IN THE SUPREME COURT OF FLORIDA

CASE NO. 76,749

DOROTHEA SMITH and JACK SMITH, her husband,

Petitioners,

original

BRIEF OF PETITIONERS

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INTRODUCTION

Plaintiffs/Petitioners will be referred to as they stand before this Court, as they stood before the trial court and by name. Defendant/Respondent VALLEY FORGE INSURANCE COMPANY will be referred to as it stands before this Court, as it stood before the trial court and as Valley Forge.

"R" refers to the record on appeal. "A" refers to the supplemental record which Petitioners filed in the Fourth District. Emphasis is supplied by counsel unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

These are proceedings to review a certified question from the Fourth District Court of Appeal which states:

> Where an insured under an automobile policy providing liability and uninsured motorist coverage is a passenger in the insured vehicle, being driven by an adult child not a resident of the household, who owns no vehicle and is uninsured, sustains injuries by virtue of the driver's negligence, is the injured party precluded from obtaining UM benefits under the holding of Reid v. State Farm Fire & Casualty Co., 352 So.2d 1172 (Fla. 1978)?

(A. 4).

Mrs. Smith appealed from a final summary judgment which determined that Valley Forge did not provide uninsured motorist coverage for an accident in which Mrs. Smith was injured while a passenger in her own automobile. (R. 15-17).

This accident occurred when Mrs. Smith's daughter Lori was driving the two of them to Mrs. Smith's home from a restaurant in Mrs. Smith's car. Lori made a left turn at a green arrow and suddenly was hit by an oncoming train. Lori was about 25 years old at the time and did not live in her parents' home. (R. 10, 15). At the time of the accident, Lori did not have her own liability insurance. (R. 10).

Mrs. Smith had an insurance policy with Valley Forge which provided both bodily injury liability coverage and uninsured motorist coverage. The liability portion of the policy provided coverage for bodily injury for which "any covered person [including anyone using a covered auto (A. 6)] became legally responsible

because of an automobile accident". (A. 5). The policy excludes liability coverage for injuries caused to the named insured or relatives residing in the household - "the family/household exclusion". (A. 17). Therefore there was no liability coverage for Lori, both because she did not have her own policy and because her mother's policy did not provide liability coverage for injuries to her mother.

The uninsured motorist portion of the policy excludes coverage for injuries caused by the family car.

> However, **"uninsured motor vehicle"** does not include any vehicle or equipment:
>
> 1. Owned by or furnished or available for the regular use of you or any **family member.**[1/]

(A. 9). Mrs. Smith sought coverage under the uninsured motorist provisions of her policy.

Valley Forge moved for summary judgment on the ground that the family car/UM exclusion precluded coverage under the circumstances. (R. 7-9). At the hearing, Valley Forge stipulated that Mrs. Smith also could move for summary judgment. (R. 15). Mrs. Smith argued that the UM exclusion for persons riding in the family car was not authorized by the UM statute and was therefore invalid. (R. 10-14). The trial court denied Mrs. Smith's motion and granted Valley Forge's motion. (R. 15-17). Mrs. Smith appealed. (R. 18).

1/ **"Family member"** is defined as "a person related to you by blood, marriage or adoption who is a resident of your household." (A. 5).

On appeal, the Fourth District affirmed. It first noted that UM coverage exists "for the sole purpose of providing a source of financial responsibility for the uninsured tortfeasor". (A. 2). It then noted that "[p]olicy exclusions attempting to restrict UM coverage available to the insured have been invalidated by numerous decisions beginning with Mullis v. State Farm Mutual Automobile Ins. Co., 252 So.2d 229 (Fla. 1971)." (A. 2). However, the sole exception to this rule is the family/household exception which this Court validated in Reid v. State Farm Fire & Casualty Co., 352 So.2d 1172 (Fla. 1978). Based on Reid, the Fourth District concluded that the family/household exception remained valid and precluded UM coverage for Mrs. Smith. It then certified the question to this Court. (A. 3-4).

