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IN THE SUPREME COURT OF FLORIDA

PATRICIA A. SHARON

Petitioner,

vs.

CASE No.: 75,391

STATE FARM FIRE AND CASUALTY COMPANY,

Respondent.
_____/

A PETITION FOR REVIEW OF A DECISION OF THE SECOND DISTRICT COURT OF APPEAL

ANSWER BRIEF ON RESPONDENT STATE FARM FIRE & CASUALTY COMPANY

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INTRODUCTION

This is a proceeding for discretionary review of a decision of the Second District pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(vi). Petitioner Patricia Sharon was the Plaintiff in the trial court and the Appellant before the Second District, and she will be addressed herein by name or as the Plaintiff. Respondent State Farm Fire & Casualty Company, on whose behalf this Answer Brief is filed, was the Defendant in the trial court and the Appellee before the Second District, and will be addressed herein as "State Farm."

Reference to the Record on Appeal will be indicated by "R" followed by a page number or numbers. There is an Appendix to this Answer Brief containing the pertinent cases, and reference to it will be indicated by "App" followed by a page number or numbers.

STATEMENT OF THE CASE AND FACTS

The salient facts of this case are quite simple. The Plaintiff alleged in her Complaint that she had been injured while riding as a passenger in her own car, which was being driven by an unrelated friend with the Plaintiff's permission. The driver/friend was uninsured, so the Plaintiff sought recovery under the UM portion of her policy issued by State Farm.

The State Farm policy had an "owned-vehicle" exclusion, which stated that there would be no UM coverage where the vehicle causing the injury was an insured vehicle under the liability portion of the policy. (R 30) Since Plaintiff was injured while riding as a passenger in her own car, the exclusion was plainly applicable under the facts of this case. However, the Plaintiff argued that the exclusion was contrary to public policy on the rationale expressed by this Court in Mullis v. State Farm, 252 So.2d 229 (Fla. 1971). The trial court rejected this argument and granted summary judgment to State Farm. (R 42) Because the coverage issue was decided on summary judgment, it was unnecessary for the trial court to make a determination as to the negligence of the driver of the Plaintiff's car, the driver of the second vehicle involved in the accident, or the Plaintiff herself.

The Second District issued its decision affirming the summary judgment on 12 January 1990. Sharon v. State Farm Fire & Casualty Co., 2d DCA Case No. 89-01711. (App 1) The one-sentence opinion affirmed the summary judgment on the basis of another

Second District decision, Brixius v. Allstate Ins. Co., 549 So.2d 1191 (Fla.2d DCA 1989)(App 2-3). The court certified its decision, just as it had in Brixius, as being in conflict with a decision of the Fifth District. This Court has tentatively accepted jurisdiction on the basis of this certification pursuant to Rule II(A)(2) of the Supreme Court Internal Operating Procedures.

So the Second District's decision in the instant case "tags along" with the Brixius decision rendered three months before. The pertinent facts of Brixius are identical to the instant case, viz., the plaintiff was injured while riding as a passenger in her own car, which was being driven by an uninsured friend with the plaintiff's permission. In Brixius the trial court also granted summary judgment to the insurer, because the vehicle causing the injury was owned by the injured party and hence fell within the owned-vehicle exclusion. 549 So.2d at 1192 (App 3). The trial court in the instant case granted summary judgment to State Farm on the exact same basis. (R 9,42) So this case and Brixius are factually and procedurally identical.

In Brixius the Second District affirmed on the basis of this Court's decision in Reid v. State Farm Fire & Casualty Co., 352 So.2d 1172 (Fla. 1978)(App 4-6), while acknowledging that the Fifth District had reached the opposite conclusion in Jernigan v. Progressive American Ins. Co., 501 So.2d 748 (Fla.5th DCA 1987)(App 15-19). Brixius was thus certified to this Court as being in conflict with Jernigan. 549 So.2d at 1192 (App 3). The

certification in the instant case was likewise based on the conflict with Jernigan. (App 1)

ISSUE

DID THE SECOND DISTRICT CORRECTLY HOLD IN THE INSTANT CASE AND BRIXIUS THAT THE OWNED-VEHICLE EXCLUSION WAS VALID AND NOT AGAINST PUBLIC POLICY?

