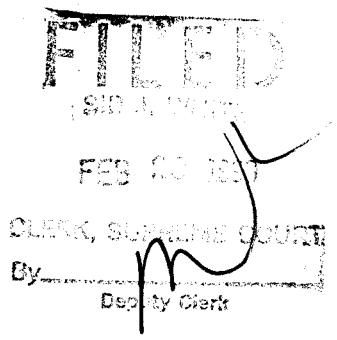
047 reg All.

IN THE SUPREME COURT OF FLORIDA




PATRICIA A. SHARON,

Petitioner,

vs.

Case No. 75,391

STATE FARM FIRE & CASUALTY COMPANY,

Respondent.

---

ON PETITION TO REVIEW THE DECISION OF THE FLORIDA SECOND DISTRICT COURT OF APPEAL

---

# PETITIONER'S INITIAL BRIEF ON THE MERITS

---

Stevan T. Northcutt, Esq.
LEVINE, HIRSCH, SEGALL
& NORTHCUTT, P.A.
Florida Bar No. 262714
Ashley Tower, Suite 1600
Post Office Box 3429
Tampa, Florida 33601-3429
(813) 229-6585
ATTORNEYS FOR PETITIONER

## Contents

## Authorities

### Cases



### Statutes

## The Case and Facts

Patricia Sharon seeks reversal of the district court of appeal decision affirming a final summary judgment in favor of State Farm Fire and Casualty Company. The summary judgment rejected Ms. Sharon's claim for uninsured motorist benefits under an insurance policy issued by State Farm.

### A. The Facts.

In June 1988 Ms. Sharon was riding as a passenger in a car owned by her and driven with her consent by Robert Napoli. (R.2)1/ Because of Napoli's negligence, the car struck another vehicle, and Ms. Sharon was injured. (R.2)

Napoli had no insurance. (R.2) Ms. Sharon had in force a State Farm insurance policy which furnished liability coverage on the car, and included uninsured motorist coverage. (R.1-2)

### B. Proceedings in the circuit court.

Ms. Sharon submitted a claim for uninsured motorist benefits, but received no response. She then filed a two-count complaint against State Farm in the Circuit Court for the Thirteenth Judicial Circuit. Count I sought a declaratory judgment as to her rights to collect uninsured motorist benefits under the policy. Count II alleged her contractual right to recover from State Farm by virtue of Napoli's negligence. (R.1, 3)

---

1/ References are to the record on appeal before the district court of appeal, which this Court has ordered transmitted.

State Farm denied liability, and filed a motion for summary judgment. (R.6, 11) It acknowledged that liability coverage was unavailable because the policy excluded injuries to an insured from its liability provisions. However, State Farm asserted an exclusion contained in the uninsured motorist section of the policy: "An uninsured motor vehicle does not include a land motor vehicle: insured under the liability coverage of this policy." Pointing out that the vehicle in which Ms. Sharon was injured was insured under the liability provisions of the policy, State Farm asserted that Ms. Sharon was not entitled to uninsured motorist benefits, and that State Farm was entitled to judgment as a matter of law. (R.10)

The trial court entered an order granting State Farm's motion for summary judgment. (R.41) In an amended order the court entered final judgment in State Farm's favor. (R.42)

**C. Proceedings in the district court of appeal.**

Ms. Sharon appealed to the Second District Court of Appeal. (R.43) While the case was being briefed, the Second District decided Brixius v. Allstate Insurance Company, 549 So.2d 1191 (Fla. 2d DCA 1989). In that case, on materially identical facts the court decided the identical issue in favor of the insurer. In so doing, the court acknowledged that its decision was in conflict with that of the Fifth District Court of Appeal in Jernigan v. Progressive American Insurance Co., 501 So.2d 748 (Fla. 5th DCA 1987).

