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FILED
SID J. WHITE
JUL 8 1993
CLERK, SUPREME COURT
By ____________
Chief Deputy Clerk

IN THE SUPREME COURT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA

NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, an insurance corporation licensed to do business in the state of Florida,

CASE NO. 80,986

Petitioner,

v.

KEVIN PHILLIPS and KIMBERLY PHILLIPS (formerly known as Kimberly Scanato),

Respondents.

PETITIONER'S REPLY BRIEF ON MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES[1]

PAGE

CASES

[1] Table of Authorities prepared by Lexis.

STATUTES

REPLY STATEMENT OF THE CASE AND FACTS

Nationwide relies upon the Statement of the Case and Facts in its Initial Brief.

<u>ISSUE ON APPEAL</u>

<u>I</u>.

WHETHER AN AUTOMOBILE INSURANCE POLICY WHICH INCLUDES UNINSURED MOTORISTS COVERAGE PURSUANT TO <u>FLA. STAT.</u> § 627.727(1) MAY PERMISSIBLY EXCLUDE UNINSURED MOTORISTS COVERAGE FOR A PARTICULAR ACCIDENT WHERE THE LIABILITY PROVISIONS OF THAT POLICY DO NOT APPLY TO THE ACCIDENT?

REPLY ARGUMENT

I.

AN AUTOMOBILE INSURANCE POLICY WHICH INCLUDES UNINSURED MOTORISTS COVERAGE PURSUANT TO FLA. STAT. § 627.727(1) MAY PERMISSIBLY EXCLUDE UNINSURED MOTORISTS COVERAGE FOR A PARTICULAR ACCIDENT WHERE THE LIABILITY PROVISIONS OF THAT POLICY DO NOT APPLY TO THE ACCIDENT.

The parties agree that this case is not complicated. Evidently, the Plaintiffs take that to mean that the case requires only superficial analysis. According to the Plaintiffs, since there are similarities between the facts of this case and the facts in Mullis v. State Farm Automobile Insurance Co., 252 So.2d 229 (Fla. 1971), this Court should automatically determine that the results should be the same. While it is certainly understandable why the Phillipses would hope that this Court avoids a step-by-step analysis of this case, this Court should not accept their invitation to do so. Instead, this Court should review Nationwide's policy to see if it conferred insured status upon Kevin Phillips while operating his motorcycle. Thereafter, it should review the Financial Responsibility Law to determine whether Nationwide was statutorily compelled to provide liability coverage and corresponding uninsured motorists (UM) coverage to Mr. Phillips. If the statutes do not compel such coverage, Mr. Phillips does not constitute a "person insured thereunder" and, therefore, there is no legal basis to invoke the public policy embraced by each statute and thereby prohibit Nationwide from enforcing its unambiguous exclusion. Application of that step-by-step analysis should lead this Court to the conclusion that the Fifth District's decision below should be quashed.

At the outset, the Plaintiffs argue that this case is indistinguishable from Mullis. They first argue that there are no material differences in the facts and thereafter state that Nationwide's policy applies precisely to the same extent as State Farm's Mullis policies. The Plaintiffs then argue that Mr. Phillips is to be treated as the "named insured" since he is the resident spouse of Mrs. Phillips, Nationwide's policyholder. Finally, they end their discussion of Mullis by arguing that the Court never considered the liability coverage in Mullis, and it should not do so here. According to the Plaintiffs, this Court need only apply the "polestar" result of Mullis to reach the correct result here. Nationwide cannot articulate the Plaintiffs' misunderstanding of the analysis any better than how it is expressed in this portion of their brief.

Determining who is the "named insured" on a policy is not a difficult matter. Nationwide's policy was issued to Kimberly Scanato (now known as Kimberly Phillips). Her name is the only name listed on the policy. (R. 28). Florida courts have uniformly held that the term "named insured" has a restricted meaning. Simply stated, it does not apply to persons not specifically named in the policy. See, Quick v. State Farm Fire & Casualty Co., 488 So.2d 909 (Fla. 1st DCA 1986); Southeastern Fidelity Insurance Co. v. Suwanne Lumber Mfg. Co., Inc., 411 So.2d 950 (Fla. 1st DCA 1982); Nicks v. Hartford Insurance Group, 291 So.2d 673 (Fla. 2d