SUMMARY OF ARGUMENT

This Court held in Reid that the owned-vehicle exclusion from UM coverage is valid, and that a vehicle insured under the liability portion of the policy cannot be considered "uninsured" under the UM portion of the policy. This Court's later decision in Boynton did not turn on the owned-vehicle exclusion, and does not detract from the Reid rationale. Boynton held that a vehicle could be considered "uninsured" when liability coverage is excluded under a separate policy of insurance. Justice Ehrlich noted in Boynton that Reid had involved only one policy, and hence its holding was not applicable to the facts of Boynton. This is a valid distinction, since the family exclusion and the owned-vehicle exclusion are not implicated when liability coverage is denied under a separate policy.

In Jernigan the Fifth District failed to recognize that Reid must apply when there is only one policy of insurance involved. It attempted to distinguish Reid on the basis of the tortfeasor's status, but an analysis of Reid as well as the family and owned-vehicle exclusions shows that this is not a valid distinction. The Second District realized this and refused to follow Jernigan.

The Third and Fourth Districts have likewise held contrary to Jernigan.

In Jernigan the Fifth District erroneously assessed Reid and Boynton, and the distinction drawn by the Fifth District is not supported by any legal rationale, contractual language, or public policy reason. This family exclusion is at the very foundation of automobile insurance law, and to allow UM coverage where the family exclusion prohibits it would be disastrous from a policy perspective. The Second District in the instant case correctly perceived the weakness of the Jernigan decision, and it is therefore respectfully submitted that the Second District's decision should be approved.

ARGUMENT

An understanding of this Court's decisions in Reid and Boynton is pivotal to the resolution of the conflict here presented, since both the Fifth and Second Districts acknowledged in their respective opinions that these are the key cases. An analysis of these two cases, and several others that have commented upon them, will demonstrate, it is respectfully submitted, that the Fifth District's Jernigan decision was based on faulty reasoning and that the Second District was eminently correct in holding as it did.

I. THE PERTINENT DECISIONS

The starting point for any discussion of UM exclusions must be this Court's epic Mullis decision, where it was held that

exclusions from UM coverage are not favored and will be closely scrutinized from a public-policy perspective. But over the years one UM exclusion has consistently withstood this heightened judicial scrutiny, and that is the owned-vehicle exclusion here in question.

A. This Court's Reid Decision

Reid is the seminal case on the owned-vehicle exclusion, and is discussed in all of the subsequent cases dealing with the exclusion. In Reid the plaintiff was injured while riding in a car owned by her father and driven by her sister. Liability coverage was not available to the plaintiff because she was a relative of the named insured, and hence excluded from coverage on the basis of the "family exclusion." The family exclusion will be discussed in more detail below, but the general purpose of such exclusions is to preclude the named insured or his family members from recovering under the liability portion of the policy.[1] Coverage was also not available under the UM portion of the policy, since the "owned-vehicle exclusion" denied coverage where the injury was caused by a vehicle owned by the named insured or a family member.

The plaintiff in Reid argued that she was entitled to UM coverage under her policy, since there was no liability insurance available by virtue of the family exclusion. She further argued

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[1] The State Farm policy here in question contained a family exclusion. (R 24)

that the owned-vehicle exclusion from UM coverage was an invalid attempt to limit UM coverage under Mullis. This Court rejected the argument, holding that the vehicle insured under the liability portion of a policy "does not become uninsured because liability coverage may not be available to a particular individual." 352 So.2d at 1173. That is exactly the situation in the instant case, as the Second District correctly recognized. Reid simply cannot be distinguished from the instant case in any meaningful way.

This Court held as it did in Reid to preserve the family exclusion from liability coverage. If an injured family member can obtain UM benefits because liability coverage is denied under the family exclusion, then the family exclusion would be totally negated. So the family exclusion and the owned-vehicle exclusion go hand-in-hand, and the failure to enforce the latter vitiates the former.

The Plaintiff asserts throughout her Initial Brief that Reid turned on the fact that the tortfeasor was the injured party's sister. This point will be discussed in more detail below, but it is important to observe that the Reid opinion on its face refutes the Plaintiff's argument. Only in the initial discussion of the facts does Reid disclose that the tortfeasor was the plaintiff's sister, and nowhere in the body of the opinion does this fact play a role in the legal reasoning. Rather, at every instance this Court made it clear that its decision turned on the

status of the injured plaintiff, and not the status of the tortfeasor:

1. This Court observed that coverage had been denied under the liability portion of the policy on the basis of the "provision in the policy that the insurance does not apply to bodily injury to any insured . . . ." 352 So.2d at 1173. (Emphasis added.) So the key factor is the status of the injured passenger under the family exclusion.

