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SUPREME COURT OF FLORIDA

CASE NO.: 80,478
DISTRICT COURT OF APPEAL
FOURTH DISTRICT - NO. 91-2395

Fla. Bar No.: 710482

WORLD WIDE UNDERWRITERS
INSURANCE COMPANY. ETC.,

Petitioner

vs.

STEVEN WELKER,

Respondent.

PETITIONER'S INITIAL BRIEF

PYSZKA, KESSLER, MASSEY, WELDON,
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PREFACE

Throughout this brief, the Plaintiff/Appellant/Respondent, Steven Welker, will be referred to by name. The Defendant/Appellee/Petitioner, World Wide Underwriters Insurance Company a/k/a, f/k/a Wausaw Insurance Company will be referred to as "World Wide". References to the record will be preceded by the letter "R". References to the Appendix to this brief will be preceded by the abbreviation "App." followed by the appropriate page number.

STATEMENT OF THE CASE AND OF THE FACTS

Mr. Welker was allegedly injured when he became involved in an automobile accident caused by a "phantom vehicle" while driving his own automobile. (R.2). Welker then brought the action at bar and alleged that he is entitled to uninsured motorist coverage under an automobile liability policy as a resident family member which was issued to his mother by World Wide. (R.2) In response, World Wide answered and alleged, inter alia, that Welker was not insured under the World Wide automobile liability policy issued to his mother. World Wide also alleged that Welker was excluded from uninsured motorist coverage as claimed by Welker. (R.7-8) The defenses alleged by World Wide were based upon exclusions found in the liability insuring agreement section and uninsured motorist insuring agreement sections of his mother's policy. Welker generally replied to these affirmative defenses. (R.9-10)

The policy provisions of Mr. Welker's mother's policy issued by World Wide necessary to the consideration of the issues involved at bar are:

"DEFINITIONS

> **Family member:** means a person related to you by blood, marriage or adoption who is a resident of your household. This includes a ward or foster child." (R.29; App.4).

The policy thereafter is divided into insuring agreements that follow:

> **"PART A-LIABILITY COVERAGE**
> **INSURING AGREEMENT**
>
> We will pay damages for bodily injury or property damage

for which any **covered person** becomes legally responsible because of an auto accident....

"COVERED PERSON" as used in this part means:
1. You or any **family member** for the ownership, maintenance or use of any auto or **trailer.** (R.30; App.5)

EXCLUSIONS

B. We do not provide liability coverage for the ownership maintenance or use of:

3. Any vehicle, other than **your covered auto,** which is :

a. Owned by any **family member;** or

b. Furnished or available for the regular use of any **family member."** (R.30; App.6)

The policy also contained a an insuring agreement in which the applicable uninsured motorist coverage provisions are found:

"PART C-UNINSURED MOTORIST COVERAGE
INSURING AGREEMENT

We will pay damages which a **covered person** is legally entitled to recover from the owner or operator of an **uninsured motor vehicle** because of bodily injury:

1. Sustained by a **covered person;** and

2. Caused by an accident.

"COVERED PERSON" as used in this part means:

1. You or any **family member.**

EXCLUSIONS

A. We do not provide uninsured motorist coverage for bodily injury sustained by any person:

1. While **occupying,** or when struck by, any motor vehicle owned by you or any **family member** which is not insured for this coverage under this policy." (R.32-33; App. 7-8).

Based upon the above policy exclusion and Welker's Answers to

a Request for Admissions, World Wide moved for Final Summary Judgment. (R.12-50) World Wide contended that Welker is excluded from liability coverage and from uninsured motorist coverage under the provisions of his mother's automobile policy. World Wide contended that Mr. Welker's status as a resident family member does not afford him liability coverage for the accident, since he was using his own vehicle and therefore he was not a "covered person" entitled to liability coverage under the policy. World Wide also asserted that because he was operating his own vehicle, Mr. Welker's claim fell within the uninsured motorist exclusion as well. Thus, World Wide contended that Mr. Welker is not defined as a "covered person" or an "insured" for the claim which arose out of the accident in question. (R.13-16,31,33). It was additionally shown that Mr. Welker specifically rejected uninsured motorist coverage in an automobile insurance policy he acquired for his vehicle from Fortune Insurance Co. (R.24-25). The trial court entered Final Summary Judgment in favor of World Wide.