DCA 1974); Kohly v. Royal Indemnity Co., 190 So.2d 819 (Fla. 3d DCA 1966), cert. den., 200 So.2d 813 (Fla. 1967). Even if Mr. Phillips had 100% ownership interest in the insured property, that fact alone would not render him a named insured. See, Pernas v. Hartford Accident & Indemnity Co., 334 So.2d 139 (Fla. 3d DCA 1976). Likewise, even if Mr. Phillips had been designated as the principal or sole operator of the vehicle listed in the policy, that fact alone would not render him a named insured for purposes of a motor vehicle policy. See, Whitten v. Progressive Casualty Insurance Co., 410 So.2d 501 (Fla. 1982); Babcock v. United Services Automobile Assn., 501 So.2d 679 (Fla. 3d DCA 1987); United States Fidelity & Guaranty Co. v. Williams, 379 So.2d 328 (Fla. 1st DCA 1979), cert. den., 386 So.2d 682 (Fla. 1980). Only those persons who are specifically identified as the named insured are considered the named insured. See, Travelers Insurance Co. v. Bartoszewicz, 404 So.2d 1053 (Fla. 1981).[2] At best, Mr. Phillips satisfied the definition of "you" or "your" in Nationwide's policy. That fact alone does not render him the named insured.

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[2] Mr. Phillips obviously recognizes that his status as a "named insured", as opposed to merely "an insured", is important because some courts have differentiated between "named insureds" and resident family members when determining whether a UM exclusion is enforceable. Compare, Government Employees Insurance Co. v. Wright, 543 So.2d 1320 (Fla. 4th DCA), rev. den., 551 So.2d 464 (Fla. 1989) (UM exclusion relating to vehicles owned by resident relatives enforceable against resident relative) with, State Farm Fire & Casualty Co. v. Polgar, 551 So.2d 549 (Fla. 4th DCA 1989) (no UM exclusion enforceable against "named insured").

Factually, while there exists certain similarities between this case and Mullis, there are several important differences. First, the statute construed in Mullis required UM coverage to be provided for motor vehicle policies with respect to any motor vehicle registered or principally garaged in Florida. The statute in the present case is far more circumscribed and requires UM coverage to be provided with respect to any specifically-insured or identified motor vehicle. While the Plaintiffs improperly rely upon the legislative history of the 1984 amendment to try to diminish the significance of the amendment, the fact remains that the Legislature unambiguously limited application of the statute to policies insuring specific vehicles. Second, given the analysis used by the Mullis court, one has to assume that State Farm's liability insuring agreement was broadly written, similar to the one addressed in Welker v. Worldwide Underwriters Insurance Co., 601 So.2d 572 (Fla. 4th DCA 1992). In the absence of such language, the Mullis court could not have concluded that Shelby Mullis had basic liability coverage because the Financial Responsibility Law did not require him to be an insured under his father's policy.

Despite the fact that the Plaintiffs' discussion of Mullis consumes nearly one-third of their brief, they never once acknowledge that the Mullis court was interpreting a statute. Instead, they criticize Nationwide's reference to the Financial Responsibility Law arguing that there is no need to analyze the interplay between it and the UM statute. The failure to recognize this important point is yet but another flaw in the Plaintiffs' argument that was so eagerly accepted by the Fifth District.

The UM statute construed in Mullis and the version applicable to this case contain certain language that has remained virtually unchanged over the years. That language is as follows:

> No automobile/motor vehicle liability policy shall be issued . . . unless uninsured motor vehicle coverage is provided . . . for the protection of persons insured thereunder . . .

The Mullis court recognized that the phrase "persons insured thereunder" necessarily referred to the liability policy to which the sentence first refers. In order to determine who those people were, the court relied upon Chapter 324, Florida Statutes and determined that "persons insured thereunder" were those people required to be insured under a liability policy issued pursuant to the Financial Responsibility Law. Mullis v. State Farm Mutual Automobile Insurance Co., 252 So.2d 229, 232 (Fla. 1971). Nearly 20 years later, this Court again recognized that this statutory phrase referred to those people required to be insured under a liability policy issued in compliance with the Financial Responsibility Law. Valiant Insurance Co. v. Webster, 567 So.2d 408, 410 (Fla. 1990). The Financial Responsibility Law does not mandate that Mr. Phillips as a resident spouse, or any resident relative, be provided with liability coverage. Therefore, Mr. Phillips is not a statutorily-required "person insured thereunder."

