in Salas, Respondent Porr could have recovered uninsured motorist benefits on her two vehicles

not involved in the fatal crash if only Porr had failed to purchase the supposedly additional protection of a UM policy on the car involved in the crash. Again, the instant case is made far more compelling by the additional fact circumstance that the negligent driver in the instant case was not a family member.

However, as with all rules, even the rule that carriers will not be permitted to whittle away UM coverage, there are some exceptions. By reviewing such cases as could be found, it appears that no general rule is applicable to all, but that instead UM coverage has been defeated in those rare instances where more than one strong public policy interest and rationale has been weighed against and found to countervail against the exceedingly strong public policy interest of giving UM coverage the broad applicability the legislature obviously intended it to have. While one may or may not agree with the narrow exceptions permitted by the courts based on only the strongest countervailing public policy arguments, the point here being made is that only such multiple strong countervailing public policies will suffice in order to outweigh the legislative intent being sought to be effectuated in the remedial uninsured motorist act. To state blandly, as to the Honorable Trial Court below and Petitioner on Appeal that the insurance company's language simply controls, or that an otherwise insured vehicle cannot become an uninsured vehicle when a particular person cannot collect or that household exclusion clauses are to be favored is totally in error

by case law, see, eg., Mullis, Salas, and would seem to suggest a black letter rule-of-thumb that simply does not exist. In Boulnois, supra, it was noted that "the driver and owners of the vehicle were just as financially irresponsible as a result of the disclaimer of [the company otherwise insuring the negligent vehicle] as if they had never taken out a policy in the first place." In Butts v. State Farm, 207 So.2d 73 (Fla. 3rd DCA 1968), the insurance company's effort to exclude a particular person from coverage was voided. In Mullis, supra, and Salas, et,al., supra, various forms of household exclusion clauses sought to be directly applied to limit UM coverage were voided. Instead, Respondent Porr would suggest that in UM coverage cases, it is nowhere more peculiarly appropriate to observe that each different factual setting must be closely scrutinized to see whether the competing public policy interests involved requires application of the general rule of no limiting language by the insurance carrier permitted or whether an "exception" should be permitted to exist because of the other countervailing exceedingly strong public policy needs. Only in this way can the multitude of UM cases be understood with any degree of logical consistency and when this is done the "exceptions" appear to be at least arguable or understandable, even if any particular person would have held the other way in any given circumstance. For example, in Taylor v. Safeco, 298 So.2d 202 (Fla. 1st DCA 1974), an adult bailee of an automobile permitting another to

drive was injured through that driver's negligence. The bailee would, at best, have been a class II insured and as a bailee was standing in the shoes of the owner for purposes of the respondeat superior rationale behind the dangerous instrumentality rule. As the owner could in no way be held at fault, either directly or vicariously, and as the driver's negligence was not imputable to the owner for purposes of that bailee, it is at least understandable why that bailee was not allowed to reach the insurance coverage held by the owner. In Hartford v. Fonck, 344 So.2d 595 (Fla. 2d DCA 1977), the court similarly denied UM benefits to a class II insured who was injured while on the job and was therefore eligible for Workers' Compensation benefits. As the injured party could not sue under the liability coverage due to the fellow-employee exclusion and as the court appropriately noted that to permit a UM claim would effectively nullify that provision and as Workers' Compensation benefits obviously would apply to provide some compensation for damages, it is at least understandable what motivated the court to hold that this class II insured could not recover under the same policy insuring the vehicle involved. However, the court in its opinion, made it clear that a weighing of public policy interest was occurring according to the fact setting of this particular case when it rejected the carrier's sweeping rule-of-thumb approach:

> "Hartford cites Centennial Ins. Co. v. Wallace, 330 So.2d 815 (Fla. 3d DCA 1976), in support of the contention that where a vehicle is covered as required by law, it does not become an uninsured vehicle simply because the coverage may not be available to an injured party under particular circumstances. We do not fully concur with that rationale. Lee did not accept that principle when recovery was allowed in a situation where there was an insured vehicle. Moreover, to accept the principle completely would even foreclose the claim of a party injured, for example, by one operating a stolen but yet insured vehicle. In such an instance where the owner's coverage may not be available to the injured party, that party would have slight comfort in knowing that the negligent thief was operating an insured vehicle."

From the above, Porr has hoped to demonstrate the near unanimity of the Florida courts in holding that the exceedingly strong public policy of the State of Florida in protecting its citizens against uninsured drivers is the general rule and that only a combination of the strongest countervailing public policy reasons will present a fact setting so egregious that an "exception" will be allowed. In that consideration, the language of the statute, past court decisions, the status of the insured as a class I or class II insured and the availability of other sources to provide the compensation which the uninsured motorist remedial act looked to are all factors that appear to weigh into the balance when, as here, an insurance carrier requests that the court carve out an additional exception to the legislatively delineated uninsured motorist coverage. It should also be noted that proof of the need for such an "exception" is certainly on the shoulders of the insurance company at the very

least. In making this determination, it is well to start out by noting that the applicable statute, in part, provides:

> "(1) no automobile liability insurance covering liability arising out of the ownership, maintenance, or use of any motor vehicle shall be delivered... unless coverage is provided therein or supplemental thereto for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of...death, resulting therefrom."
> Florida Statute 627.727(1) (emphasis supplied).