2. The next pertinent language in Reid is found in the discussion of the owned-vehicle exclusion to UM coverage: "In other words, her father's car cannot be an uninsured motor vehicle under the terms of the policy, even though, as we held in the first appeal [dealing with liability coverage], it is in fact uninsured as to her." Id. (Emphasis added.) So again, this Court's focus was upon the status of the injured plaintiff/passenger, and not the tortfeasor/driver.

The Plaintiff has not, and cannot, point to any mention in Reid of the status of the tortfeasor/driver as being legally relevant. Rather, this Court's opinion turned solely on the status of the injured plaintiff/passenger. So the fact that the driver was related to the injured passenger is no way to distinguish Reid from the instant case. Reid turned, as it should have, solely on the basis of the status of the injured passenger. Thus Reid is on all fours with the instant case, as the Second District correctly recognized.

B. This Court's **Boynton** Decision

The next important decision for present purposes is Allstate Insurance Co. v. Boynton, 486 So.2d 552 (Fla. 1986). There the plaintiff was injured at his jobsite by a fellow employee. The plaintiff was a mechanic, and he was struck by a vehicle driven by a fellow mechanic. The owner had dropped off the vehicle at the shop for repairs. The plaintiff first sued his employer and the owner of the vehicle. His employer was dismissed on the basis of workers' compensation immunity, and the vehicle owner was dismissed on the basis of its legal status as a bailor. The plaintiff then sued the tortfeasor, i.e., his fellow mechanic that was driving the car that struck him. The fellow mechanic's liability insurer denied coverage on the basis of the exclusion in its policy for liability incurred in the course of a business pursuit.

The injured plaintiff then sued his own insurer (Allstate), contending that he was entitled to UM benefits because the tortfeasor did not have liability insurance available for this particular incident, and hence was "uninsured." The trial court ruled in favor of Allstate, and the plaintiff appealed. The Fifth District reversed, holding that there was UM coverage because no liability insurance was available to either the owner of the vehicle or the tortfeasor because of applicable exclusions, hence the vehicle was "uninsured" for purposes of the plaintiff's UM coverage. 443 So.2d at 429-30. The court went on to hold that the UM carrier could not utilize the workers'compen-

sation immunity that was available to the tortfeasor, because this would defeat the purpose of UM coverage. 443 So.2d at 430-31.

This Court then reviewed the Fifth District's decision, and agreed that the tortfeasor was "uninsured" because of the exclusions in the owner's and tortfeasor's insurance policies. 486 So.2d at 553 (App 8). Justice Ehrlich said that UM coverage can be found even when the vehicle in question is covered by a liability policy, "if that policy does not provide coverage for the particular occurrence that caused plaintiff's damages." Id. So Boynton did not turn on the owned-vehicle exclusion as does the instant case, since the vehicle causing the injury in Boynton was not insured under the liability portion of the plaintiff's policy. Rather, Boynton turned on the proper interpretation the language of the UM statute specifying that coverage must be available where the insured is injured by an "uninsured motor vehicle."

Justice Ehrlich distinguished Reid in a footnote to its opinion, stating that it was not applicable to the facts before the Court for the following reason:

> In Reid, we held that a vehicle cannot be both an insured and uninsured vehicle under the same policy. The present case is distinguishable because it involves separate policies. Reid is inapplicable.
>
> (Emphasis in the original.)

486 So.2d at 555 (footnote 5)(App 10). So Justice Ehrlich expressly considered Reid, and held that it was distinguishable on the basis set forth above.

It should be noted that Justice Ehrlich did not distinguish Reid because the tortfeasor was unrelated to the injured plaintiff, as the Plaintiff attempts to do here. So Justice Ehrlich's pronouncement in Boynton once again verifies that Reid did not turn on the status of the tortfeasor; if this had been the rationale of Reid, this Court could have easily cited that fact in Boynton to distinguish Reid. It did not do so, and by implication rejected the argument the Plaintiff is making herein.

In Boynton Justice Ehrlich went on to hold that the Fifth District had erred in holding the workers' compensation defense was unavailable to the UM carrier. He said that the UM carrier stands in the shoes of the tortfeasor, and has any and all defenses available to him. So the bottom line was that the trial court's ruling in favor of the UM carrier was upheld.[2]

C. The Fifth District's Conflicting Jernigan Decision

In the Jernigan case the Fifth District attempted to synthesize Reid and Boynton, and, it is respectfully submitted, failed. The facts of Jernigan were identical to Brixius and the

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2 In a strict sense it could even be said that the holding as to the meaning of "uninsured vehicle" was dicta, since the second issue was dispositive. But the characterization of a pronouncement of this Court as dicta does not dispel the conflict between the instant case and Jernigan, nor in any way lessen the need to resolve the conflict.

instant case, namely, the plaintiff was injured while riding as a passenger in his own car while being driven by an uninsured friend with the plaintiff's permission.

