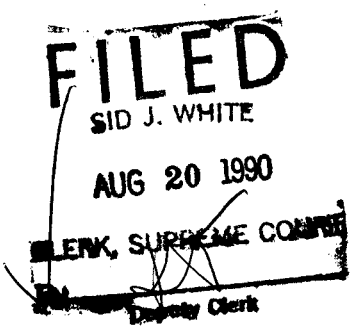
IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO: 76,318




JOANN PALACINO,

Petitioner/Plaintiff,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Respondent/Defendant.

_____/

ON APPEAL FROM THE FLORIDA DISTRICT COURT OF APPEAL
FOURTH DISTRICT

**********

# PETITIONER'S INITIAL BRIEF ON THE MERITS

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## INTRODUCTION

In this brief, the Petitioner, JOANN PALACINO, the Appellee in the lower court and Plaintiff in the trial court, will be referred to as "Petitioner" or "Plaintiff". The Respondent, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, will be referred to as "Respondent" or "Defendant". References to the Record on Appeal will be indicated by the symbol "(R)". The symbol "(A)" will be used to refer to the Appendix.

## STATEMENT OF THE CASE AND THE FACTS

The Petitioner seeks a reversal of the District Court of Appeal's en banc decision reversing a Final Summary Judgment entered by the trial court in favor of JOANN PALACINO. The Summary Judgment granted Petitioner's claim for uninsured motorist benefits under an insurance policy issued by STATE FARM. (R 54), (A 1).

Prior to her automobile accident, JOANN PALACINO obtained an insurance policy from STATE FARM which included uninsured motorist coverage. (R 3 - 25) (A 2 - 23). On March 9, 1986, the Petitioner was riding as a passenger in a vehicle owned by her and insured by the Respondent, but driven by an uninsured friend. (R 34 - 37). As a result of the driver's negligence JOANN was injured in a one car accident which occurred on Interstate 95 in Broward County, Florida. (R 34 - 37). The driver of the Petitioner's vehicle was killed in the accident. (R 34 - 37). Although JOANN PALACINO'S insurance policy was in effect on the date of the accident and the negligent driver was an uninsured motorist, the Respondent denied her uninsured motorist benefits for injuries she sustained.

JOANN PALACINO filed in the Broward County Circuit Court a Petition for Declaratory Decree seeking a determination of uninsured motorist coverage under the policy issued by STATE FARM. (R 1, 2), (A 24, 25). The Defendant responded to the complaint by denying the existence of coverage and by raising

certain exclusions contained within the policy. (R 26 - 27), (A 26, 27).

The exclusions relied upon by the Respondent are, in pertinent part, as follows:

1) As to Coverage A (Liability),

> "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."

2) As to Coverage U (Uninsured Motorist),

> "An uninsured motor vehicle does not include a land motor vehicle:
> 1. Insured under the liability coverage of this policy;
> 2. Furnished for the regular use of you, your spouse or any relative." (R 8, 14), (A 7, 13).

At the appropriate time both parties moved for summary judgment. (R 28, 33). Summary judgment was granted in favor of the Plaintiff, JOANN PALACINO, and against Defendant, STATE FARM.

The Defendant timely filed its Notice of Appeal with the District Court of Appeal, Fourth District. (R __).

On June 13, 1990, the District Court of Appeal filed its en banc opinion reversing the lower court's decision granting the Plaintiff summary judgment and further certifying conflict with the opinion of the District Court of Appeal, Fifth District, in Jernigan v. Progressive American Insurance Company, 501 So.2d 748 (Fla. 5th DCA 1987). (A 28 - 33).

## SUMMARY OF THE ARGUMENT

An insurance company that sells a policy of insurance containing uninsured motorist coverage should not be permitted to withhold that coverage from their insured who is injured while a passenger in her own vehicle driven by the tortfeasor. The public policy behind Section 627.727(1), Florida Statutes (1985) is to preclude an insurer from excluding uninsured motorist coverage except when the exclusion is necessary to uphold other important public policy considerations. Denial of uninsured motorist coverage has also been permitted when the insured would not have been "otherwise legally entitled to recover" had the tortfeasor been insured.

The tortfeasor in this case was the Petitioner's uninsured acquaintance. The Plaintiff would have been able to collect under the driver's liability policy if he were insured and, furthermore, there is no family exclusion applicable in this case. Therefore no reasonable public policy interest is served by permitting the instant exclusions to deny the Petitioner uninsured motorist coverage.