SUMMARY OF ARGUMENT

The issue in this case is whether an insurance company can validly exclude uninsured motorist coverage where the insured is injured by the negligence of an uninsured driver who coincidentally happened to be driving the family car. The exclusion should be declared invalid because the purpose of UM is to provide protection against injuries caused by drivers who do not have their own insurance. The driver here did not purchase her own insurance. She injured the insured. The only difference is that the injuries occurred while they were both riding in the family car. There is no logical basis for an exclusion which declares that the location of the parties affects the insured's entitlement to UM. If this accident had occurred in Mrs. Smith's daughter's car, Mrs. Smith would have been entitled to UM coverage. The unauthorized exclusion is invalid.

Exclusions from UM coverage are invalid as against public policy unless those exclusions are specifically approved under the UM statute. This exclusion does not fall within that category. The only time such an exclusion has been upheld is when this Court found it valid as applied where a resident relative of the insured was injured by another resident relative while riding in the family car. The justification for doing so was the "family/household" exclusion which bars liability coverage for injuries to the insured or relatives residing in the household. Reid v. State Farm Fire & Casualty Co., 352 So.2d 1172 (Fla. 1978). The Reid court concluded that the "family/household" lia-

bility exclusion would not have any meaning if the same parties could recover under the UM provisions of the policy. Therefore the court upheld the validity of the family car exclusion under the UM coverage.

The policy behind the "family/household" exclusion from liability coverage does not apply here to uphold the family car exclusion from UM coverage because the tortfeasor was not a resident of the household. Residency is a key issue in determining the applicability of this exclusion. Therefore the exclusion should be invalid.

This decision will have far-reaching consequences. It will impact elerly persons who own their own cars, but would prefer to have emancipated children drive them. It will impact drivers who have been drinking and need to have a friend or relative drive them home. The fortuity that an owner is injured by an uninsured driver while riding in the family car is not a circumstances which the legislature intended as a permitted exclusion from UM coverage. If the driver and owner are not relatives residing in the same household, the family car exclusion should be invalid.

ARGUMENT

MRS. SMITH IS ENTITLED TO UNINSURED MOTORIST COVERAGE WHERE SHE WAS UNQUESTIONABLY INJURED BY A MOTORIST WHO HAD NO INSURANCE OF HER OWN. THE "FAMILY CAR" EXCLUSION IN MRS. SMITH'S POLICY IS INVALID.

Valley Forge moved for summary judgment on the ground that the "family/household exclusion" validly precludes liability coverage and the UM exclusion for injuries caused in the family car validly excludes UM coverage. The trial court agreed, as did the Fourth District. The summary judgment should be reversed with directions to grant Mrs. Smith's cross motion for summary judgment.

Mrs. Smith does not claim that she is entitled to recover under the bodily injury liability provisions of her policy. Lori was uninsured for two reasons - both because Lori did not purchase her own insurance and because the family/household exclusion for liability coverage in Mrs. Smith's policy applies. The only question is whether the UM exclusion for injuries caused by the family car is valid to preclude UM coverage for Mrs. Smith in what otherwise would be a classic UM situation.

Valley Forge, the trial court and the Fourth District relied on a series of cases which are factually inapplicable because all of those cases involved suits between family members who were residents of the same household. Allstate Ins. Co. v. Dascoli, 497 So.2d 1 (Fla. 1986); Florida Farm Bureau Ins. Co. v. Gov't Employees Ins. Co., 387 So.2d 932 (Fla. 1980); Reid v. State Farm Fire & Casualty Co., 352 So.2d 1172 (Fla. 1978); Amica Mut. Ins.

Co. v. Wells, 507 So.2d 750 (Fla. 5th DCA 1987); Harrison v. Metropolitan Property & Liab. Ins. Co., 475 So.2d 1370 (Fla. 2d DCA 1985). The fact that the relative resides in the household is an integral part of this question. Compare Sealey v. Coronet Ins. Co., 487 So.2d 89 (Fla. 3d DCA 1986)(even though driver was relative, family/household exclusion was not triggered unless relative resided in same household).