Mr. Welker appealed to the Fourth District Court of Appeals. He argued, in essence, that Mullis v. State Farm Mutual Automobile Insurance Co., 252 So.2d 259 (Fla. 1971) mandates that anyone who at first, is defined as a "covered person" in the liability insuring agreement of an automobile liability insurance policy is entitled to both liability and uninsured motorist coverage. Mr. Welker made this argument without regard to the clear and unambiguous exclusions to the contrary which may be found in either the uninsured motorist or the liability coverage insuring agreement

in the policy. In the Fourth District, World Wide contended that the result sought by Welker can be obtained only if the exclusions in the liability and uninsured motorist sections are ignored and that they cannot be ignored, since the identical exclusions have been upheld by the Fourth District Court of Appeal and other courts that have considered them in this state.

The Fourth District Court of Appeal reversed the Final Summary Judgment and found that Welker would have been afforded liability coverage for the accident. The Fourth District found that the exclusions do not limit either the liability or uninsured motorist coverage afforded to Mr. Welker. The court found that once Mr. Welker is defined as a potential insured, the exclusion in the insuring agreement of the liability policy cannot exclude him from coverage. This court has exercised its discretion to review the decision of the Fourth District Court of Appeal since it expressly and directly conflicts with decisions of other District Courts of Appeal and this Court on the same question of law.

SUMMARY OF ARGUMENT

The Fourth District Court of Appeals incorrectly decided that Mr. Welker is entitled to uninsured motorist coverage under the facts of this case and despite policy language to the contrary. The Fourth District Court of Appeals purported to engage in the proper Mullis analysis but in fact, did not do so. In order to be entitled to uninsured motorist coverage, a resident relative such as Mr. Welker must be first defined as a "Class I" insured under the policy. A family member gains his or her identity as a "Class I" insured if that family member is insured under the liability insuring agreement of the policy for the accident. At bar, Mr. Welker was excluded from liability coverage for the accident while he was driving his own vehicle. The express exlusionary language of both the liability and uninsured motorist insuring agreements of the policy state that Mr. Welker is not a covered person in such circumstances. The Fourth District Court of Appeals erred in failing to make that determination.

The Fourth District Court of Appeals error comes into sharper focus when its decision is examined against the backdrop of numerous other appellate decisions in this state which have upheld the same or similar exclusions in other policies. And, the cases relied upon by the Fourth District in support of its finding are distinguishable. Each of the decisions involved an automobile liability policy under which the resident family member was included as a liability insured under that policy for the accident in question.

Further, §627.727 (1) Fla. Stat. (Supp. 1984) amended the uninsured motorist statute to require that uninsured motorist coverage be provided in automobile liability policies regarding specifically insured or identified motor vehicles. This amendment is significant since the Mullis decision was based upon the prior uninsured motorist statute which required that the coverage be provided with respect to any policy, without regard to specifically identified or insured vehicles.

Lastly, the result for which Mr. Welker contends at bar is plainly unfair. That is, the Fourth District Court of Appeal allowed Mr. Welker, who rejected uninsured motorist coverage on his own vehicle and who refused to pay a premium for the risk under either his or his mother's policy, to claim coverage after the risk becomes reality. This burdens insurers such as World Wide with the duty to cover unknown risks for all manner of unknown vehicles without the reciprocal right to collect premiums from those who increase the risk under the policy. Accordingly, the decision of the Fourth District Court of Appeal must be reversed and the Summary Judgment entered by the trial court in this case must be reinstated in favor of World Wide.

ARGUMENT

I. A FAMILY MEMBER WHO OWNS HIS OWN VEHICLE AND WHO RESIDES WITH A NAMED INSURED IS NOT AFFORDED UNINSURED MOTORIST COVERAGE UNDER THE NAMED INSURED'S POLICY FOR INJURIES SUSTAINED WHILE DRIVING THE VEHICLE HE OWNS WHEN HE IS SPECIFICALLY EXCLUDED FROM COVERAGE FOR THE ACCIDENT UNDER THE LIABILITY PORTION OF THE POLICY, SPECIFICALLY EXCLUDED FROM UNINSURED MOTORIST COVERAGE FOR THE ACCIDENT IN QUESTION UNDER THE UNINSURED MOTORIST SECTION OF THE POLICY, AND WHERE HE EXPRESSLY REJECTS UNINSURED MOTORIST COVERAGE IN HIS AUTOMOBILE LIABILITY POLICY FOR HIS OWN VEHICLE.

