OA 10-5-93

FILED
SID J. WHITE
JUL 22 1993
CLERK, SUPREME COURT
By ______________
Chief Deputy Clerk

EDS:bsl
July 20, 1993
BL 21768-C

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 REPLY BRIEF

PYSZKA, KESSLER, MASSEY, WELDON,
CATRI, HOLTON & DOUBERLEY, P.A.
The 110 Tower, 20th Floor
110 Southeast Sixth Street
Fort Lauderdale, Florida 33301-5015
(305) 463-8593

BY: EDWARD D. SCHUSTER, ESQUIRE

TABLE OF CONTENTS

	PAGE
TABLE OF CITATIONS	ii
PREFACE	iii
SUMMARY OF ARGUMENT	1-2
ISSUE I	3
WHETHER 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.	
CONCLUSION	11
CERTIFICATE OF SERVICE	12

TABLE OF CITATIONS

	PAGE
Allstate Insurance Co. v. Schofner, 573 So.2d 47 (Fla. 1st DCA 1990)	4
Bolin v. Massahusettes Bay Insurance Co. 518 So.2d 393 (Fla. 2d DCA 1987)	6
Coleman v. Florida Insurance Guaranty Association, Inc., 517 So.2d 686, 689 (Fla. 1988)	9
Dairyland Insurance Company v. Kriz 495 So.2d 892 (Fla. 1st DCA 1986)	6
De Luna v. Valiant Insurance Co. 792 F. Supp. 790 (N.D. Fla. 1992)	6
Government Employees Insurance Company v. Wright 543 So.2d 1320 (Fla. 4th DCA 1989) rev. den. 551 So.2d 464 (Fla. 1989)	6
Grant v. State Farm Fire and Casualty, 18 F.L.W. D. 905, 906 (Fla. 4th DCA April 7, 1993)	7
Mullis v. State Farm Mutual Automobile Insurance Co, 252 So.2d 259 (Fla. 1971)	1,2,3,5,6 7,8,9,10
Progressive American Insurance Co. v. Hunter, 603 So.2d 1301, 1302-1303	6
Prudential Property & Casualty Insurance Co. v. Bonnema, 601 So.2d 269, 270-271 (Fla. 5th DCA 1992)	5
Reino v. State, 352 So.2d 853 (Fla. 1977)	8
Salas v. Liberty Mutual Fire Insurance Co., 272 So.2d 1 (Fla. 1972)	4
South Carolina Insurance Co. v. Heuer, 402 So.2d 480, 481 (Fla. 4th DCA 1981) Rev. Den. 412 So.2d 465 (Fla. 1982)	6,9
Valiant Insurance Company v. Webster 567 So.2d 408 (1990)	5,6,8,9,10
W.J. Rives, Inc. v. Kemper Insurance Group 92 N.C.App. 313, 374 S.E. 2d 430(1988)	7

STATUTES & RULES

§627.727 Fla. Stat. (Supp. 1984)	8

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 Wausau 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.

SUMMARY OF ARGUMENT

The decision of the Fourth District Court of Appeal, that Mr. Welker should be afforded uninsured motorist benefits in the instant case, should be quashed. Nothing stated in Mr. Welker's brief or the brief of the amicus changes this contention. Mr. Welker's position at bar can be stated succinctly: Mr. Welker is defined as an insured in the liability insuring agreement and that ends the matter. There can be no exclusions from uninsured motorist coverage. Welker would like this Court to stop reading the policy at the definition section of the liability insuring agreement but it cannot as a matter of law. Mr. Welker is excluded from liability insurance for the accident in question and therefore, is not a covered person under the uninsured motorist insuring agreement of the policy as well.

In contrast with the contentions of Mr. Welker and that of the amicus, World Wide does not contend that Mullis v. State Farm Mutual Automobile Insurance Co., 252 So.2d 259 (Fla. 1971) should be overruled. Certainly, Mullis is to a certain extent controlling since it holds that a covered person under the liability portion of a given policy cannot thereafter be excluded from uninsured motorist coverage in a different section of that policy. However, Mullis is distinguishable from the case at bar and cannot support the result contended for by Mr. Welker and the amicus. This is because the Mullis court did not deal with the situation at bar where the putitive insured is not a "covered person" under the liability insuring agreement. The decision for which World Wide

contends at bar is supported by Mullis and would not have the affect of overruling Mullis. Mr. Welker rejected uninsured motorist coverage for himself and his own vehicle under his own policy of automobile liability insurance. Mrs. Welker did not purchase uninsured motorist coverage for her son, pay a premium for insuring the vehicle, or otherwise identify the vehicle on her policy. In such circumstances, the uninsured motorist exclusion involved in the case at bar should be upheld and the decision of the Fourth District Court of Appeal reversed.