There is a distinct line of cases which rule on UM coverage for similar incidents in which the driver of the family vehicle was not a relative residing in the household. Bryan v. Gov't Employees Ins. Co., 14 F.L.W. 1036 (Fla. 3d DCA Apr. 25, 1989); Colonial Ins. Co. of California v. Van Halen, 528 So.2d 1374 (Fla. 3d DCA 1988)(citing Jernigan, infra); Jernigan v. Progressive Am. Ins. Co., 501 So.2d 748 (Fla. 5th DCA 1987); State Farm Mut. Auto. Ins. Co. v. Workman, 421 So.2d 660 (Fla. 3d DCA 1982); Lee v. State Farm Mut. Auto. Ins. Co., 339 So.2d 670 (Fla. 2d DCA 1976)(restrictions on uninsured motorist coverage are contrary to public policy and are void). See generally Allstate Ins. Co. v. Boynton, 486 So.2d 553 (Fla. 1986); Stack v. State Farm Mut. Auto. Ins. Co., 507 So.2d 617 (Fla. 3d DCA 1987)(vehicle which is otherwise insured under liability portion of policy may be uninsured vehicle for purpose of UM where particular occurrence is not covered).

In Jernigan, the insured was injured while riding as a passenger in his own automobile which was being driven by a friend. The court first found there was no liability coverage because the

policy, like the policy here, excluded coverage for injuries to the name insured. This finding of no liability coverage in turn made the vehicle uninsured and the insured sought UM coverage. The policy, like the policy here, contained a UM exclusion for injuries caused by a vehicle covered under the policy. The court held that this exclusion was invalid as applied.

> Under every uninsured motorist policy issued in Florida, an insured is entitled to uninsured motorist benefits where (1) he has been injured by an uninsured motor vehicle and (2) he is "legally entitled to recover" from the operator of the uninsured motor vehicle. Boynton v. Allstate Insurance Company, 486 So.2d 552 (Fla. 1986). In Boynton, the supreme 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 insurance policy, but whether insurance is available to the injured plaintiff. Thus, the fact that a vehicle may be covered by some policy is not sufficient; the policy must provide coverage for the injured plaintiff in that particular circumstance. Boynton, 486 So.2d at 555. Although the vehicle causing the plaintiff's injury in this case was insured for liability, that insurance was not available to Jernigan [the insured/injured passenger] because he could not recover from himself on his own liability policy. It is agreed that the driver of the vehicle was not insured. Thus, as to the plaintiff in this particular circumstance, there was no liability insurance available to him. Finally, there is no question that the plaintiff would have been legally entitled to recover from the negligent driver who caused his injury. There was no statutory or common-law bar to recovery. Thus, because the plaintiff was injured by the operator of an uninsured motor vehicle against whom he was legally entitled to recover, Progressive was required to make available uninsured motorist benefits.

501 So.2d at 750.

The court reached a similar result in Lee. One brother injured another brother in a car owned by the brother who was driving. The insured passenger sought UM coverage under his parents' policy after his brother's insurer denied liability coverage under the family/household exclusion. The UM insurer relied on an exclusion similar to the one on which VALLEY FORGE relies here - it excluded UM for cars owned by a resident of the household but not listed in the policy. The court held that the exclusion was invalid.

Here, the vehicle which caused the injury was not insured for liability both because Lori did not have her own insurance and because she was not insured under the Valley Forge policy. Therefore here, as in Jernigan, there was no liability insurance available to the driver, thus meeting the first prong of Boynton. Second, there is no question that here, as in Jernigan, the injured plaintiff was legally entitled to recover from the driver because there was no statutory or common law bar, such as interspousal immunity. See Fiori v. McFadden, 405 So.2d 737 (Fla. 5th DCA 1981)(family immunity did not bar suit by mother against emancipated adult daughter). Therefore here, as in Jernigan, the injured plaintiff has met the second prong of Boynton.

The Jernigan court specifically distinguished Reid and Dascoli, the decisions on which the Fourth District and Valley Forge relied here, on the ground that those cases involved family/household exclusions. That is precisely the same reason that Reid and Dascoli should be distinguished here. But there is an additional

reason as well. The injured passenger in each case could not sue the driver because of family immunity. In Reid, they were sisters who could not sue each other. See Ard v. Ard, 414 So.2d 1066 (Fla. 1982). In Dascoli, the parties were husband and wife. In neither case was there a need for this Court to reach the UM coverage issue because there was no underlying liability. The UM statute plainly states that UM coverage only has to be provided to protect persons who are legally entitled to recover from negligent drivers.