A. Introduction

Uninsured motorist coverage should not be afforded to Mr. Welker who claims coverage simply because he is a family member, when his injuries are occasioned while he occupies his own vehicle. It will be shown that the result reached in the Fourth District Court of Appeal can only be reached if the language contained in the policy is wholly ignored or, if one stops reading the policy after its first few sentences. By the plain and unambiguous language of the World Wide policy, Welker is not covered for liability insurance or uninsured motorist insurance in the instant case.

Secondly, it will be demonstrated that the result reached in the Fourth District, is only arrived at by a misinterpretation of Mullis v. State Farm Mutual Automobile Insurance Company, 252 So. 2d 229 (Fla. 1971). That this is so is especially true in light of the statutory amendment to the uninsured motorist statute since the Mullis decision. Even absent the statutory amendment, application of the exclusions in the World Wide policy at bar is plainly not

contrary to the policy stated by this court in Mullis. In essence, it will be shown that the Fourth District Court of Appeal's erroneous holding is that exclusions from coverage must not be found in the exclusion part of each insuring agreement of the policy.

Lastly, the decision under consideration at bar is at odds with a reasonable interpretation of the insurance contract and has resulted in an unjust outcome. The decision is not just since it compels World Wide to make payment to cover a risk wholly unknown to World Wide and incurred by Mr. Welker, who knowingly accepted the risk by rejecting the uninsured motorist coverage under his own policy. Only after the risk became reality, did Welker seek coverage from World Wide. It is plainly not just to make one such as World Wide to bear the burden of what is no longer a contingent risk; but what is now the loss suffered by one who did not desire to pay a premium for coverage of the risk under either his own policy, or the liability or uninsured motorist policy at bar. Accordingly, it will be demonstrated that the Fourth District Court of Appeals decision in the instant case must be reversed.

B. The Fourth District Court reversibly erred in failing to hold that the World Wide policy excludes Welker from both liability coverage and uninsured motorist coverage and therefore, Mr. Welker is excluded from obtaining uninsured motorist coverage at bar.

As this Court in Mullis and in Valiant Insurance Company v. Webster, 567, So.2d 408 (1990) recognized, of necessity, courts and parties to insuring agreements must consider whether one who is not

the named insured and claims insurance coverage under an uninsured motorist insuring agreement is also entitled to liability coverage. This is because the Mullis decision states that a "Class I" insured acquires his or her identity as such if the person is covered for liability insurance for the accident in question. As stated in Valiant, supra: "Since our decision in Mullis, the courts have consistently followed the principle that if the liability provision did not apply to a given accident; the uninsured motorist provisions also do not apply." Id, at 410. This is because the uninsured motorist statute: "...requires only that uninsured motorist coverage be provided to those afforded liability coverage." Id, at 411. Thus, an examination of both the liability and uninsured motorist insuring agreements is necessary.

A careful and correct reading of the Fourth District Court of Appeals decision at bar reveals that the Court, necessarily found that the exclusions as drafted, say what they mean and mean what they say. That is, if a family member resides in the named insured's household, owns his own vehicle for which he is required to carry his own insurance, and is injured through the use of it, he is excluded from liability coverage if it is not insured by the World Wide policy. Therefore, the District court's conclusion should have been that the law does not operate to automatically afford a family member such as Mr. Welker uninsured motorist coverage. Indeed, the Fourth District Court correctly found that family members can be excluded from uninsured motorist coverage by utilizing the language at bar. Welker v. World Wide Underwriters

Insurance Company, 601 So.2d 572, 574 (Fla. 4th DCA 1992). What the Fourth District Court held is that the insurance policy runs afoul of Mullis because it purports to provide liability coverage for all resident family members and, in a later section, restricts uninsured motorist coverage. But, the World Wide policy is not violative of Mullis and does not, as the Fourth District Court states, provide coverage in one section and thereafter restrict it in a later section as in Mullis.