The appellant in Brixius petitioned this Court to review the decision therein. Fla.S.Ct. Case No. 75,026. Thereupon, Ms. Sharon suggested to the district court of appeal that Brixius was controlling, and requested that the court dispose of her case in accordance with the procedure suggested in Jollie v. State, 405 So.2d 418 (Fla. 1981).

On January 12, 1990 the district court of appeal rendered the following decision:

> We affirm the summary judgment on the authority of Brixius v. Allstate Ins. Co., 549 So.2d 1191 (Fla. 2d DCA 1989), and as in that case, certify that this decision is in conflict with Jernigan v. Progressive Am. Ins. Co., 501 So.2d 748 (Fla. 5th DCA 1987).

Ms. Sharon filed a notice of invoking this Court's discretionary jurisdiction to review the decision on January 22, 1990.

## Summary of Argument

The public policy of Florida is that an insured under an uninsured motorist insurance policy is entitled to recover thereunder to the same extent and in the same circumstances as he would if the uninsured tortfeasor had carried liability insurance. Insurance policy provisions which narrow the circumstances under which coverage is furnished violate public policy and are void.

In Reid v. State Farm Fire & Casualty Co., infra, this Court upheld the family-household exclusion. And it found an exception to the general rule against narrowing uninsured motorist coverage in the form of the "same policy" exclusion, where to fail to

enforce the provision would nullify the family-household exclusion.

Both the Fifth District in Jernigan, and the Second District in Brixius, appear to recognize that the "same policy" exclusion has no efficacy outside the family-household context. However, because of a footnote in Allstate Insurance Co. v. Boynton, infra, the district courts differ as to whether this Court has held as much.

Ms. Sharon submits that the "same policy" exclusion is, or should be, without force outside the family-household context. For, except in such circumstances, it serves no salutary policy purpose standing alone. It is therefore insufficient to overcome the public policy behind Florida's uninsured motorist insurance law.

## Argument

**IN THE ABSENCE OF CIRCUMSTANCES GIVING RISE TO THE FAMILY HOUSEHOLD EXCLUSION, THE "SAME POLICY" EXCLUSION IS AN INVALID LIMITATION ON UNINSURED MOTORIST PROTECTION.**

This case presents a conflict of district court of appeal decisions as to the existence or scope of an exception to the public policy of Florida regarding uninsured motorist insurance.

The courts whose decisions are at issue, the Second and Fifth Districts, appear not to disagree as to how the issue should be resolved; rather, they disagree as to whether or how this Court has resolved it.

**A. Public policy.**

As prescribed by the legislature in section 627.727(1), Florida Statutes, uninsured motorist insurance is intended to protect the insured under all circumstances and locations when he is injured by an uninsured motorist, as if the uninsured motorist had carried liability insurance. Thus, the uninsured motorist statute establishes the public policy of Florida to be that every insured is entitled to recover under the policy for damages he would have been able to recover from the negligent driver if that motorist had maintained liability insurance.2/

---

2/ In pertinent part, the statute states: "No motor vehicle liability insurance policy shall be delivered or issued for delivery in this state with respect to any specifically insured or identified motor vehicle registered or principally garaged in this state unless uninsured motor vehicle coverage is provided therein or supplemental thereto for the protection of persons insured thereunder who are legally entitled to recover damages (continued...)

Since the scope of uninsured motorist coverage is prescribed by law, the parties are unable to contract for lesser coverage, with the exception that the insured may reject the coverage altogether. Insurance policy provisions which operate to narrow the prescribed scope of uninsured motorist coverage contravene the public policy, and therefore they are invalid. Salas v. Liberty Mutual Fire Insurance Co., 272 So.2d 1 (Fla. 1972); Mullis v. State Farm Mutual Automobile Insurance Co., 252 So.2d 229 (Fla. 1971); Hodges v. National Union Indemnity Co., 249 So.2d 679 (Fla. 1971); Brown v. Progressive Mutual Insurance Co., 249 So.2d 429 (Fla. 1971).