In the instant case, it is undeniable that the minor child killed by the negligent driver was a class I insured as to the two policies under discussion. It is further undeniable that the "or operator" of the motor vehicle was totally uninsured and was not related by blood or marriage to the minor child killed. It is further undenied that both the driver and minor child were killed. There is further, no dispute that for purposes of this Point on Appeal, the discussion involves two insurance policies which are not policies covering the vehicle directly involved in the fatal crash.

Under the above circumstances, State Farm herewith seeks to invite this Honorable Court to add an additional exception to statutorily delineated UM coverage contrary to Mullis, Salas, supra, and a whole line of cases indicating that such exceptions are heavily disfavored as attempts to whittle away what the Legislature has fixed. Mullis, supra. In so doing, State Farm first must convince this Honorable Court that the "exception" to

the general rule urged is statutorily permissible contrary to Mullis, Salas, etc., and then must demonstrate to this Court that it did write in such an exception to its insurance policy.

There is obviously no argument by the insurance carrier in Point I on Appeal which even seeks to justify why the additional exception should be carved out by the Court contrary to multiple prior cases and to the express legislative intent. However, Respondent Porr does not rest there, but instead, notes that the closest cases she can find on point are Mullis, Salas, Reid, and Lee, supra, besides those cases wherein the District Courts of Appeal have recently ruled directly in favor of Respondent's position in Curtin, supra and Johnson, supra. Mullis and Salas have been discussed above and are obviously prior Supreme Court pronouncements favoring, and in Salas, directly ruling in Porr's favor. In Reid, supra, a resident relative injured her sister while driving a family car owned by the sister's father. Both sisters survived. Of course, the household exclusion clause barred the one sister from suing the other. The logic behind that rule is obvious and well known in that it is touted as necessary to prevent collusive lawsuits and promote intra-family harmony. The court further held that under those specific facts, that the unavailability of liability coverage did not make that same insurance carrier liable under the UM coverage on that same policy insuring the accident vehicle. The court noted that to do

otherwise would nullify the family household exclusion in the liability coverage section and that that interest here was deemed of more import than the UM public policy interests under the Reid facts. However, in arriving at this conclusion, it should be again noted that the court took pains to point out that:

> "we recognize as a general rule that an insurer may not limit the applicability of uninsured motorist protection...we believe however, that the present case is factually distinguishable from previous cases and is an exception to the general rule." (emphasis supplied).

Respondent Porr would contend that Reid, supra, is to be applied strictly to the facts involved therein because it is an "exception" to the general rule that UM coverage is to be applied to a member of class I insureds (such as decedent in the instant case) irrespective of "whenever or wherever bodily injury is inflicted", Mullis, at 238.

However, in Reid, the Supreme Court was dealing with the special case wherein (1) both the owner and the driver would have a defense against any direct suit by the plaintiff sister of the driver and daughter of the father/automobile owner and (2) the liability insurance coverage would be denied against both the owner and driver based on the defense of intra-family immunity and the household exclusion clause and (3) the possibility of a collusive lawsuit existed because both sisters and the father survived and (4) only the one insurance policy was involved under

which both liability coverage was denied and uninsured motorist coverage was sought and (5) the case arose at a time when the Supreme Court of Florida was in agreement that a sound public policy required upholding the family-household exclusion on the rationale that it was necessary to "protect the insurer from overfriendly or collusive lawsuits between family members". Reid at 1173. Based on the combination of the above facts and factors, the Florida Supreme Court held that (a) the family household exclusion in the liability coverage section was valid and (b) that under these particular facts, the court would permit the policy to exclude "the insured motor vehicle" from the definition of "uninsured motor vehicle" in that same policy insuring the family car.

However, the Supreme Court in that same Reid decision, also noted that as to at least one of those factors, if it were changed, a different result would apply. In the last page of the Reid decision, the Supreme Court noted that in Lee, supra, not one but three different automobile policies were involved. That factor the Supreme Court found to distinguish Lee from Reid. In quoting the Second District Court of Appeal noting that distinguishing factor between Lee and the Reid case then under consideration, the Supreme Court quoted:

> "In Lee a teenager was injured in a one car accident while a passenger in an automobile owned and operated by his brother. The teenager was permitted to recover under the

> uninsured motorist provision of his father's policy after his brother's liability carrier denied coverage under the household exclusion. In Lee this court was dealing with two separate policies. There, the teenager's father had purchased the uninsured motorist protection for himself and his family, and we held the son must be afforded that protection." Reid at 1174.

In the instant case also, the mother Porr purchased two separate insurance policies on vehicles not involved in the fatal crash for the protection of herself and her minor son. That factor alone, as indicated by the Supreme Court in Reid, distinguishes the instant case from Reid and instead makes it fall under the rationale and holding in Lee. By the Lee holding, the First District Court of Appeal was eminently correct in the instant case in finding that the mother could recover for her minor child killed by the negligence of the uninsured, unrelated, negligent driver Spradlin. However, Respondent Porr need not stop there for the instant case also contains other factors which far more strongly argue for distinguishing the instant case from Reid. In Lee, the owner and driver were one and the same person, the plaintiff's brother Stephen. Thus, a direct defense by the household exclusion clause was available against Stephen as both the owner and driver. In the instant case, the driver was Glenn Spradlin, a person who was unrelated to the mother or deceased minor child, and therefore, no such exclusion applied to this "operator" of the vehicle. Again, the Florida Uninsured Motorist Statute provides that it is for "the protection of

persons insured thereunder who are legally entitled to recover damages from...or operators...". It must be presumed that the legislature of the State of Florida used the disjunctive term "or" purposely and thereby intended that if the "or operator" was uninsured and insurance benefits were otherwise unavailable, that in that event, UM coverage would be provided to a class I insured. This would be especially true for those policies not covering the vehicle involved in the fatal crash. Notably, the insurance policy under discussion also provides that:

> "we will pay damages for bodily injury an insured is legally entitled to collect from the owner or driver of an uninsured motor vehicle."