Unlike the case at bar, this Court in Mullis did not construe a policy that excluded a family member from liability coverage for maintenance or use of the family member's vehicle not listed in the policy. In contrast, the Mullis court only concerned itself with whether one who is already a liability insured can be precluded from uninsured motorist coverage solely by an uninsured motorist exclusion in the uninsured motorist section of the policy. Thus, the Mullis Court was confronted with a policy that insured resident family members like Welker for all purposes for liability coverage. However, the policy at bar does not, as the Fourth District Court of Appeal recites, give blanket liability coverage to Mr. Welker in the liability insuring agreement and then, take uninsured motorist coverage away solely through the application of an uninsured motorist exclusion as in the Mullis case. Welker is neither a covered person for liability coverage nor for uninsured motorist coverage under the policy in question. Mr. Welker is excluded from each of the coverages in their appropriate insuring agreement sections. Therefore, the World Wide policy does not run afoul of

Mullis.

Without saying so, the Fourth District Court of Appeals ignored the exclusionary language in the policy. It is important to note that in the World Wide policy, each part of the policy has an "Insuring Agreement" which contains the exclusions applicable to that part -- but only that part. The policy is clear and unambiguous and is divided into appropriate sections. The exclusions should be given their full force and affect since the definition section cannot be read in isolation to the exclusion of all other provisions. In fact, the contractual provisions of insurance policies must be read with a view towards the risk assumed by the insurer. Praetorians v. Fisher, 89 So.2d 329 (Fla. 1956); South Carolina Insurance Co. v. Heuer, 402 So.2d 480, 481 (Fla. 4th DCA 1981) Rev. Den. 412 So.2d 465 (Fla. 1982). These maxims were not employed by the Fourth District Court of Appeal when it engaged in the analysis under consideration at bar and respectfully, the Fourth District Court of Appeal erred in failing to do so. Thus, the decision must be reversed.

This is especially true since in essence, the Fourth District Court of Appeal found no fault with the language itself and indeed, stated that such exclusions can be effectuated. It must be remembered that the Fourth District Court of Appeal did not hold that the World Wide policy in question is violative of the public policy announced in Mullis. It only held that the location of the exclusionary language is what is violative of Mullis. Thus, as demonstrated above, the Fourth District Court's decision is

erroneous and therefore, the decision of the Fourth District Court of Appeals must be reversed.

C. The liability and uninsured motorist exclusions applicable to Mr. Welker's claim at bar have been upheld by other appellate courts of this state and are not violative of the Mullis decision.

The liability exclusion involved in the instant case and other similar exclusions have been found to preclude resident family members from liability insurance coverage when they own their own vehicles. It will be shown below that courts of this state that have construed identical similar language in both the liability and uninsured motorist coverage policies, have determined that the policy provisions at bar exclude resident family members from both liability and uninsured motorist coverage.

The Fourth District Court of Appeals was confronted with a liability exclusion identical to that at bar in Heuer, supra. In Heuer, a resident daughter sought liability coverage for an accident in which she was involved while driving her own vehicle. Like Welker, she sought coverage under her parent's policy. Id, 402 So.2d 480, 481. The Fourth District Court of Appeal construed identical exclusionary language to that in the instant case and found that the daughter in Heuer was not entitled to liability coverage under the policy. The Fourth District commented regarding the resident family member's argument, which is much like Mr. Welker's argument at bar as follows:

> "Acceptance of appellee's contention would result in a finding of ambiguity in every insurance policy containing an exclusion.

> This is not supportable. To the contrary, it has been held that even a named insured may be specifically excluded from coverage. Insurance Co. of North American v. Coates, 318 So.2d 474 (Fla. 2nd DCA 1975). Appellee's contention would also mean that, under the terms of the policy here involved, whenever a family residing together in the same household owns more than one vehicle, it would be necessary to insure only one in order to have coverage on all. We do not accept this contention."

As in Heuer, the Fourth District Court of Appeal should have found that same language rendered Mr. Welker not to be an insured or "covered person" for liability coverage under the policy. Therefore, the law should not have operated to allow Mr. Welker uninsured motorist coverage under the World Wide policy at bar.