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.

The arguments in the Answer Brief filed on behalf of Mr. Welker and by amicus curiae are based on a misapplication of this Court's decision in Mullis v. State Farm Automobile Insurance Co., 252 So.2d 229 (Fla. 1971). This will be clearly demonstrated below. Further, the Mullis decision does not support the decision of the District Court. Accordingly, reversal of the decision of the Fourth District Court of Appeal is required despite Welker's protests to the contrary.

Welker's position can be easily summarized as it is stated on page five of his brief: because Mr. Welker is included as a covered person in the Definition section of the policy by virtue of his status as a resident family member, he is entitled to uninsured motorist coverage regardless of the circumstances of the case and apparently, regardless of policy language which excludes him from "covered person" status under certain circumstances. Of course, in making this request, Welker does not (and cannot) contest the fact that he is asking this Court to rewrite the insuring agreement despite the plain and unambiguous exclusion involved at bar. This

is so since as written, the policy excludes Welker from "covered person" status when occupying a vehicle owned by him, but not a covered auto under the policy. Unless violative of public policy, this Court cannot rewrite the insuring agreement between the parties; stop reading the policy at the Definition section thus failing to give a valid exclusion its intended affect; or otherwise reach a result contrary to the intent of the parties. Allstate Insurance Co. v. Shofner, 573 So.2d 47 (Fla. 1st DCA 1990). Application of these elementary rules of construction to the insurance policy at bar mandates the reversal of the decision of the Fourth District Court of Appeal.

Despite the above, on page 4 of his brief, Welker apparently argues that Salas v. Liberty Mutual Fire Insurance Co., 272 So.2d 1(Fla. 1972) supports his contention that the only material part of the policy is the Definition section of the policy because of the phrase in Salas that every insured: "...as defined in the policy is entitled to uninsured motorist coverage". However, Welker asks this Court to add to that phrase the phrase: "In the Definition section of the policy to the exclusion of all other policy provisions". Necessarily, Welker must do this since if this Court reads the entire policy in order to decide who is a covered person, this Court must reach the conclusion that the policy, when read as a whole, excludes Welker from both liability and uninsured motorist coverage. Therefore, quashal of the Fourth District Court of Appeals decision is required.

Further, a comment upon the quotation of some of the policy

provisions on pp. 4-5 of Mr. Welker's brief is in order. Only the Definition Sections of the liability insuring agreement are set forth. Welker fails to cite, discuss, or directly acknowledge the existence of the unambiguous exclusions in both the liability and uninsured motorist insuring agreements. This is something that this Court cannot do. Prudential Property & Casualty Insurance Co. v. Bonnema, 601 So.2d 269, 270-271(Fla. 5th DCA 1992).

Mr. Welker next asserts on page 5 of the brief that Mullis holds that if family members are covered persons without qualification in the Definition section, uninsured motorist protection is mandated. However, Mullis actually held that automobile insurance policies must provide uninsured motorist coverage to covered persons who are also protected by the liability insuring agreement of the policy for the claim. The "exception" exists when the putative insured is not covered under the liability insuring agreement and therefore is also properly excluded from coverage under the uninsured motorist insuring agreement as well. As stated by this Court:

> "Since our decision in Mullis, the courts have consistently followed the principle that if the liability portions of an insurance policy would be applicable to a particular accident, the uninsured motorist provisions would likewise be applicable; whereas, if the liability provisions did not apply to a given accident, the uninsured motorist provisions of that policy would also not apply (except with respect to occupants of the insured automobile)." Valiant Insurance Company v. Webster, 567 So.2d 408, 410 (Fla. 1990). Citations omitted.