Again, the disjunctive "or" is used, presumably with purpose by the instant insurance carrier. As in the instant case, the negligent driver was in no way related to the deceased injured party or to the owner of the vehicle, the "or driver" who is uninsured is a factor distinguishing the instant case from Reid and is a reason why uninsured motorist coverage should be afforded to Porr.

Additionally, a further distinguishing factor in the instant case is that while there can be argument that a household exclusion rationale supports the Reid holding, there are absolutely zero foundation facts underlying the household-exclusion principles in the instant case. This, for another time provides distinguishing factors between the instant

case and Reid. In the instant case, it would be absolutely ludicrous to suggest that there was a collusive lawsuit or any possibility of disruption of family harmony where the minor child died as a direct result of the crash. As no violence is done whatsoever to the rationale behind the household exclusion rule, under those facts, the policy weight given to that exclusion where death is a direct result becomes zero and that rationale provides no countervailing weight to urge an exception to the general rule requiring no insurance carrier limitation on statutorily fixed uninsured motorist coverage.

As the cases of Salas and Lee closest on point to the instant case all readily properly reject a carving out of additional exceptions to legislatively delineated broad uninsured motorist coverage protection, this Honorable Supreme Court should continue to hold that an injured plaintiff or his personal representative may recover on uninsured motorist policies not covering the car involved in the crash itself.

It should be noted that not only does public policy weigh against the Supreme Court carving out an additional exception to the general rule that an insurer may not limit the applicability of uninsured motorist protection, but that also the insurance policy under discussion in the instant case on the two vehicles not involved in the fatal crash do not themselves provide for such an exception. Of course, the insurance carrier may sell more than the statute sets as a minimum. Boden, supra. In the

instant case, there is no "household exclusion" clause in the UM coverage itself (A-15). Instead, in the instant UM coverage, the policy contained (a) the promise to "pay damages for bodily injury an insured is legally entitled to collect from the owner or driver of an uninsured motor vehicle", (b) defined an uninsured motor vehicle as, among other things, a vehicle for which "the insuring company denies coverage" (emphasis supplied) but (c) excluded as an uninsured motor vehicle the vehicle "insured under the liability coverage of this policy." (emphasis supplied.) (App.-A-15).

Because the household exclusion clause only applies to the liability coverage, the only arguable "exclusion" clause would be that clause indicating that an uninsured motor vehicle does not include a vehicle insured under the liability coverage "of this policy" (emphasis supplied). As pointed out by the Fifth District Court of Appeal in Curtin v. State Farm Mutual Automobile Insurance Company, 449 So.2d 293 (Fla. 5th DCA 1984), this exclusion clause only relates to "this" policy covering the vehicle involved in the accident and so would not exclude UM coverage under other policies insuring other vehicles owned by Porr. Thus, the instant insurance coverage itself does not exclude UM coverage as to those two policies on vehicles not involved in the fatal crash in Porr. Any ambiguity or doubt as to this UM issue is to be strictly construed against the carrier. Hodges v. National Union Indemnity Company, 249 So.2d 679 (Fla.

1971). And, of course, even if the insurance carrier had drafted appropriate language to provide for such an exclusion, it would fall under the facts of the instant Porr case because there are no sufficient public policy reasons to justify that insurance company effort to draft an exception to the legislatively delineated UM coverage. Instead, the facts of the Porr case clearly require an application of the general rule that the insurer may not limit the applicability of statutorily delineated UM protection.

In reviewing the argument of the Petitioner State Farm as to its policy language, Respondent Porr must express her disagreement. The insurance company apparently asserts that they can foresee some difference between "the exclusion of a risk" by denying liability and their language of explaining that an uninsured motorist is one wherein "the land motor vehicle is insured but...the insuring company denies coverage...". From that point, State Farm criticizes the District Court of Appeal because the District Court of Appeal considers it ambiguous (or considers it in favor of Porr's position on this point of appeal) to indicate that State Farm's definition of an uninsured motorist vehicle including one in which "the insuring company...denied coverage" is what happened here as to that insurance policy applicable to the one covering the vehicle directly involved in the crash. To the contrary, Porr would note that today's easy reader insurance policies are supposed to be able to be

understood by the "man on the street". Indeed, it is now the rule of Florida Law that terms in an insurance policy shall be defined and given their everyday "man on the street" understood meaning. Sanz v. Reserve Insurance Company, 172 So.2d 912 (Fla. 3rd DCA 1965). The undersigned would respectfully suggest to the Court that by the phrase "denied coverage", the "man on the street" would understand exactly what occurred here in the Porr case, that an insurance company was saying that it would have covered the accident and paid the benefits it promised to pay except for some exclusion language. Further, the "man on the street" would clearly understand that not insured under "this" policy is exactly what the District Court of Appeal in Curtin, supra, indicated that it would mean, i.e., that while coverage was not afforded under "this" policy, coverage could certainly be afforded under the other two policies not covering the vehicle directly involved in the fatal crash. If anything, the language in the instant insurance policy clearly indicates that coverage is available under the other two insurance policies covering vehicles not directly involved in the fatal crash. Notably an urged "nonliability clause" exclusion and an urged "limitation of coverage" exclusion in Mullis met the same fate of void as against public policy.