Indeed, in Government Employees Insurance Company v. Wright, 543 So.2d 1320 (Fla. 4th DCA 1989) rev. den. 551 So2d 464(Fla. 1987), the court upheld an uninsured motorist exclusion where the relative was driving her own vehicle. The court properly found that the circumstances which triggered the exclusion to be relevant:

> "Wright contends that, as a relative relative in the Hull [her parents] household, she is entitled to liability coverage under the Hull policy and thus to UM coverage. If the premise regarding liability coverage were correct, we could agree with Wright. However, that premise is erroneous because the liability provisions of the policy expressly exclude Wright in these circumstances because she was not injured in an "owned" or "non-owned" vehicle. Contrary to Wright's contention that Mullis prevents application of the exclusion present here, simply because Wright was a relative and, as such, would have had coverage under the Hull policy, we hold Mullis to be inapposite. Whereas Wright would have been covered had she been riding in the Hull's [her parents] automobile, the policy of

> insurance did not extend to all manner of unknown automobiles owned by Hull's relatives. Were it otherwise, the insurer could never determine its exposure in order to arrive at the appropriate premium to charge for Hull's policy....
>
> In conclusion, we recognize and honor the long standing rule set out in Mullis that UM coverage must be provided for persons covered under the basic liability section of an automobile insurance policy. However, as here, when the claimant is not an insured under the basic liability section of the policy, the insurer is not restricted by the rule in Mullis regarding the furnishing of UM coverage to resident relatives injured an automobiles owned by them."

In Dairyland Insurance Company v. Kriz, 495 So.2d 892 (Fla. 1st DCA 1986), the Court found that the named insured's mother was not an insured under the liability section of the policy and therefore, not covered under the uninsured motorist section of the policy while a passenger in another automobile since she owned her own automobile. Id, 892-893. Also, in France v. Liberty Mutual Insurance Co., 380 So.2d 1155 (Fla. 3rd DCA 1980) a named insured's daughter sought uninsured motorist coverage under her parent's policy. She was not afforded coverage because she was, by definition, excluded from uninsured motorist coverage. Indeed, no liability coverage analysis is apparent in that case. And, in Bolin v. Massachusettes Bay Insurance Co., 518 So.2d 393 (Fla.2d DCA 1987) the Second District Court of Appeal precluded a resident family member from obtaining uninsured motorist benefits since he was injured in his car and was thus not covered by the insurer's policy.

The above decisions are consistent even with those decisions

that interpreted §627.0851 Fla. Stat.(1969) which is the statute that was interpreted by the Mullis court. Those decisions have held that relatives who reside in the named insured's household may not recover uninsured motorist benefits under that policy where the relative owns and is injured in his or her own vehicle. See, e.g United States Fidelity and Guaranty Insurance Co. v. Webb, 191 So.2d 869 (Fla. 1st DCA 1966); Traveler's Indemnity Co. v. Powell, 206 So.2d 244 (Fla. 1st DCA 1968); Liberty Mutual Fire Insurance Co. v. Kessler, 232 So.2d 213 (Fla. 3rd DCA 1970) and Gilligan v. Liberty Mutual Insurance Co., 265 So.2d 543 (Fla. 4th DCA 1972).

Time and time again, courts of this state have upheld language in insurance policies that excludes the resident relative from liability coverage and from uninsured motorist coverage where the relative owns his or her own vehicle for which he or she must procure insurance. The Fourth District Court of Appeal erred when it decided otherwise and the decision therefore must be quashed.

D. The result for which World Wide contends is not violative of §627.727 Fla. Stat. (Supp. 1984) or the Mullis decision.

In 1984, the legislature amended §627.727 (1) to read in pertinent part:

> "No motor vehicle liability insurance policy which provides bodily injury coverage shall be delivered or issued for delivery in this state with respect to any specifically insured or identified motor vehicle and registered or principally garaged in this state unless uninsured motor vehicle coverage is provided therein or supplemental thereto." Emphasis supplied.

This amendment, applicable to the case at bar, indicates that uninsured motorist coverage must be provided to vehicles

