75,026

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

JILL BRIXIUS and ROBERT
A. BRIXIUS, her spouse,

Petitioners/Appellants/
Plaintiffs,

Appeal No.: 89-307

vs.

ALLSTATE INSURANCE COMPANY,
a foreign corporation,

Respondent/Appellee/
Defendant.
_____/

pl

ON APPEAL FROM THE SECOND DISTRICT COURT OF APPEALS

AMICUS CURIAE BRIEF

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STATEMENT OF THE CASE AND FACTS

The Academy of Florida Trial Lawyers adopts the Statement of the Case and Facts as submitted in Petitioner/Appellant/Plaintiff's Initial Brief.

SUMMARY OF ARGUMENT

An uninsured motorist carrier should not be permitted to exclude uninsured motorist coverage for injuries suffered by an insured simply because the tortfeasor is driving the insured's own car when the insured is a passenger. This court has recognized that it is the public policy of this state to extend uninsured motorist coverage to protect citizens from injuries suffered at the hands of uninsured drivers. The only exclusions permitted for uninsured motorist coverage have been those that serve to uphold other public policy considerations such as cases involving family members or workers' compensation injuries. The instant exclusion does not serve any such policy consideration nor does it further any legitimate government interest. The motorists in both cases before this court were uninsured when they caused the appellant's injuries. Accordingly, the decision of the lower courts should be reversed and the exclusions voided.

ARGUMENT

AN INSURED OWNER RIDING AS A PASSENGER IS HIS OR HER OWN VEHICLE WHO IS INJURED BY A NEGLIGENT NON-RELATIVE DRIVER IS ENTITLED TO UNINSURED MOTORIST BENEFITS AND ANY POLICY EXCLUSIONS TO THE CONTRARY ARE VOID.

This Court has declared that the public policy of the uninsured motorist statute contained in Florida Statute §627.727 (1989) 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. Mullis v. State Farm, 252 So.2d 229 (Fla. 1971). Specifically, the Mullis Court indicated that the purpose of the statute was to permit an insured "to recover for the damages he or she would have been able to recover if the offending motorist had maintained a policy of liability insurance". Mullis at 234 citing Standard Accident Insurance Company v. Gavin, 184 So.2d 229 at 232 (Fla. 1st DCA 1966). Both the public policy of the uninsured motorist statute as ennunciated by this Court and the purpose of the statute are violated by the 2nd Distrist Court of Appeal's decision in Brixius v. Allstate Insurance Company, 549 So.2d 1191 (Fla. 2nd DCA 1989).

This Court has not hesitated to strike down as void limitations on uninsured motorist coverage imposed through policy restrictions of insurance carriers except where the restrictions have attempted to avoid either common law or statutory immunities. These common law and statutory immunities have

basically included that of family exclusions and workers' compensation exclusivity found in Chapter 440 of Florida Statutes. Except in those cases, uninsured motorist coverage limitations violate both public policy and the purpose of Florida Statute 627.737 The facts in the instant case do not fall within one of these recognized immunities. Therefore, the exclusion in Brixius should fail.

The instant appeal involves a claimant injured while riding as a passenger in her own vehicle. The vehicle was driven by a negligent uninsured non-relative. The instant claimant was unable to bring a claim under her liability policy, so uninsured motorist benefits were sought. The insurance carrier denied coverage based on an exclusion. This Court must decide if such an exclusion is valid.

The concept of an uninsured motorist claim where the driver-tortfeasor is driving a vehicle that has liability insurance and that liability insurance is not available to the claimant has been before this Court most notably in Reid v. State Farm Fire and Casualty, 352 So.2d 1172 (Fla. 1977) and Allstate Insurance Company v. Boynton, 486 So.2d 552 (Fla. 1986). The court in Reid and Boynton found no coverage, because of strong public policy reasons to uphold the exclusions.

In Reid, a liability exclusion for claims between family members prevented a direct liability claim. Such exclusions have been upheld so as not to expose insurance carriers to fraudulent and collusive claims. The uninsured motorist exclusion was also

upheld because the same potential for fraud and collusion existed. The exclusion in Reid was not void since it served a long recognized public policy and to allow the claim would have circumvented the family liability exclusion.