The extent to which the insurance company must grasp at straws in the instant case is nowhere perhaps more dramatically reflected than in the last sentence on Point I on Appeal wherein

the insurance carrier suggests that UM coverage would be available to Respondent Porr if Porr had "insured her other automobiles with other liability and UM insurers, for example". In response thereto, Porr would suggest that she did have her automobiles insured under other insurance policies by the purchase of separate insurance policies with State Farm. She would further suggest that there is no logical distinction between having separate insurance policies covering her separate automobiles and having each of the three vehicles covered by three different insurance carriers. Regardless of the form Respondent Porr was sold by State Farm, she should still be provided UM coverage benefits under the express terms of the instant insurance policy and, more importantly, under the clear general rule of the public policy mandate by the legislature that an insurer "may not limit the applicability of uninsured motorist protection".

As the insurance carrier had attempted to draft an exception and exclusion to the legislatively delineated UM coverage under the facts of the instant case where no rationale exists to support such an exclusion and as the insurance carrier itself did not provide for such an exclusion in either of the two policies on vehicles not involved in the fatal crash, the District Court of Appeal was eminently correct in holding consistent with Salas, Mullis, Curtin, among others, that the mother Porr could recover for the death of her minor child due to the negligence of

the unrelated, uninsured driver, Spradlin, under those two UM policies on vehicles not involved in the crash.

The case that would seem at first blush to be most appropriate to attempt a justification of the exclusion clause in the instant case would be Reid, supra. In Reid, it would be recalled that the exclusion clause under uninsured motorist coverage excluding "the insured motor vehicle" under that policy from the definition of an "uninsured motor vehicle" was permitted because "to hold otherwise in this case would completely nullify the family-household exclusion" of the liability portion of the insurance policy. If it were not for that underlying necessity to uphold the family-household exclusion clause in the Reid case, it seems quite clear that the exclusionary language excluding "the insured motor vehicle" would not have been permitted to stand as it would have violated the broad rule of Mullis that "under whatever conditions, locations, or circumstances any of such insureds happen to be in at the time, they are covered by uninsured motorist liability insurance." Thus by the general rule, where the minor child Robert Ward is killed by the negligence of an uninsured motorist driver/operator, it should make no difference that Robert is in a vehicle owned and insured by his mother under the circumstances of a one car fatal crash as opposed to being a pedestrian or riding a motorcycle. See,

Mullis. To justify the exception of allowing the insurance company to write out from uninsured motorist coverage the "insured motor vehicle" under the policy, the Supreme Court in Reid agreed that the family-household exclusion rationale would, under the Reid fact circumstances, justify the exclusion in those particular circumstances. The family-household exclusion in Reid the court felt provided that strongest of countervailing public policy reasons because the rationale for the family-household exclusion was "to protect the insurer from over friendly or collusive lawsuits between family members."

The issue currently before the court in this case is (a) whether that specific exception in Reid should be expanded and (b) whether that specific exception in Reid should be reconsidered in light of further Supreme Court holdings since Reid.

It would be Porr's assertion that the Reid case should be specifically recognized for what it is, an "exception" to the general rule. The viability of this "exception" depends solely on the particular facts involved and the public policy rationale being deemed of sufficient weight to counter balance the extremely strong public policy behind the legislative mandate affording broad UM coverage. It is simply not enough to say talismanically, nor is there any such black letter law cast in bronze which forever holds that an "insured motor vehicle" may not become an "uninsured motor vehicle" as is suggested by the

insurance company. To simply utter this phrase is simplistic and impedes, rather than promotes, appropriate discussion of the fundamental issue of whether any particular "exception" should be allowed to the general rule that an insurer may not limit the applicability of UM protection.

Indeed, to now make such a black letter law would require overruling multiple past Supreme Court decisions holding that indeed an otherwise insured motor vehicle is in fact an uninsured or underinsured motor vehicle depending on the facts of the particular case. The answers lie not in recital of talismanic phrases, but instead, lie in looking to the rationale as applied to different fact settings to determine whether the rationale continues to prove the necessity of the exception to the general rule that insurers may not limit the applicability of UM protection. Where that rationale fails, so does the presumed rule being urged. See, eg., Florida Farm Bureau Insurance Company v. GEICO, 371 So.2d 166 (Fla. 1st DCA 1979), wherein the interspousal tort immunity doctrine was held simply inapplicable because of the different fact situation presented.

In Reid, the facts important enough to raise the necessity of a family-household exclusion were the facts that (1) both the owner and the driver would have a defense against any direct suit by the plaintiff sister of the driver and daughter of the father/automobile owner and (2) the liability insurance coverage would be denied against both the owner and driver based on the

defense of intra-family immunity and the household exclusion clause and (3) the possibility of a collusive lawsuit existed because both sisters and the father survived and (4) only the one insurance policy was involved under which both liability coverage was denied and uninsured motorist coverage was sought and (5) the case arose at a time when the Florida Supreme Court was in agreement that sound public policy required upholding the family-household exclusion in its rationale of protecting against collusive lawsuits. As at least only family members were involved as the driver and owner and all survived, there were thus in Reid at least these underlying facts which would support the rationale proffered by the Supreme Court that the family-household exclusion clause should not be nullified in the liability coverage of the insurance contract and that therefore the exclusion language in the uninsured motorist protection coverage excluding the "insured motor vehicle" would be permitted under those circumstances.