**B. Exceptions.**

In Reid v. State Farm Fire & Casualty Co., 352 So.2d 1173 (Fla. 1977), the plaintiff was injured while riding as a passenger in the family car, which had been insured under a policy obtained by her father. The plaintiff's sister, who resided in the household, was driving the car at the time, and her negligence caused the accident in which the plaintiff was injured.

Rejecting the plaintiff's attempt to recover under the liability provisions of the insurance policy, this Court upheld the so-called family-household exclusion. "The reason for the

---

2/(...continued)
from owners or operators of uninsured motor vehicles because of bodily injury, sickness, or disease, including death, resulting therefrom. However, the coverage required under this section is not applicable when, or to the extent that, any insured named in the policy rejects the coverage in writing."

exclusion is obvious: to protect the insurer from over friendly or collusive lawsuits between family members." Id. at 1173.

In a consolidated appeal the Court also rejected the plaintiff's assertion that, if liability insurance benefits were not available to her, she was entitled to recover under the uninsured motorist portion of the policy. The policy in question contained another exclusion providing that an "uninsured motor vehicle" may not be the vehicle defined in the policy as the insured motor vehicle.

> In other words, her father's car can not be an uninsured motor vehicle under the terms of the policy, even though, as we held in the first appeal, it is in fact uninsured as to her.
>
> We hold that the family car in this case is not an uninsured motor vehicle. It is insured and it does not become uninsured because liability coverage may not be available to a particular individual. Taylor v. Safeco Insurance Co., 298 So.2d 202 (Fla. 1st DCA 1974); Centennial Insurance Co. v. Wallace, 330 So.2d 815 (Fla. 3d DCA 1976).

Reid, 352 So.2d at 1173.

The Court held that the case before it presented an exception to the general rule that an insurer may not limit the applicability of uninsured motorist protection. "To hold otherwise in this case would completely nullify the family-household exclusion." Reid, 352 So.2d at 1174.

Query: did Reid present an exception to the general rule because it involved family members residing in the same household? or because the uninsured motorist was driving a vehicle that was otherwise insured under the same policy?

But for one footnote, this Court's later decision in Allstate Insurance Co. v. Boynton, 486 So.2d 552 (Fla. 1986), would have seemed to imply the former. In that case the Court rejected the notion that a vehicle cannot be considered uninsured if it is covered by liability insurance.

> The fact that an owner or operator of a motor vehicle has a liability insurance policy does not always mean that the vehicle is insured in the context of section 627.727(1). A vehicle is insured in this context only when the insurance in question is available to the injured plaintiff.

Boynton, 486 So.2d at 555. The Court disapproved Centennial Insurance Co. v. Wallace, which had been cited in Reid for the opposite conclusion. Boynton, 486 So.2d at 554, n.4.

Thus, in a situation that did not involve the family-household exclusion or its salutary purpose, the Court reasoned that a vehicle on which liability insurance was maintained could be considered uninsured if the liability coverage on the vehicle was not available to the injured plaintiff.

But in its only reference to Reid, the Boynton Court did not mention that the earlier case involved the family-household exclusion. Rather:

> Allstate, citing [Reid], asserts in its brief that a valid exclusion in a liability policy does not make a vehicle uninsured for uninsured motorist purposes. 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.

Boynton, 486 So.2d at 555, n.5 (Emphasis by the Court).

C. The conflict.

Jernigan v. Progressive American Insurance Co., 501 So.2d 748 (Fla. 5th DCA 1987), involved a factual scenario that was materially identical to the instant case: the plaintiff was injured while riding as a passenger in a vehicle owned by him and on which he maintained insurance, but which was negligently driven by an uninsured friend. The plaintiff's insurance policy provided, inter alia, that:

> "Uninsured motor vehicle", however, does not mean a vehicle:
>
> a. Owned by or furnished or available for regular use by you or a relative.
>
> * * * * * *
>
> Exclusions
>
> This coverage does not apply to bodily injury sustained by a person:
>
> 1. While occupying a motor vehicle owned by you or a relative for which insurance is not afforded under this Part, or through being struck by the motor vehicle.

