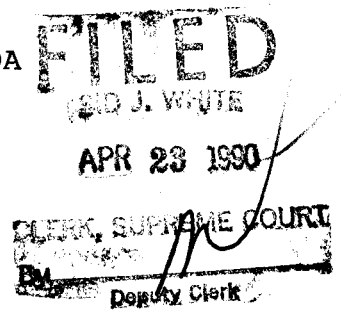
IN THE SUPREME COURT OF FLORIDA



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 REPLY BRIEF ON THE MERITS

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Summary of Argument

State Farm's contrary assertion notwithstanding, Jernigan is supported by a very important policy rationale: the public policy prohibiting undue restrictions on the uninsured motorist coverage prescribed by statute. Its determination that UM coverage was available under the circumstances before it did not invalidate the family-household liability exclusion. Rather, the court discerned that in the absence of family members with whom the claimant might collude, the purpose of the family-household liability exclusion would not be served by a denial of UM benefits. That being the case, there was no basis for a departure from the governing public policy requiring UM coverage.

This approach was the same as that in Reid, in which very different circumstances supported an exception to the public policy. In that case, permitting the recovery of UM benefits would have nullified the applicable family-household exclusion, thereby exposing the insurer to the danger of collusive claims among family members.

State Farm's assertion that Jernigan and Reid were legally identical overlooks a critical difference between the two cases. In Reid and the other pertinent cases, there were at least two family members involved, thus giving rise to the danger of familial collusion and therefore to the need to restrict UM benefits. In Jernigan and the instant case, there were no family members with which to collude.

This distinction, which would permit the injured insured to recover UM benefits in the instant case, would not have the dire consequences State Farm predicts. An insured would not be able to recover benefits for injuries caused by his own negligence, nor would he be vicariously liable to himself under the dangerous instrumentality doctrine. The reason is that to recover UM benefits the insured must have a claim that he can reduce to judgment in a court of law. Since an insured could not sue himself, he could not recover under his policy for injuries that were his own fault.

Finally, State Farm's fear that it would have no indemnity rights because the tortfeasor/driver is an omnibus insured under its liability policy is groundless. With respect to injuries suffered by the named insured, the tortfeasor/driver is <u>not</u> insured under the policy.

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.

When asserting that Jernigan v. Progressive American Insurance Co., 501 So.2d 748 (Fla. 5th DCA 1987), lacks a policy rationale, State Farm overlooks the public policy from which any analysis of uninsured motorist coverage must begin: the statutory prescription that a UM policyholder should recover under the policy any sums he would have recovered if the uninsured motorist had maintained liability insurance. Insurers are not permitted to restrict the applicability of this coverage. 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).

Proceeding from that premise, the Jernigan court examined whether the circumstances of that case supported an exception to the rule, so as to permit the insurer to avoid paying UM benefits under an "owned vehicle" exclusion. Finding no such circumstances, the court declared the exclusion invalid.

In so doing the court did not, as State Farm suggests, in some way invalidate the family-household liability exclusion which is a universal fixture in automobile insurance policies. To the contrary, the court expressly considered it and found that

the circumstances of the case did not support its application so as to deny UM coverage.

This Court took the same approach when considering the "insured vehicle" UM exclusion in Reid v. State Farm Fire & Casualty Co., 352 So.2d 1173 (Fla. 1977). In that case the Court recognized the general rule that insurers may not limit the application of UM insurance as contemplated by statute. But, it held, "the present case is factually distinguishable from previous cases and is an exception to the general rule." Id. at 1174.

The distinction which permitted the exception in Reid was the presence in that case of circumstances which invoked the liability exclusion aimed at protecting the insurer from collusive claims among family members. In that case, the plaintiff was injured while riding as a passenger in the family car owned and insured by her father, with whom she lived. The car was driven by plaintiff's sister, who also lived with her father. Under those circumstances, the Court held, a failure to honor the "insured vehicle" UM exclusion would nullify the family-household liability exclusion. Thus, the Court permitted an exception to the general rule against limiting UM coverage.

Allstate Insurance Co. v. Boynton, 486 So.2d 552 (Fla. 1986), distinguished Reid because the earlier case involved an attempt to treat the family car as insured and uninsured under the same policy, whereas Boynton involved difference policies. But, as Ms. Sharon has previously pointed out, Boynton failed to

mention that the only extant justification for honoring the "insured vehicle" UM exclusion is as a necessary adjunct to the family-household liability exclusion.

In its brief State Farm apparently agrees that this is the only purpose of the "insured vehicle" or "owned vehicle" UM exclusion. But the parties differ as to what circumstances will permit an insurer to deny UM benefits on its account.

State Farm argues that Jernigan and Reid were "legally identical", since in each case the injured party was an insured under the liability portion of the policy. The Jernigan court failed to perceive this, State Farm posits, because it examined the status of the tortfeasor vis-a-vis the family-household exclusion when it should have focused on the status of the injured passenger.

State Farm is incorrect on both accounts. First, Reid does not suggest that the injured party was an insured under the liability policy in that case. But more important, the Jernigan court did not fail to apply the family-household exclusion because it focused its attention on the driver instead of the injured passenger. Rather, the court discerned that the family-household exclusion could not operate as an exception to UM coverage in that case because under the circumstances presented the purpose of the family-household exclusion would not have been served. The reason: the absence of a family member with whom the insured might have colluded.