In Jernigan the insurer relied upon the owned-vehicle exclusion, but the trial court held the exclusion to be void as contrary to public policy. The Fifth District agreed that the exclusion was contrary to public policy, noting that this Court's Mullis decision and its progeny had struck down most attempts to limit UM coverage. Judge Orfinger relied especially on this Court's then-recent decision in Boynton, which stood for the proposition, Judge Orfinger said, that "the test for determining whether a vehicle is insured for purposes of uninsured motorist coverage is not whether the owner or operator of the vehicle has a liability insurance policy, but whether insurance is available to the injured Plaintiff." 501 So.2d at 750 (App 17). Judge Orfinger went on to express doubt as to whether Reid was still good law in instances where the driver is unrelated to the injured passenger. 501 So.2d at 751 (App 18). Thus the Fifth District held, contrary to the Second District in the instant case and Brixius, that an owned-vehicle exclusion is an invalid attempt to limit UM coverage.

D. The Fourth District's decision in **Allstate Ins. Co. v. Baker**.

In Allstate Insurance Co. v. Baker, 543 So.2d 847 (Fla.4th DCA 1989) a child was injured while riding as a passenger in an automobile owned by her parents but driven by a family friend.

The driver was uninsured, and the child made a UM claim under her parents' policy. So the pertinent facts were identical to the instant case: the passenger was an insured under the policy and she was injured by the negligence of an unrelated tortfeasor/-driver. The trial court held that there was UM coverage for the injured child under her parents' policy, but the Fourth District reversed. Judge Downey quoted the owned-vehicle exclusion from the UM portion of the policy, and said that such exclusions had been held valid in Reid.

Judge Downey distinguished Jernigan in an interesting way. The rationale for upholding owned-vehicle exclusions in the UM portion of the policy is that if such clauses were stricken down, family exclusions from liability coverage would also be invalidated by necessary implication. Judge Downey cited this rationale, and then observed that the Fifth District in Jernigan had apparently not been asked to consider a family exclusion in the liability portion of the policy before the court. Judge Downey said there was a family exclusion in the Allstate policy before him (as there is in the instant case), hence Jernigan was not controlling. There is some doubt whether Jernigan can be distinguished in the manner suggested by Judge Downey (see discussion on pp 17 and 18 hereof), and the Second District did not attempt to so distinguish Jernigan under identical facts in the instant case. But whether the distinction is valid or not, the fact remains that Baker reached the same conclusion as the Second District did in the instant case under identical facts.

Jernigan reached the opposite conclusion, again under identical facts. So Jernigan's interpretation of Reid and Boynton is impeached not only by the Second District, but also by the Fourth District.[3]

E. The Second District's Brixius Case Redux.

In Brixius Judge Lehan considered all of the cases set forth above (with the exception of Baker). He disagreed with the Fifth District's conclusion in Jernigan that this Court had somehow overruled Reid in the Boynton decision. He observed that in Boynton this Court had specifically discussed Reid, and had endorsed its continuing vitality. The Second District thus declined to follow Jernigan, opting instead for the higher authority of this Court as expressed in Reid and re-confirmed in Boynton.

II. THERE IS A REAL AND MEANINGFUL DISTINCTION BETWEEN REID AND BOYNTON

So what conclusions can be drawn from this group of cases? Reid clearly stands for the proposition that the owned-vehicle

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[3] The Third District can perhaps be added to the list of courts that have held contrary to Jernigan. In Pierson v. National Ins. Assoc., 15 FLW 552 (3d DCA Op. filed February 27, 1990)(App 25) the court upheld the validity of the family exclusion on the basis of Reid. Though the court did not disclose the underlying facts, both of the other cases cited with Reid involved circumstances where the driver of the car was not related to the injured/insured that was a passenger. So even though the Third District did not set forth the facts before it, they were likely similar to the instant ones. If so, the court's holding is consistent with the Second District's and contrary to Jernigan.

exclusion is valid, and a vehicle may not be considered "uninsured" under the UM portion of the policy if it would be "insured" in the liability portion but for the family exclusion. Boynton did not deal with an owned-vehicle exclusion, because there the vehicle causing the injury was not owned by the named insured or a family member. Rather, Boynton interpreted the language of the UM statute to mean that a vehicle could be considered "uninsured" for UM coverage, even though there would have been liability coverage under a separate policy but for an exclusion.