The Plaintiffs ignore this critical factor and argue that Nationwide is simply trying to restrict coverage to certain vehicles. In reality, however, Nationwide is arguing that neither the UM statute nor the Financial Responsibility Law mandate that a person becomes an "insured" merely by virtue of his bloodline or residence with a named insured. Instead, the Financial Responsibility Law ties insured status to operation of a specified vehicle. Since Mr. Phillips was not operating the specified vehicle in this case, he never attained insured status. There is no need to classify him as Class I or Class II. He is not insured at all. The Plaintiffs try to avoid this obvious conclusion by suggesting that the UM statute and Mullis require coverage for all resident relatives of the named insured. Remarkably, the Plaintiffs point to no language in the UM statute which has ever said that such coverage is compulsory for resident relatives of the named insured. Likewise, the true Mullis rule is that "persons insured", as used in the UM statute, are the same "persons insured" as contemplated by the Financial Responsibility Law. The Mullis court only stated that ordinarily those persons were the owner or operator of an automobile, his spouse and other members of his family. It is that language of Mullis upon which the Plaintiffs and the Fifth District have so heavily relied.

It is quite clear that had the Legislature intended for all resident relatives of the named insured to be provided with UM coverage, it could have easily done so. Part XI of the Insurance Code addresses motor vehicle and casualty insurance contracts. Only one statute provides for compulsory coverage for resident relatives of the named insured. That compulsory coverage is contained within the Florida Motor Vehicle No-Fault Law, Fla. Stat.

§ 627.730 through 627.745. Florida Statutes § 627.733(1) requires every owner or registrant of a motor vehicle which is required to be registered or licensed in the state to maintain security as further defined in the statute. Florida Statutes § 627.736(1) requires that every policy complying with the security requirements of the act provide personal injury protection to the named insured, relatives residing in the same household and certain other persons with the benefits addressed in the statute. The Legislature further defined the term "relative residing in the same household" in Fla. Stat. § 627.732 to mean a relative of any degree by blood or by marriage who usually makes his home in the same family unit, whether or not temporarily living elsewhere.

The No Fault Act amply demonstrates that when the Legislature has decided that certain people must be insured under a compulsory insurance requirement, it has identified those people who must be insured. When the Legislature has specifically intended for resident relatives to be provided certain coverage, it has expressly stated that intention in unambiguous language within the statute. If the Legislature had intended for all resident relatives of the named insured to be provided with UM coverage or liability coverage, it easily could have expressed that intention in either the Financial Responsibility Act or the UM statute. It chose to do neither. The Fifth District had no right to create such compulsory insurance by judicial fiat.[3] Such decisions are

[3] It should be noted that the Fifth District has doggedly clung to the erroneous belief that UM coverage is always mandated and may never be excluded. This Court has

best left to legislators who can consider the financial impact of such decisions, both upon insurers licensed to do business in this state and the policyholders who will have to pay the premiums for such coverage. Those types of decisions certainly require the balancing of various policy decisions that are best left to the citizens' elected representatives rather than to judges.

The Plaintiffs' next attempt to distinguish the Fourth District's decision in Progressive American Insurance Co. v. Hunter, 603 So.2d 1301 (Fla. 4th DCA 1992) and the other district courts' decisions relied upon by Nationwide and claim that Nationwide's policy language is materially different from the policies in those cases. Of all the arguments submitted by the Plaintiffs, this one seems to be the least credible. In Hunter, Progressive's policy language read as follows:

> We will pay on behalf of an injured person, damages, other than punitive or exemplary damages, for which an insured person is legally liable because of bodily injury and property damage caused by an accident and arising out of the ownership, maintenance or use of an your insured auto, utility trailer or any non-owned auto.
>
> Additional definitions used in the part only as used in this part, "insured person" means:
>
> 1. You, or a relative, for any liability arising out of the ownership, maintenance

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frequently attempted to correct that mistaken understanding. Compare, Jernigan v. Progressive American Insurance Co., 501 So.2d 748 (Fla. 5th DCA 1987), with Brixius v. Allstate Insurance Co., 589 So.2d 236 (Fla. 1991). Compare also, Webster v. Valiant Insurance Co., 512 So.2d 971 (Fla. 5th DCA 1987), with, Valiant Insurance Co. v. Webster, 567 So.2d 408 (Fla. 1990).

> or use of your insured auto, utility trailer or any auto.