In this very important respect Jernigan differed from Reid, in which the negligent driver, the injured passenger, and the insured vehicle owner were all related to each other. Jernigan also contrasted with Allstate Insurance Co. v. Baker, 543 So.2d 847 (Fla. 4th DCA 1989), in which the injured party was the child of the named insureds; and with Allstate Insurance Co. v. Dascoli, 497 So.2d 1 (Fla. 1986), and Harrison v. Metropolitan Property and Liability Insurance Co., 475 So.2d 1370 (Fla. 2d DCA 1985), both of which involved spouses.

In each of those cases the policy favoring protection from collusion among family members supported an exclusion from liability coverage which would have been defeated if no exception was made to the public policy requiring UM coverage. Jernigan recognized that in situations where there were no family members with whom the claimant could collude, the purpose of the family-household exclusion would not be served by denying UM coverage; in that case the general public policy favoring UM coverage must prevail.

In Brixius v. Allstate Insurance Co., 549 So.2d 1191 (Fla. 2d DCA 1989), the Second District "[did] not necessarily disagree with the reasoning set forth in Jernigan which supports the position that Boynton should have overruled Reid in these circumstances." Brixius, 549 So.2d at 1192.

Nor, for that matter, did the Third District in Baker disagree with Jernigan. Instead, it distinguished Jernigan.

Recall that in Baker the injured plaintiff was the child of the named insureds.

> [T]he policy consideration at issue here is the threat of fraudulent or collusive lawsuits to the insurer, whereas in Jernigan it was the unreasonable limitation of uninsured motorist benefits to the insured. Even Jernigan recognized that the latter [sic] policy is a valid one.

Baker, 543 So.2d at 850.

State Farm surmises that the Baker court was under the impression that the insurance policy in Jernigan did not contain a family-household liability exclusion. But it concedes that this is unlikely, given that such exclusions are universal. It is more likely that Baker simply meant what it said: the policy considerations in the two situations are different. Where, as in Baker, there is a threat of collusion among family members, the purpose of the family-household liability exclusion can only be served if UM benefits are denied as well. However, where there are no family members with whom the claimant might collude, as in Jernigan and the instant case, there is no reason for allowing an exception to the public policy against limiting UM coverage.1/

State Farm would probably argue that Ms. Sharon's UM claim must be denied even so, because its version of the family-

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1/ State Farm's suggestion that Pierson v. National Insurance Association, 15 FLW 552 (Fla. 3d DCA Op. filed February 27, 1990), may disagree with Jernigan is not supported by the opinion. State Farm notes that in two of the three case cited in that opinion the driver of the car was not related to the injured passenger. On the other hand, every case cited by Pierson involved at least two related participants. Moreover, Pierson's reference to the liability insurance statute, section 324.151, Florida Statutes, suggests that it did not involve UM coverage or the public policy behind it.

household liability exclusion embraces the "insured". But apparently no authority has permitted the denial of UM benefits on that basis. Notably, Dascoli and Harrison might have done so, but did not; instead they focused on the familial relationships involved in those cases.

This distinction does not set the stage for the dire consequences State Farm predicts. It would not allow an insured to recover UM benefits for injuries suffered as a result of his own negligence, or under a vicarious liability theory based on the dangerous instrumentality doctrine.

The reason appears in the uninsured motorist statute, section 627.727, Florida Statutes, which provides that insurers must offer coverage for the protection of insureds "who are legally entitled to recover damages" from uninsured motorists. This language means that the insured must have a claim against the tortfeasor which could be reduced to judgment in a court of law. Boynton, 486 So.2d at 555. Since no person can obtain a judgment against himself, State Farm's warnings in this regard are wholly unfounded.2/

Nor does Jernigan deprive a UM insurer of its right to seek indemnification from the uninsured tortfeasor. In this regard State Farm argues that since in these circumstances the uninsured driver was an omnibus insured under the liability portion of its

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2/ The insurance policy at issue here obligates State Farm to "pay damages for bodily injury an insured is legally entitled to collect" from an uninsured motorist. (R. 30)

policy, it would be without a source of indemnification for its UM benefit payments because the law does not permit an insurer to obtain indemnification from its insured.

But State Farm overlooks that its policy does not insure the driver against liability for bodily injuries suffered by Ms. Sharon. In that respect he is uninsured, and State Farm's right to seek indemnification from him is intact.

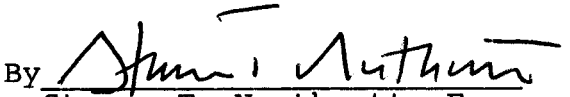
Conclusion

Under circumstances identical to the instant case, Jernigan recognized that the family-household liability exclusion could not justify a departure from the public policy of this State which prohibits restrictions on UM coverage, and that therefore Reid did not apply. The Second District in Brixius, and by reference in Ms. Sharon's case, recognized the wisdom of Jernigan's reasoning. But it felt bound by footnote 5 of this Court's Brixius opinion to affirm a denial of UM benefits on the basis of Reid.

Ms. Sharon submits that Jernigan was correct. Reid's single-policy/multiple-policy distinction serves no policy purpose in the circumstances of this case. For this reason, she respectfully urges the Court to reverse the decision under review.

Respectfully submitted,

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

By 

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Certificate of Service

I certify that a true copy of the foregoing has been furnished by U.S. Mail to Robert L. Donald, Esq., Post Office Box 2151, Tampa, Florida 33601, this 20th day of April, 1990.

Stevan T. Northcutt, Esq.