specifically insured or identified under an automobile liability policy. It is undisputed that Mr. Welker's vehicle is not a "specifically insured" or "identified" vehicle in the World Wide policy in question. Further, at least two courts of appeal that have construed (but not applied) the above amendment construe it to limit uninsured motorist coverage to those vehicles specifically identified or insured under a particular policy. Automobile Insurance Co. v. Hartford, Connecticut v. Beem, 469 So.2d 138, 141 (Fla. 3rd DCA 1985); Ellsworth v. Insurance Co. of North America, 508 So.2d 395 (Fla. 1st DCA 1987) [earlier version of the Statute "...did not limit the provision of uninsured motorist coverage to 'specifically insured or identified' motor vehicles. This language was added by the 1984 amendments".]. Thus, the amendment to the uninsured motorist statute clearly permits the exclusion to uninsured coverage at bar. Indeed, it evinces a change of public policy in Florida from that first identified by this Court in Mullis, supra, in 1971. This is so since as stated by the Mullis court, the earlier statute it construed: "... requires that uninsured motorist coverage be included in all policies delivered or issued for delivery in Florida..." Id, 252 So. 2d 229 at 238. The limitation of uninsured motorist coverage to specifically insured or identified autos mandates a different result at bar than that rendered by the Fourth District Court. This conclusion is bolstred by reading §627.727 (9)(d) which specifically permits the exclusion at bar without regard to liability coverage.

Notwithstanding the above, it is true that several cases seem

to be at odds with the result for which World Wide contends at bar. However, these cases can be harmonized or distinguished. The first in the series chronologically speaking, Auto Owner's Insurance Co. v. Bennett, 466 So.2d 242 (Fla. 2nd DCA 1984) involved a policy which "...as to basic liability coverage does not limit its coverage to relatives living with the father who did not own an automobile." Id, at 243.

In contrast with Bennett, such a limitation is found in the World Wide policy in the liability insuring agreement in the instant case. Thus, unlike the decision in Bennett, there is no inclusion of Mr. Welker as a liability insured for the accident and thereafter, an exclusion of him from uninsured motorist coverage in a later section of the policy in violation of Mullis.

So too in Auto Owner's Insurance Co. v. Queen, 468 So.2d 498 (Fla. 5th DCA 1985), there was no restriction from liability coverage to resident family members. As stated by the Court in Queen, "Nothing in the policy limits this [liability] coverage to relatives who do not own a car." Id, at 499. The instant case is clearly distinguishable since Mr. Welker is expressly excluded from liability coverage if he owns a vehicle. And, in Incardona v. Auto Owner's Insurance Co., 494 So.2d 513 (Fla. 2nd DCA 1986) rev. den.503 So2d 326 (Fla. 1987) the court stated that since:

> "...inasmuch as Margaret Incardona was insured as a relative residing with appellant under the basic liability coverage clause quoted above, uninsured motorist coverage was a statutory requirement which could not be excluded by the policy terms." Id, at 514.

In contrast, Mr. Welker is clearly not entitled to liability

coverage under the policy at bar and therefore also is properly excluded from uninsured motorist coverage.

Lastly, the 5th District Court of Appeal in Nationwide Mutual Fire Insurance Co. v. Phillips, 609 So.2d 1385 (Fla. 5th DCA 1992) also may seem against the position advanced here by World Wide. However, it appears that the Phillips court was not confronted with a policy which excluded the plaintiff from liability and uninsured motorist coverage while the putative insured uses his own vehicle. The Phillips court further goes on to state that it really matters not whether an insured would be entitled to liability coverage since "Class I" insureds are covered at all times for all purposes and relies on Mullis for this proposition. However, it is apparent that the Phillips court has skipped a step in its analysis. That is, in order to be considered a Class I insured, a person must be covered under the liability policy for the claim in the first place. A potential insured's status as either a Class I or Class II insured is determined by the potential insured's status as an insured for liability coverage for the accident in question. If there is no such liability coverage, the person, as Mr. Welker in the case at bar, is not a Class I insured or indeed, insured at all for the particular claim in question.

Despite the above, the Phillips court further assails this court's decision in Valiant Insurance Co. v. Webster, supra, and the Federal District Court's application of Valiant in De Luna v. Valiant Insurance Co., 792 F. Supp. 790 (N.D. Fla. 1992) on the ground that the identity of the vehicles involved in an accident is

irrelevant to a determination of uninsured motorist coverage. But, there are problems with this approach. First, the argument again assumes, without reference to any policy language, that one such as Welker is a Class I insured. Further, the Phillips decision overrules any attempt to restrict resident family members from liability coverage if they own their own vehicles for which they must, and can, procure their own motor vehicle insurance. This is erroneous since it forces insurers to insure relatives for liability coverage for any purpose or for any vehicles. And, such a result is precluded by §627.4132 Fla. Stat. (1982) and by the express language or §627.727 (1). This is because § 627.4132 limits liability coverage to that afforded to an insured's own vehicle. And, §627.727(1) states that uninsured motorist coverage is required to be afforded in motor vehicle liability policies regarding specifically identified or insured motor vehicles in a given policy.