The Fifth District held that these provisions operated to deny the plaintiff benefits to which he was entitled under the uninsured motorist law, and that the provisions were therefore invalid as contrary to public policy.

In the course of its opinion, the Jernigan court acknowledged Reid's holding that a vehicle could not be both insured and uninsured under the same policy. However, the court noted that Reid was premised on cases which reasoned that a vehicle did

not become uninsured simply because the insurance policy might not be available to a particular injured party.

> [T]his reasoning has been replaced by the supreme court's pronouncement in Boynton that a vehicle is insured in the context of uninsured motorist coverage only where the insurance in question is available to the particular plaintiff. Boynton, 486 So.2d at 555. Clearly, under the Boynton definition of an "uninsured vehicle," a vehicle can be insured and uninsured under the same policy. The definition of uninsured motor vehicle in the present policy is contrary to the Boynton test. The exclusion in the policy before us operates to deny the plaintiff coverage in a circumstance where he has been injured by the negligence of an unrelated operator of a vehicle as to which no liability insurance is available. Thus, to the extent that these policy provisions have denied the plaintiff protection for injuries caused by an uninsured motorist, we must declare them invalid as contrary to the public policy expressed in section 627.727, Florida Statutes.

Jernigan, 501 So.2d at 751 (footnote omitted).

Moreover, the Jernigan court posited, its holding was consistent with Reid and this Court's later decision in Allstate Insurance Co. v. Dascoli, 497 So.2d 1 (Fla. 1986).

> In both Reid and Dascoli, the plaintiffs were attempting to recover under an uninsured motorist coverage held by their spouses, for injuries sustained while riding in a family vehicle. Valid exclusions in the liability policies prevented recovery by family members. Both the Reid and Dascoli decisions recognized that to permit recovery under the uninsured motorist policy in this circumstance would render the family exclusion meaningless. The result of declaring these uninsured motorist exclusions invalid would be to expose the insurer to the same threat of fraud and collusion that would be present if family members were permitted to recover under the liability policy.
>
> * * * * * *
>
> In the present case however the plaintiff was not injured by a family member. Neither did the policy exclude liability coverage for injuries caused by friends of the insured.

> Thus, declaring the uninsured motorist exclusion invalid does not defeat any valid liability exclusion.

Jernigan, 501 So.2d at 751 (footnotes omitted).

Brixius v. Allstate Insurance Co., 549 So.2d 1191 (Fla. 2d DCA 1989), also involved facts identical to those presented here. And, as in this case, the insurance policy there provided that an uninsured motor vehicle was not a vehicle defined as an insured vehicle under the liability portion of the policy. Reviewing a summary judgment in favor of the insurer, the Second District acknowledged that Jernigan would have required a reversal. But the court declined to follow Jernigan, and affirmed.

> We do not necessarily disagree with the reasoning set forth in Jernigan which supports the position that Boynton should have overruled Reid in these circumstances. See Allstate Insurance Co. v. Dascoli, 497 So.2d 1 (Fla. 1986), which approves the reasoning of this court in Harrison v. Metropolitan Property & Liability Insurance Co., 475 So.2d 1370 (Fla. 2d DCA 1985). But Boynton specifically distinguishes, and in effect reaffirms, Reid in the following language: [quotation omitted].

Brixius, 549 So.2d at 1192. The omitted quotation was of Boynton's footnote 5, set forth earlier in this brief.

D. The "same policy" exclusion.

At bottom, then, the conflict between Brixius and Jernigan rests on footnote 5 of the Boynton opinion, in which this Court distinguished Reid because it held a vehicle could not be insured and uninsured under the same policy, whereas Boynton involved separate policies.