The exclusions should be stricken as violative of the public policy of the State of Florida and the majority decision of the District Court of Appeal, Fourth District, should be reversed.

## ARGUMENT I

**AN INSURED OWNER RIDING AS A PASSENGER IN HER OWN VEHICLE WHO IS INJURED BY THE NEGLIGENCE OF A NON-RELATIVE DRIVER IS ENTITLED TO UNINSURED MOTORIST COVERAGE AND ANY INSURANCE POLICY EXCLUSIONS TO THE CONTRARY ARE VOID.**

Section 627.727(1), Florida Statutes (1985) states in pertinent part:

> "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 the persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness or disease including death resulting therefrom."

This Court has declared that the public policy behind Section 627.727(1) is to provide uniform and specific insurance benefits to persons injured by the negligence of insolvent or uninsured motorist. Mullis v. State Farm, 252 So.2d 229 (Fla. 1971); Brown v. Progressive Mutual Insurance Company, 249 So.2d 429 (Fla. 1971). Given the purpose of the uninsured motorist statute as well as the public policy in support of limitations on insurance companies' ability to dilute or restrict that coverage, the decision of the District Court of Appeal in State Farm Mutual Automobile Insurance Company v. Palacino, __ So.2d __ (Fla. 4th DCA June 22, 1990) [15 FLW 1583] is erroneous.

In the instant case, JOANN PALACINO bought an insurance policy from the Respondent that included uninsured motorist coverage. STATE FARM denied uninsured motorist coverage to her by raising and relying upon the following exclusionary language:

> "An uninsured motor vehicle does not include a land motor vehicle:
> 1. Insured under the liability coverage of this policy;
> 2. Furnished for the regular use of you, your spouse or any relative." (R 14).

Throughout the years this Court has consistently held that policy exclusions which operate to limit the scope of uninsured motorist coverage are against public policy and are, therefore, invalid. Brown v. Progressive, supra, Mullis v. State Farm, supra, see also Hodges v. National Union Indemnity Company, 249 So.2d 679 (FLa. 1971). There are, however, certain limitations that have been upheld. Specifically, this Court has upheld the validity of a household or family exclusion designed to prevent collusion between family members in an instance where one family member is injured by the negligence of another. See, e.g., Allstate Insurance Company v. Dascoli, 497 So.2d 1 (Fla. 1986). Except in the case of the family exclusion or other similar exclusions designed to be consistent with common law or statutory immunities, uninsured motorist coverage limitations are violative of public policy and are invalid. The Respondent's denial of uninsured motorist coverage in this case in not supported by a valid exclusion and therefore that coverage cannot be withheld.

This Court has previously addressed issues similar to those

raised in this appeal in Reid v. State Farm Fire and Casualty Company, 352 So.2d 1172 (Fla. 1977) and, more recently, in Allstate Insurance Company v. Boynton, 486 So.2d 552 (Fla. 1986). In Reid, this Court upheld a family-household liability exclusion which prevented the injured person from recovering under the liability portion of a relative's policy. The plaintiff then sought to recover under the uninsured motorist coverage contained within the policy. The exclusion in the Reid policy that the vehicle defined in the policy could not be an "uninsured motor vehicle" was also upheld as consistent with public policy designed to prevent the potential for fraud and collusion between family members. Reid at 1173.

In Boynton, supra, the plaintiff, an auto mechanic was injured on the job when he was struck by an automobile driven by a co-employee. Liability coverage was unavailable to the plaintiff under prohibitions contained within the Workers' Compensation Statutes. The claim for uninsured motorist coverage was disallowed because of an exclusion contained within the policy which required that the injured party be "otherwise legally entitled to recover" from the owner or operator of the uninsured vehicle. This Court upheld exclusions contained within the policy so as not to violate or circumvent the legislative intent of Florida Statute Section 440.01, et seq (1989). The facts in the instant case are clearly distinguishable from those in Reid and Boynton.

Disallowing the exclusions contained within the policy

provided to the Petitioner would not violate any similar exclusion. JOANN PALACINO was a passenger in a car being driven by a friend. The friend was killed in the accident. There exists no potential for collusion between family members since the at-fault party is not related to the Petitioner. The denial of uninsured motorist coverage simply does not hinge upon a valid family exclusion as in Reid. Therefore, the Plaintiff is otherwise "legally entitled to recover damages" from the driver and coverage should be afforded.