Also, it must be remembered that under the policy in question, a "covered person" is insured for liability purposes only with reference to an "auto accident" and that uninsured motorist coverage is afforded to "covered persons" caused by an accident. Thus, the circumstances surrounding the accident are necessary to the determination of whether a person is a "Class I" insured. Webster, supra, 567 So. 2d 408, 410; DeLuna, supra, 792 F.Supp. 790, 791.

Lastly, no courts have allowed coverage in the situation at bar where the putative insured rejects uninsured motorist coverage

for himself and his vehicle, avoids payment of a premium to obtain coverage for the risk, becomes involved in an accident in a vehicle which is not identified or insured in the family member's policy, and thereafter seeks uninsured motorist benefits under that policy. Mr. Welker rejected uninsured motorist coverage for his specifically identified or insured motor vehicle. It is unjust to allow one who deems uninsured motorist coverage unnecessary for his own vehicle to reject the coverage until he needs the coverage and thereafter, seek it from a resident family member. As noted in Appleman, Insurance Law & Practice, §5080.35 (1981), the result sought by the respondents should not occur.

> "As pointed out earlier, an insurer needs to know the number of vehicles which will be operated by the insured group in order to measure its exposure. If there are five vehicles in a household which are customarily driven by the named insured and the members of a household, there is a greater likelihood of accident, and resulting injury, than if there is a single vehicle. Premium rates are determined by actuarial statistics. It seems not unreasonable, then, for an insurer which insists upon a separate premium paid for each vehicle owned by an insured which he wants to have covered to demand a like payment for each such vehicle in the household whose will create an exposure to loss. Lacking such payment, the insurer may insert an exception to coverage resultant from the use of such vehicle owned by other members of the household...."

In response to the argument in favor of allowing recovery of uninsured motorists benefits in all cases, which is made by Professor Alan Widiss of the Univerity of Iowa, Appleman responds:

> "Alan states the arguments for this point of view as ably, perhaps, as can be done. However, he is influenced primarily by two factors: first, he feels as a matter of public policy that recovery should be allowed in all such cases, at least if the accident resulted from the fault of the tortfeasor; second, the premium charged is so small, why fuss about it? It is small only because loss

> ratios can be computed actuarily when the exposure is known. If, as Alan suggests, a different insurer might be upon the other vehicle, and that insurance will become primary (as we shall see in a later chapter); the fact that the premium presently is small does not justify a multiplication of exposure. The decisions which hold this provision to be valid would seem to be correct on principle, even as are those which refuse to give multiple coverage for a single premium when the insured owned more than one vehicle. The choice is that of the insured in his household, and that construction seems to be more fair." Emphasis supplied.

The result for which Mr. Welker contends cannot be allowed to stand if justice is to be done in this case. Mr. Welker should not benefit by recovering uninsured motorist benefits from an insurer who did not know of the existence of his vehicle and especially, since he rejected uninsured motorist coverage under his own policy of insurance when he could have easily chosen the coverage. Simply, the choice was his. Accordingly, the decision rendered by the Fourth District Court of Appeal should be quashed and the entry of the Final Summary Judgment in favor of World Wide should be reinstated.

CONCLUSION

WHEREFORE, due to the foregoing, the Respondent, World Wide UNDERWRITERS INSURANCE COMPANY a/k/a, f/k/a WAUSAW INSURANCE COMPANY, respectfully requests that this Court enter an order which quashes the decision of the Fourth District Court of Appeal and reinstates the entry of Final Summary Judgment in favor of World Wide UNDERWRITERS INSURANCE COMPANY a/k/a, f/k/a WAUSAW INSURANCE COMPANY.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail on June 11, 1993 to: SUSAN S. LERNER, ESQUIRE, PREDDY, KUTNER, HARDY, RUBINOFF, THOMPSON, BISSETT & BUSH, 501 N.E. First Avenue, Miami, Florida and E.J. GENEROTTI, ESQUIRE, DELL & SCHAEFFER, P.A., 2401 Hollywood Blvd., Hollywood, Florida 33020.

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