However, in the instant Porr case, there are basic fact differences which completely nullify the Supreme Court's rationale in Reid and which therefore distinguish this case and should lead to a different result, that result being that the general rule still applies and the insurance carrier may not limit the applicability of UM protection in this case. In Porr, the driver of the vehicle was completely unrelated to the injured Plaintiff or to the owner. When Robert Ward was killed by

Spradlin's negligence, two causes of action immediately arose. The first cause of action lay against the driver for his negligent operation of the vehicle and the second lay against the owner of the vehicle based on a dangerous instrumentality theory. As distinguished from Reid, the cause of action in the instant case against the driver existed against a nonfamily member who was uninsured, assertedly negligent, and who had no defense similar to the intrafamily immunity in Reid. When the two foundation predicates of negligent and uninsured were met as to Spradlin, then UM coverage attached "for the protection of the person insured" and could not be defeated by the simple circumstance that Robert Ward was in a particular vehicle at the time the negligence of the uninsured driver injured/killed him. It is certainly clear that the cause of action arising because of the negligent driver should not be defeated because of no insurance coverage through the liability portion of the owner's policy because the Statute and the instant insurance policy are both framed in the disjunctive. By Florida Statute §627.727, the negligence of "or operators" of uninsured vehicles brings into play the uninsured motorist protection sold specifically to protect the injured person. By the terms of the insurance policy, damages are payable for the negligence of the "or driver" of an uninsured motor vehicle. (A-15) As we know that a vehicle is uninsured or underinsured if insurance policy affords no coverage, see, eg., American Fire and Casualty Company v.

Boyd, 357 So.2d 768 (Fla. 1st DCA 1978), it makes no difference why the insurance is unavailable if the earlier prerequisites are met in that the driver negligently caused the injuries and that that driver was uninsured. As these fact circumstances distinguish Reid, the result in the instant case should allow recovery to Porr for the death of her minor child caused by the uninsured, negligent driver. To hold otherwise as the insurance carrier suggests, that State Farm may invoke a blanket black letter law which excludes all "insured motor vehicles" from ever becoming uninsured motor vehicles under the terms of a policy providing no coverage here to an exclusion clause is clearly contrary to the intent of the Florida Legislature in enacting the the uninsured motorist act. That act was specifically passed "to protect persons who are injured, as opposed to protecting the insurance carrier or the uninsured motorist". Diem, supra. UM coverage came into existence through the legislature in response to society's demand to compensate the innocent victim injured as the consequence of the negligent and financially irresponsible motorist. It is to provide the same protection that the public would have had if the negligent motorist had carried applicable liability coverage. Boulnois, supra. Clearly under the circumstances of the instant case, if the negligent driver, Spradlin, had carried appropriate liability coverage, this case would not be before the Supreme Court. Respondent Porr has acted to protect herself and her family in the manner provided by

Statute and after the event of a negligent uninsured driver is not now to be told that a talismanic black letter law phrase somehow defeats her statutorily fixed entitlement to UM compensation. Indeed, following State Farm's suggestion to merely recite a proposed phrase and forget about analysis would lead to further ludicrous results. As was recognized and stated specifically by the Second District Court of Appeal in Hartford v. Fonck, supra:

> "... to accept the principle completely would even foreclose the claim of a party injured, for example, by one operating a stolen but yet insured vehicle. In such an instance, where the owner's coverage may not be available to the injured party, that party would have slight comfort in knowing that the negligent thief was operating an insured vehicle." Id. at 597.

The proposition would obviously reach the height of absurdity when a minor child or the named insured was injured while in the family car during the process of theft of the car. That this is not a farfetched or absurd example is readily observable to anyone reading newspapers and noting the father who jumped on the hood of his car when a thief drove away with his children and car. Quite clearly, the man or child of his could have been hurt in the automobile head-on collision that resulted as the thief tried to escape. Quite obviously also State Farm in the instant case would be quick to contend that because the child was riding in the family car when the thief attempted to steal

it, no UM protection was due to the injured child because the child was related to the owner/parent who had failed in his attempt to protect the child by buying UM benefits from State Farm in a manner mandated by law. This result is preposterous. State Farm again should be reminded that the word "or" exists both in the Statute and in its policy. Even though there is no public policy prohibition against putting a family-household exclusion clause into the liability section of the insurance coverage, when you then talk about passing that through to UM coverage, the "or driver" and "or operator" brings in uninsured motorist protection, just as the legislature intended, to provide relief from the irresponsible negligent driver. So too, should it do so in the instant case because the driver himself was negligent, uninsured and had no defensive claim to protect himself or stop UM protection from attaching.

Another fact distinction in the instant case is the fact that both the driver and the minor child were killed. The exception to the general rule in Reid depends upon the validity of the rationale underlying the household exclusion clause in the liability section so as to avoid nullifying it by permitting it to become valid as to UM coverage by a different exception in the uninsured motorist coverage. Where that rationale no longer exists, there is no further reason to continue that particular exception to the general rule that an insurer may not limit UM protection. It would be ludicrous indeed and cruel to even

suggest that a driver or a parent would agree to the death of the driver and/or minor child for purposes of furthering a collusive lawsuit. It is similarly ludicrous to suggest that there is any possibility of disruption of family harmony by holding the insurance carrier to the intended UM coverage provided by the Florida Legislature under the facts of this case.