In Jernigan the Fifth District held that the rationale of Boynton was controlling, and that Reid is of doubtful continuing validity in the wake of Boynton. But what the Fifth District ignored was that this Court had explicitly discussed Reid in Boynton, and had set forth the key factor for distinguishing the applicability of the two cases. In Boynton Justice Ehrlich said that Reid did not apply because Reid had involved only one insurance policy. He noted that Boynton involved an exclusion from liability coverage under a separate policy of insurance, and that this was the distinguishing fact.

So the distinction between Reid and Boynton is fairly easy to draw. The vehicle causing the injury cannot be considered "uninsured" for UM purposes simply because the family exclusion to liability coverage applies to bar liability coverage under the owner's policy. This is the intended effect of the owned-vehicle exclusion, which this Court expressly held in Reid to be valid.

However, if the vehicle causing the injuries is not owned by the insured or his family, and therefore not subject to the owned-vehicle exclusion, the vehicle can be considered "uninsured" with respect to the injured person's UM coverage, since the faiure of liability coverage arises under a separate policy. So if there are two policies in question, there can be UM coverage. But if there is only one policy in question, there cannot be UM coverage. As this Court said in Reid, a vehicle cannot be an insured vehicle and an uninsured vehicle under the same policy.

In both the instant case and Brixius there was only one insurance policy involved, and the Second District correctly realized that Reid/Boynton dictated that UM coverage did not exist under such circumstances. Jernigan also involved a single policy, but somehow the Fifth District did not comprehend the straightforward distinction between Reid and Boynton. So the Fifth District failed to heed established precedents from this Court, and for that reason its decision should be disapproved.

III. THE FIFTH DISTRICT'S ATTEMPT TO DISTINGUISH REID WILL NOT STAND LOGICAL SCRUTINY

In Jernigan Judge Orfinger said that the court questioned the continuing application of Reid "in cases where no family exclusion or other bar to recovery is involved." 501 So.2d at 751 (App 18). So the court seemed to be saying that Reid would have continuing vitality where there is a "family exclusion" under the liability portion of the policy, but that no such exclusion was present in the case before the court. This

statement reveals a definite misunderstanding of the family exclusion, and a possible misunderstanding of the insurance policy that was before the court.

A. The family exclusion from liability coverage and the reciprocal effect of the owned-vehicle exclusion from UM coverage.

Automobile insurance policies invariably exclude liability coverage where the injury is to the named insured or a family member. Such "family exclusions" have been universally held to be valid. See, e.g., Florida Farm Bureau Ins. Co. v. GEICO, 387 So.2d 932 (Fla. 1980). The State Farm policy here in question contained a family exclusion from liability coverage. (R 24)

The purpose of these family exclusions is twofold: to protect an insurer from collusive suits between family members, and to allow lower rates by excluding passengers most likely to be in the tortfeasor's vehicle at the time of the accident. Florida Farm Bureau Ins. Co. v. GEICO, supra at 934; Amica Mutual Ins. Co. v. Wells, 507 So.2d 750,752 (Fla.5th DCA 1987).

As mentioned previously, the main impetus for this Court upholding the owned-vehicle exclusion in Reid was to give effect to the family exclusion to liability coverage. The family exclusion would be rendered meaningless if the injured family member--who is excluded from recovering under the liability portion of the policy--could simply turn around and recover under the UM portion of the policy. So to invalidate the owned-vehicle exclusion from UM coverage would have the effect of invalidating

the family exclusion from liability coverage. The two exclusions go hand-in-glove, and the invalidation of one also negates the other. As the Second District noted in Harrison v. Metropolitan Property & Liability Ins. Co., 475 So.2d 1370,1371 (Fla.2d DCA 1985), "[T]he restriction involved here [the owned-vehicle exclusion from UM coverage] is valid because otherwise the family exclusion in the policy would be rendered meaningless."[4] The Second District cited Reid in support of this proposition.

So in a family exclusion in the liability portion of the policy is the reciprocal of the owned-vehicle exclusion in the UM portion of the policy. Automobile insurance policies invariably contain both of these clauses, and the invalidation of one automatically negates the other.