The Boynton court dealt with a slightly more complicated set of facts involving a workplace automobile accident. No liability insurance was available to the injured claimant for various reasons. The claim for uninsured motorist was disallowed based on exclusion in the policy. This court upheld the exclusion because otherwise the legislative intent of Florida Statutes §440.01 et seq. (1989) would have been circumvented

In the instant case, there is no potential for fraud and collusion since the at-fault party is not related to the injured claimant and the at-fault party faces the same downside risk as the uninsured motorist carrier and therefore, would have the same interest in vigorously defending the matter. This is so because the uninsured motorist carrier and the at-fault driver can both be sued by the injured claimant. If, in fact, only the uninsured carrier is sued, the uninsured motorist carrier still would have subrogation rights against the at-fault party.

Several examples will illustrate why the exclusion in this case should be treated differently than the exclusions upheld in Boynton and Reid. If a brother is driving a vehicle negligently and injures his passenger sister, under the current State of Florida law, she would not be able to bring a direct

liability claim against the brother. There would likely be a valid liability exclusion within the policy. Further, the Boynton case would uphold an exclusion as to any claims the sister may have against the uninsured motorist carrier. If the brother were driving a separate car and hit the sister in a separate vehicle, then no claim would be able to be brought under the liability insurance policy of the brother. Further, the exclusion under the uninsured motorist coverage of the sister, would be upheld under Reid and Boynton. This is to protect the carrier from any type of fraud and collusion between the brother and sister where the brother would be more likely to testify he was at fault and be less likely to vigorously defend the action since the damages would flow through to his sister. The same basic factual situation would apply with any other type of family member exclusion.

However, the logic breaks down into the instant situation. If a non-relative tortfeasor driver injures a person in another car and the non-relative tortfeasor driver does not have any insurance, there is no question but that the uninsured motorist coverage would apply. However, if you place the non-relative tortfeasor driver in the injured person's car and that person drives negligently and injures the claimant, the insurance company's position then changes arguing no uninsured motorist coverage. The uninsured motorist statute was not designed solely to defeat claims based on who was in which car

and how many cars were involved in the accident. The basic point behind the uninsured motorist statute was to protect people from injuries received as a result of uninsured drivers and owners' negligence. Of course, this court has held in Boynton and Reid that the uninsured driver must be someone from whom the insured could collect. The instant case presents exactly this situation.

It should also be noted that there are various other cases that the insurance companies would likely cite as authority for upholding exclusion. Other than Boynton and Reid, these cases basically involve facts such as State Farm Mutual Auto Insurance Company v. McClure, 501 So.2d 141 (Fla. 2nd DCA 1987).Basically, these are cases where the claimant was attempting to collect insurance coverage under the same policy twice. Those cases where the liability insurance limits would not satisfy the claimant's injuries and therefore, the claimant would then claim under both the liability and the uninsured motorist portion of the policy if they were able to show that both the vehicle they were riding in and the other vehicle in the accident were each partially at fault under Florida's comparative negligence doctrine.

This is not the case in the instant appeal since there is no available liability insurance from anyone for the injured persons. In addition, it should be pointed out that the claimants in the instant case are not trying to circumvent any valid statutory immunities or inter-family immunities and that

the defendant insurance companies are not put in any position where they would have to pay out more than their policy limits such as the insurance company argued in McClure. In this case, the insurance company would be in no different situation than as if the insured had been struck by an uninsured vehicle owned by a non-relative. Instead, the insured was "struck" by an uninsured non-relative driver of their own vehicle.

CONCLUSION

In the instant case, there are no public policy reasons why the insured claimant should not be able to make a claim against the at-fault driver. In fact, if the at-fault driver had insurance, there would be no controversy. Since there exists no common law or statutory bar to the claim against the uninsured at-fault driver, no exclusion should bar the uninsured motorist claim. Any uninsured motorist exclusion not based on statutory intent (Chapter 440) or longstanding public policy should be struck as void.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been mailed this 16th day of April, 1990 to JOHN P. JOSEPH and LISA A. JAYSON, 300 31st Street North, Suite 400, P.O. Box 16008, St. Petersburg, FL 33733 and DAVID J. ABBEY and BARD D. ROCKENBACH, One Fourth Street North, Suite 1000, St. Petersburg, FL 33701.

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