In the accident in which Kathy Hunter was involved, she was operating a Pontiac vehicle which she owned jointly with her father which was not insured under Progressive's policy. The Fourth District correctly stated that it interpreted the language as ". . . excluding (or more properly, not including) . . ." Kathy while she drove the Pontiac. That automobile was not an insured auto, like Mr. Phillips' motorcycle here, because it was not listed in the policy. Likewise, like Mr. Phillips' motorcycle here, it could not constitute a non-owned auto because it was jointly owned by Kathy and her father, a named insured. Rather than being different, the material language in the respective policies is almost identical. The language of the policies in the other cases relied upon by Nationwide also relate insured status to operation of an insured vehicle.[4]

Finally, the Plaintiffs spend little more than a page attempting to justify the Fifth District's interpretation of <u>Fla. Stat.</u> § 627.727(9), Nationwide will not duplicate its analysis of the statute contained within its Initial Brief. However, it is important to note that, unlike their reliance on the legislative history regarding the 1984 amendment, the Plaintiffs have not whispered a single word concerning the legislative history of <u>Fla. Stat.</u> § 627.729(9). The absence of such a discussion appears to be

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4 It is no surprise that in Mr. Phillips discussion of these cases he once again tries to equate himself with the named insured.

a well-reasoned decision by the Plaintiffs. Under no view of the legislative history can it be said that the Legislature intended to expand coverage to persons who it never required to be insured in the first instance. Instead, the clear intent of the Legislature in enacting Fla. Stat. § 627.727(9) was to allow insurers to offer policies of UM coverage which allowed someone who was an insured to waive their rights to aggregate multiple coverages. In exchange for the waiver, the insurer was required to reduce its premium by the specified percentage. The lack of any credible attempt by the Plaintiffs to justify the novel interpretation of the Fifth District certainly suggests that even they concede that the Fifth District's analysis was completely flawed.

The remainder of the Plaintiffs' argument appears to boil down to public policy. It is important to remember, however, that courts are not free to strike provisions in insurance contracts, or any other contracts for that matter, under the broad banner of "public policy" derived from a statute, in the absence of the conclusion that the statute is applicable to the situation. Typically, before one can invoke the protection of statutory public policy, one must demonstrate that the statute applies to the given situation. See, e.g., Lynch-Davidson Motors v. Griffin, 182 So.2d 7, 8-9 (Fla. 1966); Bankers & Shippers Insurance Co. of New York v. Phoenix Assurance Co. of New York, 210 So.2d 715, 718-719 (Fla. 1968); Ennis v. Charter, 290 So.2d 96, 99-100 (Fla. 1st DCA 1974). In the present case, Mr. Phillips is not entitled to rely upon the public policy referred to in Mullis because he cannot demonstrate that he is required to be insured by virtue of the Financial Responsibility Statute, and conversely, by virtue of the UM statute. In the absence of coming within the parameters of the statutes, he cannot then rely upon them to strike down the language of the policy which he claims violates his statutory rights.

In the present case, it is abundantly clear that the Fifth District completely misinterpreted the step-by-step analysis relied upon by this Court in Mullis. Instead, it was persuaded to accept the superficial analysis advocated by the Plaintiffs to determine that since this case and Mullis involved motorcycles and vehicles not listed on the policy, that Nationwide was precluded from enforcing its exclusion. The Fifth District determined that Nationwide's exclusion was unenforceable after first having concluded that Mr. Phillips was not insured for purposes of liability coverage. The court identified no provisions in the UM statute which required Nationwide to provide him UM coverage. Instead, by judicial fiat, it turned UM coverage into compulsory automobile coverage for all resident family members of the named insured, even when the Legislature specifically chose not to include such language in the statute. Certainly, the Florida Legislature is authorized to amend the statute to require such coverage should that become its collective legislative intent. The history of the statute demonstrates that the Legislature has never had difficulty amending the UM statute to express its intent. Such decisions are clearly best left to the elected official who can weigh the competing factors to determine whether such coverage should be required. However, under the language of the existing statute and the analysis identified by this Court more than 20 years ago, it is clear that Nationwide was not required under the circumstances of this case to provide Kevin Phillips with UM coverage. It was error for the Fifth District to hold Nationwide's exclusion unenforceable. This Court should quash the decision of the Fifth District with directions on remand for the trial court to be instructed to enter judgment in favor of Nationwide.

CONCLUSION

The Fifth District could have easily resolved this matter by resorting to this Court's precedent. Instead, it judicially legislated its own view of what the UM statute should read and thereby justify its decision to prohibit Nationwide from enforcing its clear exclusion. This Court should quash the decision below with directions on remand to enter judgment for Nationwide.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by U. S. Mail to **Paul B. Irvin, Esquire,** 311 W. Fairbanks Avenue, Winter Park, Florida 32789; **Louis K. Rosenbloum, Esquire,** Post Office Box 12308, Pensacola, Florida 32581; and **Raymond T. Elligett, Jr., Esquire,** NCNB Plaza, Suite 2600, 400 N. Ashley Drive, Tampa, Florida 33602, on July 6, 1993.

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George A. Vaka, Esquire