Because the facts of the instant case completely distinguish it from the necessary facts of Reid which were required to support the rationale of the "exception" to the general rule, the Supreme Court in the instant case may simply find that the exception of Reid is one that it would continue to recognize, but is one that is held specifically to the facts involved therein. Where, as here, a non-relative, negligent, uninsured driver was responsible, a different result should obtain and the general rules should be recognized without the court furthering the Reid exception to the general statutory rule.

POINT II

SECTION 627.727, FLORIDA STATUTES, DOES REQUIRE THAT UNINSURED MOTORIST COVERAGE BE PROVIDED TO A CLASS I INSURED UNDER THE PROVISIONS OF POLICIES OF INSURANCE PROVIDING SUCH COVERAGE TO AUTOMOBILES NOT INVOLVED IN THE ACCIDENT UNDER THE FACTS OF THE INSTANT CASE.

It is sufficient for Respondent Porr to note under this Point on Appeal, that under the totality of facts in the instant case, there are no public policy reasons sufficient to justify a holding that this case does not come under the well known general rule "that an insurer may not limit the applicability of uninsured motorist protection". Reid, Mullis, Salas, among others. The reasons the general rule applies in the instant case were reviewed as a necessary part of Point I which is herewith incorporated by reference.

The insurer State Farm in Point II cites New Hampshire Group v. Harbach, 439 So.2d 1383 (Fla. 1983). The Court there was careful to note that its ruling was not based on 627.727, but was instead controlled by 627.4132, the Anti-Stacking Statute. However, the court further noted that its decision "is of limited applicability since this Statute was amended in 1980 to omit reference to uninsured motorist protection."

The Court could have gone further by noting that the amendment to the Statute specifically makes the entire Section 627.4132 not applicable to uninsured motorist coverage issues after the amendment. As the accident in the instant case occurred on August 9, 1981, Harbach is not applicable.

The Supreme Court in Harbach felt it germane to note the Legislative staff analysis of the 1980 Amendment in making its

decision in Harbach. Reading further from that same Legislative Staff Analysis from the 1980 Amendment indicates that:

> "This Bill would simply eliminate the prohibition against stacking and would thus revive prior case law which permitted and determined the extent of the stacking of uninsured motorist insurance policies."

The Legislature would, of course, be presumed to know that the prior case law which they were reviving would include such key cases such as Mullis and Salas, supra, Brown v. Progressive Mutual Ins. Co., 249 So.2d 429 (Fla. 1971). While some may dispute the wisdom of the Legislature in so specifically taking uninsured motorist coverages out of the Anti-Stacking Statute, those problems, again, should be addressed to the Legislature, rather than by State Farm coming to the Supreme Court and requesting that the Court itself legislate by case law. Such is not the function of the court, when the legislature has so specifically spoken and required a return to the fixed standards reviewed in prior case law.

POINT III

Anti-Stacking Statute made inapplicable to UM coverage on October 1, 1980, before the instant accident on August 9, 1981.

ARGUMENT

CROSS APPEAL

POINT I

THE HONORABLE DISTRICT COURT OF APPEAL ERRED IN DETERMINING THAT RESPONDENT PORR COULD NOT RECOVER FOR THE DEATH OF HER MINOR CHILD UNDER FACT CIRCUMSTANCES WHEREIN THE DEATH OF HER MINOR CHILD, ROBERT WARD, WAS CLEARLY ATTRIBUTABLE TO THE NEGLIGENCE OF AN UNINSURED DRIVER WHO WAS NOT RELATED BY BLOOD OR MARRIAGE TO EITHER THE OWNER OF THE VEHICLE OR THE MINOR CHILD KILLED AND UNDER FACT CIRCUMSTANCES WHERE THERE IS NO LOGICAL RATIONALE SUPPORTIVE OF A HOUSEHOLD - EXCLUSION CLAUSE AS TO UNINSURED MOTORIST BENEFITS, AND THUS UNDER A TOTAL FACT SITUATION WHICH DOES NOT SUPPORT AN EXCEPTION TO THE GENERAL RULE THAT "AN INSURER MAY NOT LIMIT THE APPLICABILITY OF UNINSURED MOTORIST PROTECTION".

In response to the Petitioner Insurance Carrier, STATE FARM's argument on Point I on Appeal, Respondent/Cross-Petitioner discussed at length the fact that the Florida Legislture enacted a Remedial Statute when it enacted the Florida Uninsured Motorist Coverage Act, Florida Statute 627.727. As such, the well established Law in Florida is that the provisions of such an act should be liberally construed to accomplish the beneficial purposes intended thereby. Rather than repeat what was stated in Point I on Appeal, Respondent PORR as Cross-Petitioner would refer the Honorable Supreme Court back to pages 2 through in Point I on Appeal and would incorporate the Argument therein by reference here as to Point I on Cross Appeal. Suffice it to say at this juncture that the providing of the broad coverage indicated and fixed by the Florida Legislature in law has