B. The family exclusion pertains to the injured party, not the tortfeasor.

The family exclusion provides that there will be no liability coverage when the insured or a family member is the injured party. Yet the Fifth District seemed to think in Jernigan that the family exclusion turned on whether the tortfeasor was the named insured or a family member. This was the basis upon which the court distinguished Reid, where the driver was the passenger's sister. Judge Orfinger seemed to think that the family exclusion would not apply when a non-relative tortfeasor was

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[4] This Court expressly approved the reasoning of the Harrison case in Allstate Ins. Co. v. Dascoli, 497 So.2d 1 (Fla. 1986).

driving and the injured passenger was the insured or a family member. But this is plainly not so.

Even if the driver is not the insured or a family member, the family exclusion would deny coverage where the injured party was the insured or a family member. The focus of the family exclusion is on the injured party, and not on the tortfeasor. A number of cases have held that the family exclusion applies to bar recovery by a passenger who is the insured or a family member, even when the tortfeasor/driver is not related to the passenger in any way.[5] See, e.g., Allstate Ins. Co. v. Baker, supra; Newman v. National Indemnity Co., 245 So.2d 118 (Fla.3d DCA 1971).

In summation, Reid and Jernigan were legally identical, since in each case the injured party was an insured under the liability portion of the policy. So the Fifth District's attempted to distinguish Reid because of the status of the tortfeasor simply is not based on legally supportable reasoning.

C. The JERNIGAN decision effectively invalidates family exclusions from liability coverage, while at the same time confirming the validity of such exclusions.

Judge Orfinger never said in Jernigan whether the liability portion of the insurance policy there in question contained a family exclusion, and this silence raises a mild influence that

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[5] These cases also hold that the family exclusion is perfectly valid in such situations, since the exclusion's salutary purposes apply with equal force when a friend is driving as when a relative is behind the wheel. Allstate Ins. Co. v. Baker, supra at 849.

it did not contain such an exclusion. In fact, Jernigan has been distinguished on this basis. Allstate Ins. Co. v. Baker, supra. But as pointed out above, family exclusions to liability coverage go hand-in-hand with owned-vehicle exclusions to UM coverage. It is virtually inconceivable that a policy could have an owned-vehicle exclusion and not have a family exclusion. As will be discussed in more detail below, the family exclusion is at the very heart of liability coverage, and its absence would expose an insurer to liability not required by law or reason. So the policy in question in Jernigan undoubtedly had a family exclusion to liability coverage.

In Jernigan the Fifth District said that family exclusions are valid, noting that Reid had approved such exclusions. But because of the Fifth District's mistaken notion that family exclusions concern the status of the tortfeasor rather than the injured party, the effect of the Fifth District's holding was to invalidate the family exclusion in the policy before it! The Jernigan reasoning would also invalidate family exclusions in all other cases where an insured was not the actual tortfeasor. So the practical effect of the Fifth District's holding is contrary to the legal maxim expressed in the opinion--the decision invalidates the family exclusion on the one hand while confirming the validity of such exclusions on the other.

IV. THE INTERPRETATION OF REID/BOYNTON BY THE SECOND DISTRICT IS CORRECT FROM A POLICY PERSPECTIVE

Of course this Court is empowered to change the common law of Florida, within constitutional parameters, if it deems that a policy consideration requires such a change. But, mirabile dictu, there is no reason to change the rule that emerges from a reading of Reid and Boynton together, since this rule is correct from a policy perspective. Let's consider the policy considerations that are involved.

A. The Jernigan distinction is not supported by any policy rationale.

As can be seen from the foregoing discussion of Reid and its progeny, the principal reason given by the courts for upholding the owned-vehicle exclusion is to preserve the family exclusion from liability coverage. As can also be seen from the above discussion of Jernigan, the Fifth District's holding invalidates the family exclusion, at least in part, since the court failed to understand that the focus of the family exclusion is upon the injured party rather than the tortfeasor.

Perhaps counsel for the Plaintiff in the instant case would argue that Jernigan invalidates the family exclusion only in the rare instance where someone not an insured under the policy is driving and an insured is injured as a passenger or otherwise. First of all, this is not such a rare instance, as can be seen by the plethora of cases that have lately arisen under this factual scenario. But more importantly, there is simply no basis to draw

the distinction between the instance where a tortfeasor is an insured under the policy, and where he isn't. The family exclusion itself makes no such distinction, and does not even speak of the tortfeasor at all. The case law has observed that the purposes of the family exclusion are just as well served where the tortfeasor is a friend rather than relative. So why draw the distinction the court erroneously drew in Jernigan? There is no policy rationale to support it.