Plainly, there are "exceptions" to uninsured motorist coverage that have been recognized by this Court and other courts that have

considered them. A major one, as stated by Mullis and this Court in Valiant Insurance Co. v. Webster, supra, is where the insured is not a "covered person" under the liability insuring agreement. Welker is such a person in the case at bar. Unlike Mullis, the instant case does not involve a situation where, a liability insured is excluded from uninsured motorist coverage in the uninsured motorist insuring agreement. Accordingly, the decision of the Fourth District Court of Appeals must be reversed.

On pages 5 and 6 of his brief, Welker next makes the incorrect assertion that exclusions such as the one involved at bar have never been upheld. This statement is simply wrong. Similar policy exclusions have been upheld by courts that have considered them. Government Employees Insurance Co.v. White, 543 So.2d 1320 (Fla. 4th DCA) rev. den. 551 So.2d 464 (Fla. 1989); Dairyland Insurance Co. v. Kriz, 495 So.2d 464 (Fla. 1989); rev. den. 504 So.2d 767 (Fla. 1987); Bolen v. Massachussettes Bay Insurance Co., 518 So.2d 393 (Fla. 1980). See also, Progressive American Insurance Co. v. Hunter, 603 So.2d 1301, 1302-1302-1303 (Fla. 4th DCA 1992) and DeLuna v. Valiant Insurance Co., 792 F.Supp. 790 (N.D. Fla. 1992); South Carolina Insurance Co. v. Heuer, 402 So.2d 480, 481 (Fla. 4th DCA 1981) rev. den. 412 So.2d 465 (Fla. 1982)[liability insurance precluded to resident daughter while driving in her own vehicle which was not a "covered auto" under her mother's policy based on identical language involved at bar].

Further, a recent decision has held that an insured, defined as such, was not entitled to recover uninsured motorist benefits

where the insured was injured riding a motorcycle he owned but which was not insured under the policy. Grant v. State Farm Fire and Casualty, 18 F.L.W. D 905, 906 (Fla. 4th DCA April 7, 1993) and cases cited therein.

Welker attempts to distinguish some of the above cited cases on the grounds that the resident relative was not excluded in the Definition section of the policy. Again, Welker ignores the fact that the exclusion from coverage at bar, is found in the exclusion section of the policy. The function of the exclusion in the insurance policy is to exclude certain risks of loss or events from coverage. See, W.J. Rives, Inc. v. Kemper Insurance Group, 92 N.C. App. 313, 374 S.E. 2d 430 (1988). Welker's position that such a provision should be found in the definition section of the insuring agreement rather than the exclusion section is incomprehensible.

Next, on page 7 of Mr. Welker's brief, he urges that the injured son in Mullis "...would have been denied coverage under a virtually identical liability exclusion..." and therefore, apparently concludes that it matters not whether Mr. Welker is covered for liability insurance under the policy in question when analyzing whether he is also entitled to uninsured motorist coverage. There are problems with this argument. First, nowhere in the Mullis decision is there a recitation, or discussion, of the liability exclusion or definition section of the policy involved in Mullis. The second problem with the argument is that this Court has stated:"...that if the liability provision did not apply to a given accident, the uninsured motorist provision would also not

apply..." Valiant Insurance Co., supra, 567 So.2d at 410. At bar, Welker is neither a "covered person" for liability insurance or uninsured motorist coverage and this Court's decision in Mullis clearly supports this contention.

Regarding Welker's assertions concerning the 1984 Amendment to Section 627.727(1) Fla. Stat., and that it has no impact on the case at bar, Worldwide still contends that the statute places its focus on identified motor vehicles in a given policy. Citation to legislative history is improper since this Court should not resort to rules of construction where the words used in the statute are plain and unambiguous and rules of construction may not be used to create ambiguity. Reino v. State, 352 So.2d 853 (Fla. 1977).

Welker's position which in essence, would preclude any exclusion to uninsured motorist coverage is made clear on pp. 9-10 of his brief: "Broad protection-no exclusions". While it is true as Welker argues that drivers are subjected to (uninsured) "misguided missiles"; Mr. Welker opted not to purchase coverage for himself for this risk. Instead, he expressly rejected it. Now, as the risk becomes reality, without notification and payment of premium, he seeks coverage for himself and his vehicle under his mother's policy. Clearly, this case presents at least one "exception" to uninsured motorist coverage that does not offend legislative intent and which does not offend this Court's real holding in Mullis.

