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

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PETITIONER'S REPLY BRIEF

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STATEMENT OF THE CASE AND THE FACTS

The Petitioner adopts its Statement Of The Case And The Facts set forth in its Initial Brief On The Merits.

By way of clarification, the Petitioner would further point out that the information regarding the accident giving rise to the Petitioner's injuries as contained within the Respondent's Statement Of The Case And Facts are not contained within the record below. Specifically, there exists no evidence in the record (and the Respondent has failed to cite to the record) regarding the speed of the vehicles, the activities of the occupants prior to the accident, the physical condition of the occupants prior to the accident, or whether there were any eye witnesses to the event.

The Summary Judgment entered by the Trial Court in favor of the Petitioner was based upon the pleadings, the applicable insurance policy, and the parties' Motions for Summary Judgment. The facts surrounding the accident, other than that the Petitioner was a passenger in her own vehicle which was driven by a friend, were not before the Trial Court nor are they relevant to the issues at hand.

SUMMARY OF ARGUMENT

The Respondent, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, should not be permitted to deny uninsured motorist coverage to the Petitioner where the Petitioner was injured while a passenger in her own motor vehicle as a result of the negligence of a non-relative driver. Section 627.727(1) Florida Statutes, requires uninsured motorist coverage to be available to an insured who has obtained liability coverage. The public policy behind that statute requires the availability of uninsured motorist coverage except when a necessary and important policy exclusion exists. The purpose behind the family-household exclusion contained within the instant policy would not be thwarted if uninsured motorist coverage is not withheld from the Petitioner.

The Reid v. State Farm Fire and Casualty Company case is distinguishable from the case at bar. In this case the Petitioner was being driven by a friend and not a relative. The threat of collusion does not exist as it did in Reid, and Petitioner here is legally entitled to recover in tort from the negligent tortfeasor.

ARGUMENT

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.

The Respondent in its Answer Brief, contends that the case at bar is factually indistinguishable from Reid v. State Farm Fire and Casualty Company, 352 So.2d 1172 (Fla. 1977) and argues that this Court apply the "family exclusion" to deny the Petitioner uninsured motorist coverage. Respondent's position is incorrect in its assessment of the law as set forth by Reid and is further insupportable on a public policy basis.

The Reid case is factually distinguishable from the circumstances here. In Reid, the Plaintiff was injured while a passenger in an automobile driven by her sister. Reid was denied uninsured motorist coverage on the basis of the exclusion that provided that "an uninsured motor vehicle" may not be the vehicle defined in the liability policy as the insured motor vehicle because "to hold otherwise in this case would completely nullify the family household exclusion". Reid at 1174. JOANNE PALACINO is easily afforded uninsured motorist coverage in this case without circumventing the purpose behind the family exclusion.

Family exclusion is designed to prevent collusion between family members in an instance where one family member is injured by the negligence of another. Allstate Insurance Company v. Dascoli, 497 So.2d 1 (Fla. 1986). In this case, the Petitioner was being driven by a friend in her own vehicle. JOANNE PALACINO

could have availed herself to liability coverage carried by the negligent driver if he was so insured. In other words, she would have been "legally entitled to recover" from the operator of the vehicle. There exists no statutory or common law prohibitation against a claim by PALACINO against the driver. Further, collusion is not a significant issue since the driver was not a relative.

The Respondent has also argued through somewhat circular reasoning, that "if the household exclusion is not valid or applicable to [the facts of this case], then there would be no bar to her recovery from her friend (and State Farm) as he would qualify (as a permissive user) as an omnibus insured under her insurance policy. If this were the case, however, uninsured benefits would not be available here in that the limits of the liability coverage and of the uninsured motorist provision in this policy are identical." Answer Brief at p. 6. The Respondent cites the case of Shelby Mutual Insurance Company v. Smith, 556 So.2d 393 (Fla. 1990) in support of its position. The Shelby case held that uninsured motorist coverage did not exist when the injured party's uninsured motorist limits were equal to or less than the liability limits held by the tortfeasor. The use of the Shelby holding in support of this position begs the question, at best, or raises additional defenses to this action which were not presented in the Trial Court or upon appeal in the Court below. The question of whether the insured would be legally entitled to recover under Florida Statute Section

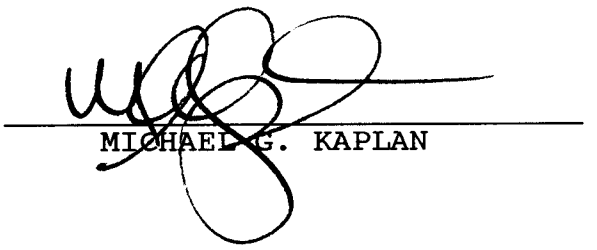
627.727(1) refers to tort liability not insurance coverage. The Shelby holding is not relevant to the issues at hand.

The Respondent further argues that the household exclusion is applicable to this situation and relies upon the District Court of Appeal decisions of Allstate Insurance Company v. Baker, 543 So.2d 847 (Fla. 4th DCA 1989), Poor v. State Farm Mutual Automobile Insurance Company, 452 So.2d 93 (Fla. 1st DCA 1984), Curtin v. State Farm Mutual Automobile Insurance Company, 449 So.2d 293 (Fla. 5th DCA 1984), and Newman v. National Indemnity Company, 245 So.2d 118 (Fla. 3rd DCA 1971). None of the above-cited cases are controlling. The only Supreme Court opinion in which the driver and the passenger were not related is the case of Allstate Insurance Company v. Boynton, 486 So.2d 552 (Fla. 1986). In that case this Court held 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 policy, but whether insurance is available to the injured Plaintiff. It is admitted that the Boynton case is not identical to the case at bar. In Boynton there existed two (2) separate insurance policies. In this case there was one (1) policy. However, in the circumstance where no legitimate exclusion is involved, the Boynton holding should apply to cases involving one policy as well, so to provide uninsured motorist coverage for the consumer who purchases the coverage with the expectation that it will be applicable if a tortfeasor is a non-relative and uninsured.

Finally, Respondent in its Answer Brief fails to address the public policy issues raised in this appeal. This Court has consistently upheld the clear public policy behind Florida Statute Section 627.727(1) which is designed to provide insurance coverage to those who are otherwise legally entitled to recover damages as if the tortfeasor had carried liability coverage. The District Court's decision unnecessarily thwarts the public policy and legislative intent behind Florida Statute Section 627.727(1) in favor of greater coverage. The lower Court's opinion forfeits JOANNE PALACINO's uninsured motorist coverage even though to allow the Petitioner uninsured motorist coverage would not contravene the spirit behind the family-household exclusion. Furthermore, affirmance of the decision below would merely lead to the unavailability of insurance coverage to an incapacitated auto owner who requires the services of a friend to operate the automobile. The insured could reasonably expect to be protected in this situation. Absent a clear legislative directive to the contrary, the insured's uninsured motorist protection should be available.

CONCLUSION

For the foregoing reasons, 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 five copies of the foregoing was mailed this **27th** day of SEPTEMBER, 1990, to the Clerk of Court, Supreme Court of the State of Florida, 500 S. Duval Street, Tallahassee, FL 32399-1925; JAMES CLARK, ESQ., Attorney for Respondent/Defendant, 19 West Flagler Street, #1003, Miami, FL 33130 and a copy was mailed to BRIAN S. DUFFY, ESQ., Attorneys for The Academy of Florida Trial Lawyers, Ervin, Varn, Jacobs, Odom & Ervin, Post Office Drawer 1170, Tallahassee, FL 32302.

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