By distinguishing Reid on that basis rather than on the fact that Reid had involved the family-household exclusion, Boynton could be read to imply that Reid recognized a "same policy" exclusion that was of a legal dignity equal to that of the family-household exclusion. If that was the case, Ms. Sharon submits it was not apparent on the face of the Reid opinion.

Recall that Reid tendered two justifications for its ruling on the uninsured motorist aspect of that case. First, the Court pointed to prior case law holding that an insured motor vehicle could not be treated as an uninsured vehicle simply because the liability coverage was not available to a particular individual. Second, the Court said that to hold otherwise in that case would have nullified the valid family-household exclusion.

Of course, the first rationale was undermined by the Boynton decision itself; an insured vehicle can be treated as uninsured precisely because the insurance benefits are unavailable to a particular individual.

Reid's second rationale expressly depended on the presence in that case of facts which invoked the family-household exclusion, the purpose of which was described as protecting the insurer from collusive lawsuits between family members. No mention was made of what independent policy objective might be served by enforcing the "same policy" exclusion standing alone.

That omission is significant. For, certainly, an exception to the public policy of the state should itself serve some important policy objective. Having articulated the policy served

by the family-household exclusion, Reid offered no justification for the "same policy" exclusion other than that, under the facts of that case, its enforcement was necessary to effectuate the family-household exclusion.

Not so here. Here, the family-household exclusion did not come into play. Had Mr. Napoli carried liability insurance, Ms. Sharon would have been entitled to recover thereunder for her injuries caused by his negligence.

Under the public policy of Florida, Ms. Sharon was entitled to uninsured motorist benefits under the same circumstances in which she could have recovered if Mr. Napoli had carried liability insurance. What policy objective is served by denying Ms. Sharon uninsured motorist coverage simply because the car Mr. Napoli drove was insured for liability under the same policy that furnished the uninsured motorist coverage? The answer is none.

Under like circumstances, the Jernigan court recognized that the "same policy" exclusion has no efficacy outside the family-household context in which it was applied in Reid.3/ The Brixius court did not disagree with Jernigan's reasoning in that regard,

---

3/ In fact, the "same policy" exclusion is of only limited efficacy even in the family-household exclusion context. Insurers are just as vulnerable to fraud and collusion among family members in multiple vehicle and multiple policy situations. Obviously, in those cases the "same policy" exclusion would be no impediment to recovering uninsured motorist benefits. See, e.g., Salas v. Liberty Mutual Fire Insurance Co., supra.; Lee v. State Farm Mutual Automobile Insurance Co., 339 So.2d 670 (Fla. 2d DCA 1976).

but considered itself bound to apply the "same policy" exclusion solely because of Boynton's footnote 5.

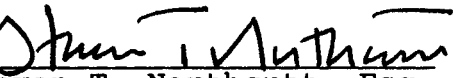
Ms. Sharon respectfully submits that the mentioned footnote was inaccurate or incomplete insofar as it suggested that the "same policy" exclusion may operate to restrict uninsured motorist coverage outside the family-household setting. In the absence of an important policy purpose, no circumstance can override the public policy of Florida that an insured is entitled to recover uninsured motorist benefits to the same extent as he would have recovered if the tortfeasor had carried liability insurance.

## Conclusion

For the reasons described, Ms. Sharon respectfully requests the Court to reverse the decision of the Second District Court of Appeal below, and direct that the summary judgment in the insurer's favor be set aside.

Respectfully submitted,

LEVINE, HIRSCH, SEGALL
& NORTHCUTT, P.A.

By 

Stevan T. Northcutt, Esq.
Florida Bar No. 262714
Ashley Tower, Suite 1600
Post Office Box 3429
Tampa, Florida 33601-3429
(813) 229-6585
ATTORNEYS FOR PETITIONER

## Certificate of Service

I certify that a true copy of the foregoing has been furnished by U.S. Mail to Dee Ann Setchel, Esq., P.O. Box 20770, St. Petersburg, Florida 33742, this 26th day of February, 1990.

Stevan T. Northcutt, Esq.