B. The Jernigan rationale is in derogation of this Court's stated policy in favor the family exclusion.

The ramifications of the acceptance of the Jernigan logic is potentially catastrophic. As noted above, there is no logical reason to draw the distinction based on whether the tortfeasor is an insured or isn't. So the principal effect of the Jernigan logic would be to weaken the foundation upon which the family exclusion (and its twin the owned-vehicle exclusion) is founded.

If the Jernigan logic were accepted, it would be a small step to say that there is UM coverage for an insured who is injured by his own negligence while driving his own car. The injured insured could argue that the vehicle is "uninsured" because no liability coverage is available to him because of the family exclusion. Thus UM coverage would supply the excluded liability coverage, and thereby indirectly negate the family exclusion. This is exactly the potential result that prompted this Court to hold as it did in Reid.

The Plaintiff will argue that there is no reason to think that the "small step" will ever be taken. But there is good reason to fear this possibility. Since the distinction drawn in Jernigan is based on no legitimate contractual or statutory basis, it would be susceptible to judicial erosion. And there would be a certain logic to the further extension of the Jernigan rationale, since the family exclusion itself does not speak in terms of the tortfeasor's status. So if the premise were accepted that an insured can recover UM benefits while riding as a passenger without doing violence to the family exclusion, then it would follow that the insured should be able to recover UM benefits even if he was driving himself. The latter example offends the family exclusion no more than the former. The end result is that UM coverage becomes super PIP coverage that applies without fault. Thus an insured is permitted to recover from his insurer for his own negligence far above the limits prescribed for PIP coverage. So Jernigan, by weakening the family exclusion, strikes at the legal foundation of both liability and UM coverage.

C. The Jernigan rationale muddles the distinction between liability coverage and UM coverage.

It is not necessary to extend Jernigan in order to see the fallacy of its logic. Just the effects of the decision itself make the best case against it. In Jernigan, as in the instant case and Brixius, the insured was injured while riding as a passenger in his own car.

1. The dangerous-instrumentality doctrine

An owner of a vehicle is liable for the negligence of a permissive driver under the dangerous instrumentality doctrine: "An automobile owner is generally liable for another's negligent misuse of his vehicle under the dangerous instrumentality doctrine." Michalek v. Shumate, 524 So.2d 426,427 (Fla. 1988). So if the passenger in Jernigan and the instant case had been anyone other than the insured himself, he would have sued the insured under the dangerous-instrumentality doctrine![6] Allowing the insured to recover UM benefits under these circumstances is the functional equivalent of allowing an injured insured to recover liability benefits under his own policy. This incestuous relationship between liability and UM coverage is just exactly what was condemned by this court in Reid. It comes about by dishonoring the owned-vehicle exclusion, which in turn destroys the family exclusion to liability coverage. Thus liability coverage springs into being by an indirect route where none could exist by any direct means.

In Jernigan Judge Orfinger apparently thought that his holding would do no violence to the family exclusion. But the foregoing discussion shows that he was mistaken. The family exclusion focuses on the injured party, and not the tortfeasor. The exclusion must be so directed to prevent an insured, who is

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[6] The owner's liability insurer in fact has the first layer of responsibility, even before that of the liability insurer of the tortfeasor. Allstate Ins. Co. v. Fowler, 480 So.2d 1287,1289 (Fla. 1986).

liable by virtue of the dangerous-instrumentality doctrine, from in essence recovering from himself.

2. The right of indemnification

The muddling of the distinction between UM and liability coverage has still another bad effect. When an insurer pays UM benefits to its insured, it has the right of indemnification against the party or parties actually liable for the injury to the insured. Allstate Ins. Co. v. Fowler, supra at 1289. But under the Jernigan rationale the insurer would be denied that right.

Jernigan would allow UM benefits to the named insured when a non-relative is the tortfeasor. From whom would the insurer seek indemnification? It could not seek indemnification from the owner of the vehicle, since its insured is the owner. Nor could the insurer seek indemnification from the tortfeasor, since the tortfeasor is an additional insured under the liability portion of the policy by virtue of his status as a permissive driver. Allstate Ins. Co. v. Fowler, supra at 1290. So by allowing an insured to recover liability benefits under the guise of UM benefits, the insurer is deprived of its legal right to indemnity from the responsible parties. This is still another reason why the owned-vehicle exclusion, in conjunction with the family exclusion, precludes coverage in such instances.