resulted in the repeated general rule that "an insurer may not limit the applicability of uninsured motorist protection" and that insurers will not be allowed to "whittle away" at that broad coverage, because the Florida Legislature intended that whenever bodily injuries are inflicted on a class one named insured or a member of his household by the negligence of an uninsured motorist "under whatever conditions, locations, or circumstances any of such insureds happen to be in at the time, they are covered by an uninsured motorist liability insurance." Mullis, Reid, Hodges, Salas, Brown, supra. Indeed, because of the multitude of cases wherein exclusionary clauses written into adhesion insurance contracts by insurance carriers purchased by insureds have been stricken as void, it should be quite clear that even where the insurance carrier can truthfully say that both he and the insured have "agreed" to each particular "exclusion", it is simply impermissible that such contracts, even by agreement, can take precedence over the legislative delineation of required uninsured motorist protection. The law becomes a part of the contract, and frankly, were it not so, it would have been quite pointless for the Legislature to ever have enacted the Uninsured Motorist Coverage Law. (See examples voiding multiple different limiting clauses at page 8 to 12, infra). It should be clear, at this juncture, also that the burden should be on the insurance carrier to justify why a deviation and exception to the general rule required by law is

to be permitted under the peculiar fact circumstances of each case and that only a combination of exceedingly strong public policy arguments will persuade the courts to allow an exception not specifically provided by statute. This should be a job ordinarily left to the wisdom of the legislators and courts, quite properly, should be loathe to create exceptions by court decision where those exceptions are absent in the Legislative mandate. Thus, it is in the instant case that even though State Farm Insurance Company can claim that their exclusion language would deny coverage being provided to Respondent Porr because their policy does not permit uninsured motorist coverage when the vehicle involved in the accident is the vehicle insured under "this policy", nevertheless, State Farm must justify this exception to the general rule that "an insurer may not limit the applicability of uninsured motorist protection" or else this further particular exclusion attempting to limit UM coverage that should be due attributable to the uninsured drivers negligence should also fall as void as against public policy.

It was noted earlier that the Reid decision occurred in 1977 under the Supreme Court's then view of the validity of the rationale behind the family-household exclusion. The reason for the exclusion as stated by the Supreme Court at that time was "to protect the insurer from overfriendly or collusive lawsuits between family members". Id at 1173. Obviously involved in this

statement is a postulation, at least in part, that there may be fraud on the insurance carrier either by the staging of accidents or by the exaggeration of injuries after an accidental injury has occurred.

Looking first to the possibility of staging accidents, it is noted that criminal law is more appropriately designed to control that aspect. It is secondly observed that Sec. 627.727(7) now requires that general damages cannot be obtained for pain, suffering, mental anguish, or inconvenience, unless the injury or disease meets the threshold predicates of Florida Statute 627.727(2), Subparagraphs (a) through (d). As these threshold requirements are designed to require a significant bodily injury, or death it is suggested that the thought of family members talking another family member into sustaining a significant permanent injury is a relatively low risk, especially when insurance fraud laws add to the risk.

Further, it would appear to Respondent Porr that the basic rationale underpinning the household exclusion rule and its sister doctrines of intra-family immunity and inter-spousal immunity are being eroded by much justly deserved criticism. A look at the responses which are being made as those doctrines are being eroded also provides much deserved responses to the insurance carrier's professed rationale to preserve any exception allowed to UM coverage by continuing the viability of a family household exclusional rule into UM coverage by way of a

different "this policy"

In Ard v. Ard, 414 So.2d 1066 (Fla. 1982), the Florida Supreme Court had occasion to review the continued validity underlying policy arguments allegedly supporting the intra-family immunity doctrine. In so doing, the court noted that the usual rationale suggested for intra-family immunity lay in the preservation of domestic harmony and tranquility; depletion of family assets in favor of one member of the family unit; and the danger of fraud and collusion between family members, among others. Rather than simply reciting phrases, however, the court noted that in reality the widespread use of insurance typically made hollow the of rationale that the intra-family immunity doctrine needed continued viability for domestic tranquility or to avoid depletion of family assets in favor of one of the members. As recognized by the Florida Supreme Court:

> Where such insurance exists, the domestic tranquilty argument is hollow, for in reality the sought after litigation is not between child and parent but between child and parent's insurance carrier.

Similarly, the parent and child are not truly adversary for:

> Both parties seek recovery from the insurance carrier to create a fund for the child's medical care and support without depleting the family's other assets. Far from being a potential source of disharmony, the action is more likely to preserve the family unit in pursuit of a common goal - the easing of the family financial difficulties stemming from the child's injuries. Id. at 1068.

When speaking about the possibility of fraud or collusion between family members (the specific rationale typically stated to support the family-household exclusion), the Supreme Court noted in agreement with the Indiana Supreme Court that:

> "The possibility of fraud and collusion exists in all litigation. However, we are not convinced that the danger is so great when the plaintiff and defendant are also husband and wife that judicial relief should be summarily denied. Furthermore, it should not be overlooked that the testimony of both parties will be extremely vulnerable to impeachment at trial on the grounds of bias, interest and prejudice. The trial court's responsibility, indeed, its duty, to properly instruct the jury on the credibility of witnesses and the rules governing the weight of evidence will remain unchanged, and, as was stated in United States v. Freeman, (2d Cir.1966), 357 F.2d 606,620,"...it cannot be presumed that juries will check their common sense at the courtroom door." Id. at 1069.

Ultimately, the Florida Supreme Court found that "because of the changes in the conditions which fostered its underlying policies", talismanic acceptance of intra-family immunity would no longer apply, but would instead be altered and waived to the extent that available insurance coverage applied but not otherwise. This is nothing less than a proper recognition that as the alleged policy rationales behind rules change, the rules themselves should be changed to accord with reality.