Finally a short response to the brief of amicus curiae is in order. The amicus brief as well as Welker's brief wholly ignores,

and does not even attempt to argue, or distinguish the proper analysis set forth in South Carolina Insurance Co. v. Heuer, supra, and similar such cases. Further, neither brief suggests how this Court, or any court, can read an insurance policy absent the exclusions or allow coverage in the absence of the payment of a premium, especially where the insured rejects the precise coverage now sought by him. These oversights exist because there is no reasonable argument against them. In any event, these glaring omissions only tend to magnify the weakness of the arguments and the unfairness of the result for which Welker and amicus contend at bar.

On page 4 of the brief of the amicus, reliance upon Coleman v. Florida Insurance Guaranty Association, Inc., 517 So.2d 686, 689 (Fla. 1988) for the proposition that Welker need not purchase his own insurance is misplaced. Coleman involved a stacking question involving several vehicles insured by one insurer and where the putative insured did not execute an informed rejection. Indeed, the Coleman court noted: "We agree with the district court below that 'The case law supports counting the number of UM coverages and the number of premiums for which UM coverage is paid.' Id, at 689. At bar, Welker paid nothing for uninsured motorist coverage to World Wide, or even his own insurer. Thus, Welker is not "a covered person" or "an insured family member".

Amicus also misstates World Wide's position in its brief. That is, that Valiant Insurance Co. v. Webster, supra, overruled Mullis. World Wide hopes to now make it clear that although some

aspects of Mullis and Valiant Insurance Co., govern the case at bar, neither of them deal precisely with the situation at bar. And, Mullis need not be overruled and indeed, World Wide does not argue that Mullis should be overruled. Where the amicus and Welker are wrong is that Mullis by itself does not support the contention that they advance at bar. Mullis was not confronted with a resident relative who was neither a liability nor an uninsured motorist insured under the policy. Mr. Mullis' son was not driving his own vehicle for which he rejected his own uninsured motorist coverage under his own policy. Given the presence of these facts, mostly ignored by Welker and amicus, Mullis does not prevent the application of the exclusion to both liability and uninsured motorist coverage in the policy at bar.

The result for which Welker and the amicus contend is neither fair nor just. The dicta as stated in Mullis and restated and expanded to create coverage, should not be stretched any further to grant coverage under the facts at bar. Mullis by itself does not support Welker's contentions at bar. Stare decisis does not dictate the result for which Welker and amicus contends. The exclusion in the instant case is not violative of public policy and must be given its full force and effect. Therefore, reversal and quashal of the Fourth District Court of Appeals' decision in the instant case is required.

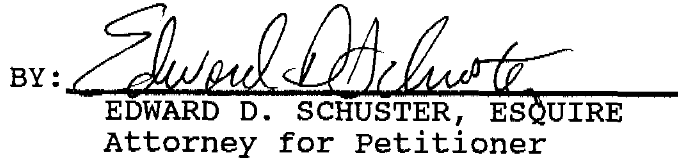
CONCLUSION

WHEREFORE, due to the foregoing, the Respondent, World Wide UNDERWRITERS INSURANCE COMPANY a/k/a, f/k/a WAUSAU 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 WAUSAU INSURANCE COMPANY.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail on July 20, 1993 to: SUSAN S. LERNER, ESQUIRE, PREDDY, KUTNER, HARDY, RUBINOFF, THOMPSON, BISSETT & BUSH, 501 N.E. First Avenue, Miami, Florida, E.J. GENEROTTI, ESQUIRE, DELL & SCHAEFFER, P.A., 2401 Hollywood Blvd., Hollywood, Florida 33020 and LOUIS K. ROSENBLOUM, ESQUIRE, LEVIN, MIDDLEBROOKS, MABIE, THOMAS, MAYES & MITCHELL, P.A., P.O. Box 12308, Pensacola, Florida 32581.

PYSZKA, KESSLER, MASSEY, WELDON,
CATRI, HOLTON & DOUBERLEY, P.A.
The 110 Tower, 20th Floor
110 Southeast Sixth Street
Fort Lauderdale, Florida 33301-3400
(305)463-8593

BY: 

EDWARD D. SCHUSTER, ESQUIRE
Attorney for Petitioner