So the Second District's interpretation of Reid/Boynton is certainly preferable to Jernigan from a policy perspective. It

preserves the integrity of the family exclusion to liability coverage, and this exclusion is at the foundation of the law pertaining to such coverage. There just is no public policy rationale to recommend Jernigan. It is based on an artificial distinction that finds no antecedent in the law or the applicable language of the insurance policy, and this false distinction will weaken the foundation of UM coverage that this Court has so carefully constructed.

V. THIS COURT'S METHOD OF DISTINGUISHING REID IN THE BOYNTON CASE IS LOGICALLY CORRECT AND IS SUPPORTED BY PROPER POLICY CONSIDERATIONS

The Plaintiff in the instant case argues that this Court's method of distinguishing Reid in footnote 5 of the Boynton decision was ill advised, and that the logic of Jernigan is preferable. As can be seen from the discussion above, Jernigan did not make a logical distinction at all, and its ramifications are potentially disastrous. Let's now examine Justice Ehrlich's statement in footnote 5 of Boynton from a policy perspective.

Justice Ehrlich said that Reid did not apply to the facts of Boynton because in Boynton the tortfeasor was not insured under the same policy as the injured person claiming UM benefits. So in Boynton this Court held that a tortfeasor could be considered "uninsured" for UM purposes under the injured party's separate policy because of an exclusion from coverage under the tort-feasor's policy. Boynton did not concern a situation where an

insured was claiming UM benefits because of an exclusion from liability coverage under his own policy, as had been the case in Reid and as is the case here. So in Boynton the allowance of UM benefits in no way impacted upon the family exclusion from liability coverage or the owned-vehicle exclusion from UM coverage.

When an injured party makes a claim for UM benefits under his policy because of a liability exclusion under his own policy, the family exclusion and owned-vehicle exclusion are necessarily implicated. Justice Ehrlich realized this, and correctly drew the distinction based on the two separate policies that were in question. Boynton never mentions the family exclusion or the owned-vehicle exclusion, while Reid had turned on these exclusions. So there was a real, concrete reason to draw the distinction as Justice Ehrlich did. His distinction is supported by the logical application of all of the relevant factors pertaining to UM coverage as it interacts with liability coverage. Boynton and Reid can peaceably co-exist, and neither impinges upon the other if the distinction made by Justice Ehrlich is maintained. Since the Second District has properly honored the distinction, its decision should be approved.

VI. IF THE FAMILY EXCLUSION AND OWNED-VEHICLE EXCLUSION ARE TO BE HELD INVALID, THIS SHOULD BE DONE BY THE LEGISLATURE RATHER THAN THE JUDICIARY.

In Reid this Court observed that "it is certainly within the power of the Legislature to prohibit all family-household

exclusions in automobile liability insurance policies."[7] 352 So.2d at 1173 (App 5). However, the Court went on to hold that such exclusions were not outlawed by any statute then in effect. Reid was decided 12 years ago, so in the interim the Legislature has had numerous opportunities to invalidate family exclusions if it deemed this to be in the best interests of the citizenry. It has not done so, thereby at least implicitly endorsing the Reid holding. It is therefore difficult to conceive of the family exclusion and the owned-vehicle exclusion as being against public policy, when both this Court and the Legislature have declined to so hold. To the contrary, the courts of this state have said that these clauses serve a positive policy purpose. Since this is so, and since there is no statute prohibiting such clauses, a policy shift to the opposite direction of such monumental proportions should be undertaken, if at all, only by the Legislature. Since the Legislature has not chosen to invalidate such clauses in the twelve years since Reid, it is respectfully submitted that this Court should not now do so.

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[7] A small minority of the states have enacted such statutes. Annot., 52 ALR4th 18 (1987).

CONCLUSION

The Jernigan case misinterprets this Court's decisions in Reid and Boynton, and in so doing makes several legal errors. If Jernigan were allowed to stand, it would have disastrous effects on the law of Florida pertaining to the interplay between liability and UM coverage. This Court itself has properly distinguished Reid from Boynton in footnote 5 of the Boynton decision, and the distinction is the proper one that comports with the pertinent policy considerations. The Second District properly recognized the correctness of this Court's view, and it is therefore respectfully submitted that the Second District's decision should be approved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail this 26th day of March, 1990 to Steven T. Northcutt, Post Office Box 3429, Tampa, FL 33601-3429.

Robert L. Donald