The facts in the instant case more closely resemble those in Jernigan v. Progressive American Insurance Company, 501 So.2d 748 (Fla. 5th DCA 1987). In Jernigan, the plaintiff was riding as a passenger in a vehicle owned by him but driven by an uninsured friend. As a result of the driver's negligence, a one car collision occurred in which the driver was killed and Jernigan was seriously injured. The insured's policy contained exclusions similar to those applicable in the instant case. The District Court of Appeal, Fifth District, held that under these facts the uninsured motorist policy exclusions were contrary to public policy and, therefore, invalid. Jernigan at 750.

Our case is virtually identical to Jernigan, and the same conclusions should be reached. Permitting recovery under the uninsured motorist policy in this case would not, as it did in Reid, render the family exclusion meaningless. That exclusion is not applicable here.

The reasoning behind the decision in Reid is solid. A

reasonable exclusion based upon long recognized public policy and crafted to result in a furtherance of that policy should not be overturned. However, public policy and logic demand that uninsured motorist coverage be made available in all other circumstances.

To permit the Respondent to limit or remove uninsured motorist coverage under the facts as they exist in this case is contrary to good reason. Affirmance of the decision below would lead to the unavailability of insurance coverage in situations where coverage is necessary. For example, an car owner who has consumed alcoholic beverages or is on medication and seeks the assistance of a friend to drive him home is riding without insurance if the policy exclusions are given their full effect. Additionally, there is no insurance coverage whatsoever for an ill or incapacitated individual who is being driven to the hospital by a caring but negligent friend. Under these scenarios there is no reasonable basis to fear fraud or collusion and every reason to require the availability and applicability of uninsured motorist coverage.

As pointed out by Judge Stone in his dissenting opinion below,

> "Forcing the insured to forfeit uninsured motorist protection against the driver's negligence would inhibit insureds from utilizing the services of another, even a friend, as a driver of the insured vehicle when the insured is incapacitated, intoxicated or otherwise unable to drive. Applying the principal that a vehicle cannot be both insured and uninsured under the same policy, in this case, deprives the insured of

> the benefit of uninsured/underinsured motorist protection against the negligence of a driver who is not a member of her family or household." (A 31).

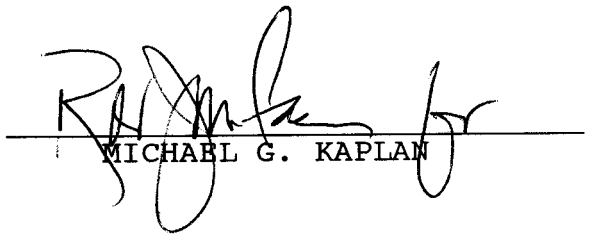
Section 627.727(1), Florida Statutes (1989) allows

> "every 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 v. State Farm Mutual Automobile Insurance Company, at 234. [citing Standard Insurance Company v. Gavin, 184 So.2d 229, 232 (Fla. 1st DCA 1966)].

In Reid, plaintiff could not recover uninsured motorist benefits because of a valid family-household exclusion. However, in the instant case, if the offending motorist had liability insurance, Miss Palacino would have been able to recover. There exists no valid or useful purpose in denying coverage to an automobile owner who is injured while a passenger in her vehicle driven by an uninsured, non-family member. Under the facts sub judice, Section 627.727(1) and public policy mandate reversal of the decision of the District Court of Appeal.

## CONCLUSION

There exists no public policy reasons why the Petitioner should be precluded from making a claim under her uninsured motorist insurance coverage against the negligent driver which caused her injuries. There exists no common law or statutory bar to any claim the Petitioner has against the uninsured driver of her automobile. The exclusions contained within the Petitioner's insurance policy violate public policy and should be considered void. The decision of the District Court of Appeal, Fourth District, reversing the lower court's summary judgment in favor of the Plaintiff/Petitioner should be reversed.



MICHAEL G. KAPLAN

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the foregoing was mailed this 16th day of AUGUST, 1990, to the Clerk of Court, Supreme Court of the State of Florida, 500 S. Duval Street, Tallahassee, FL 32399-1925 and a copy mailed to JAMES CLARK, ESQ., Attorney for Respondent/Defendant, 19 West Flagler Street, #1003, Miami, FL 33130.

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