> No motor vehicle liability insurance policy which provides bodily injury liability coverage shall be delivered or issued for delivery 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 from owners or operators of uninsured motor vehicles because of bodily injury, . . .

Fla.Stat. § 627.727(1). Therefore, there would not be any public policy considerations involved in determining whether a UM exclusion for suits between family members is valid because the UM statute does not address such a circumstance.[2/]

Here, on the other hand, there was no family immunity and the driver was not subject to a family/household exclusion, i.e., she was not a relative residing in the household. This case involves an emancipated adult child - Lori was not a relative residing in

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[2/] In fact, most insurance policies contain the requirement that the policyholder be "legally entitled to recover" from the owner or operator of the uninsured vehicle before the policyholder can be entitled to UM coverage. E.g., Allstate Ins. Co. v. Boynton, 486 So.2d 552, 555 (Fla. 1986).

the household. Mrs. Smith could sue Lori for her negligence. But Lori has no liability insurance coverage. Mrs. Smith therefore should be entitled to coverage under the uninsured motorist provision of her policy.[3/]

It would be contrary to the public policy of this state to permit an insurer to deny UM coverage to an insured simply because the insured was unfortunate enough to be injured in her own automobile when someone else was driving it. UM coverage is not tied to the vehicle in which the insured is riding. Mullis v. State Farm Auto. Ins. Co., 252 So.2d 229 (Fla. 1971). UM follows the insured.

> Richard Lamar Mullis is a member of the first class; as such he is covered by uninsured motorist liability protection issued pursuant to Section 627.0851 whenever or wherever bodily injury is inflicted upon him by the negligence of an uninsured motorist. He would be covered thereby whenever he is injured

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[3/] Fraud and collusion have also been voiced as a grounds for justifying a family exclusion. This Court has commented on such an argument in the context of abrogating family immunity to the extent of insurance coverage and it rejected the argument.

> The possibility of fraud or collusion by family members in dealing with liability insurance has traditionally been an argument in favor of both parental and interspousal immunity. We recognize that the possibility of fraud exists in every lawsuit but reject the contention that such possibility still forms a valid justification for denying a child compensation for injuries negligently inflicted by the parent when the immunity is waived by the presence of insurance.

Ard v. Ard, 414 So.2d 1066, 1069 (Fla. 1982). The rejection of fraud as a justification for the exclusion is even stronger here where the tortfeasor is not a relative who lives in the same household as part of the same family unit.

> while walking, or while riding in motor vehicles, or in public conveyances, including uninsured motor vehicles (including Honda motorcycles) owned by a member of the first class of insureds. . . . Any other conclusion would be inconsistent with the intention of Section 627.0851. It was enacted to provide relief to innocent persons who are injured through the negligence of an uninsured motorist; it is not to be "whittled away" by exclusions and exceptions.

252 So.2d at 238 (emphasis by court).

The philosophy of Mullis, and the idea that there is no public policy reason to bar UM coverage where the driver of the family car is not a resident relative, was recently discussed by the Fifth District in Government Employees Ins. Co. v. Fitzgibbon, 15 F.L.W. D2600 (Fla. 5th DCA Oct. 18, 1990). In that case, the court felt bound to follow the weight of authority (including the Fourth District's decision in this case) and conclude that the family car exclusion was valid. However, the court criticized that rule and certified the question to this Court. It referred to those cases in which the driver of the vehicle was not a relative residing in the household and noted:

> The public policy reasons for upholding the family exclusion; (i.e., collusive or friendly suits, or preventing the insured from reaping benefits from his or her own negligence) do not apply in these cases.
>
> The same reasoning could be applied to this suit since interspousal immunity no longer bars a widow's suit against her deceased husband. Arguably, uninsured motorist insurance coverage should be available here because of the requirements of section 627.0851 and the absence of any public policy reasons to sustain the family member exclusion.