In Dressler v. Tubbs, 435 So.2d 792 (Fla. 1983), the

Florida Supreme Court noted that inter-spouse immunity did not apply to wrongful death actions. Although the technical language of the decision specifically dealt with the nature of tort surviving a decedent and their applicability to the wrongful death act, Respondent Porr would nevertheless note that the Supreme Court bolstered its decision with the rather common sense statement of policy that the inter-spousal immunity doctrine is founded on the rationale that "allowing such a suit would be disruptive of marital unity and harmony." Because the factual situation in Dressler, supra, dealt with an action wherein both the husband and wife were killed, the court noted that obviously such a rationale could not be applied to a fact situation where the husband and wife were dead and there was "no longer any marital unity to preserve." Id. @ 794.

Similarly, in the instant Porr case, the underlying policy rationale should be analyzed. If that underlying policy rationale has been eroded by changing concepts and the wide spread use of insurance and the adversary and jury systems' ability to deal with the possibility of fraud and collusion when the case comes before them, then those changed policy rationales should be addressed. If the direct death of persons involved renders absurd any policy rationale supportive of an inter- spousal or intra-family immunity doctrine, then that obvious fact should be addressed. In Ard, supra, the result of the addressing changing policy concepts led the court to

conclude that the intra-family immunity doctrine realistically had a lesser viability than in earlier times and would permit litigation at least to the extent that insurance coverage existed. Specifically, it should be noted that the insurance coverage under discussion in Ard, supra, would be that contained in liability insurance coverage.

In the instant case, the same concerns about changing concepts and the continued viability of a worry about fraud and collusion between the family members as it relates to supporting an exception to the general rule that insurance carriers may not limit legislatively delineated UM coverage should also be addressed. If the Florida Supreme Court has correctly recognized that the fear of collusive lawsuits arguments cannot stand in the face of a realistic assessment in the circumstances of Ard, then how much less validity does this argument have when touted as a "rationale" to counter balance the extremely strong public policy of not allowing insurance carriers to limit the applicability of legislatively delineated UM protection. Indeed, this "rationale" must be characterized as nugatory.

Perhaps then the only remaining rationale for permitting a family household exclusion rule to justify an exception to the otherwise general rule that insurance companies cannot limit the UM protection lies in the thought that perhaps insurance premiums are limited thereby. To that, Porr can only respond that nowhere that Respondent is aware of have the courts of Florida refused to

uphold legislatively mandated strong public policy based on the sole counter argument, always present as a threat, from insurance companies, to wit: the floodgates of litigation are going to be open to the ruin of all. But, of course, as always, the threat is never supported by realistic figures to give substance to this phantom argument. More specifically, Porr would note that in the instant case, the floodgates of litigation are not even in sight, for in the instant case, the facts indicate that Porr is only seeking to recover her just legislative due of recovery under all three insurance policies, including the ones specifically covering the vehicle involved in the accident, because she has met the dual required predicates of an unrelated negligent driver who was totally uninsured from any source and because in the Porr facts circumstances, the negligent driver was unrelated by either blood or marriage to either the owner of the vehicle or the injured child. Thus, absolutely zero policy rationale consideration of the need to protect against collusive lawsuits come into play and there exists absolutely zero reasons under the Reid, supra, rationale to permit the instant State Farm Insurance Company to draft in limitations on UM protection provided by statute and soundly condemned in every case following the general rule. The Supreme Court need only go that far in this case and, to the extent that the "rate structure" and "floodgates of litigation" argument pulls any sway, can easily suggest in its opinion that consideration of the further

liability of the Reid, supra, exception where totally household members are involved may well depend upon a balancing of the strong public policy interests in affording wide UM protection in line with Mullis, supra, on the one hand as contrasted to the savings of premium dollars which may be suggested by an insurance carrier on the other hand. It would be hoped that perhaps then the Court would be given facts, not phantoms, about changes in premium amounts.

In the instant Porr facts circumstance, as the insurance carrier has failed to justify an exception to the general rule that insurers may not limit the applicability of legislatively delineated UM protection, those UM benefits are payable even as to the uninsured motorist coverage providing coverage on the vehicle involved in the fatal crash in a fact circumstance where the twin predicates of negligence of the driver and his uninsured status from that and where the uninsured driver is unrelated to either the owner or an injured party. Under those circumstances, the insurance carrier has shown no rationale justifying an exception to the general rule that it may not exclude UM coverage for Porr.

CONCLUSION

Respondent believes that the First District Court of Appeal has correctly ruled allowing recovery in the instant case consistent with Salas, Curtin, Johnson, et al as to those two policies providing UM coverage for the two vehicles not involved in the minor's fatal car crash. In the instant case wherein the policy on its face only attempts to exclude the vehicle insured under "this" policy and where two separate insurance policies provide UM coverage, there is no policy language excluding coverage. As the general rule is that State Farm may not draft exclusions to statutorily mandated UM coverage and as the instant case involves a concededly unrelated, uninsured negligent driver there exists no reason for the court to permit this exception to the general rule that State Farm may not limit the statutorily delineated UM protection. Furthermore, as only the strongest countervailing public policy will permit an exception to the general rule that insurers may not limit UM protection as none has been shown here, and as the underlying rationale for the family household exclusion retains only limited viability the underlying rationale of the household exclusion clause is not, sufficiently strong to allow an exception to the general rule. Wherefore Respondent Porr should further be allowed to receive uninsured motorist benefits pursuant to that policy covering the vehicle involved in the fatal crash.