IN THE SUPREME COURT OF FLORIDA

CASE NO. : 83,242

FOURTH DISTRICT COURT OF APPEAL
CASE NO. : 93-0238

GOVERNMENT EMPLOYEES
INSURANCE COMPANY,

Petitioner,

vs.

WILLIAM J. DOUGLAS,

Respondent.

PETITIONER'S REPLY BRIEF

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ISSUE ON APPEAL

WHETHER AN INSURER IS REQUIRED TO PROVIDE UNINSURED MOTORIST COVERAGE TO AN INSURED FOR DAMAGES SUSTAINED IN AN ACCIDENT INVOLVING AN OWNED AUTOMOBILE, NOT LISTED IN THE POLICY, WHEN THAT POLICY CONTAINS AN EXPRESS PROVISION EXCLUDING UM COVERAGE IN THAT CIRCUMSTANCE?

ARGUMENT IN REPLY

Respondents' sole argument is premised on the fact that this Court's Opinion in World Wide Underwriters Insurance Company v. Welker, 19 FLW 5153 (Fla. April 8, 1994) is inapplicable to this case. The alleged basis for its inapplicability is that the car accident and policy issuance in that case pre-dated the amendment to the UM Statute. Further, it is Respondent's contention that while the Welker decision is correct, it does not apply in instances where an insurer fails to comply with §627.727(9). This statement incorrect. This Court has already rendered an opinion on all fours with the case sub judice finding that Florida Statute §627.727(9) does not preclude the entry of judgment for the carrier here.

Respondent has misapprehended the holding in Welker as being applicable only to cases occurring prior to the enactment of §627.727(9). In his attempt to distinguish the

case at bar, Respondent has overlooked the case which is squarely on point and was decided by this Court on the same day as Welker: Nationwide Mutual Fire Insurance Company v. Phillips, 19 FLW S157 (Fla. April 8, 1994).

Contrary to Respondent's contention, this Court in Phillips construed a policy which was issued after the 1987 amendment. In Phillips, the car accident occurred on September 20, 1990, after the amendment of the statute.[1] Moreover, the policy there contained the same UM exclusion as found in the case sub judice.[2]

In Phillips, the Fifth District Court of Appeal found the UM exclusion invalid due to the lack of compliance with the requirements of subsection (9). Based on this non-

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[1] "...on September 20, 1990, Kevin Phillips was riding a motorcycle owned by him when he was injured by the negligence of an uninsured motorist".

Phillips, 609 So.2d 1385, 1386 (Fla. 5th DCA 1992).

[2] "The UM section of the policy contains the following exclusion:
This Uninsured Motorist insurance does not apply as follows:
(4) It does not apply to bodily injury suffered while occupying a motor vehicle owned by you or a relative living in your household, but not insured for Uninsured Motorists coverage under this policy...".

Phillips, 609 So.2d 1386.

compliance, the Fifth District affirmed the lower court's finding of coverage.

The Fifth District Court stated:

> "Because the insurer failed to obtain a knowing rejection of the statutorily required UM limits, Nationwide cannot rely upon section 627.727(9)(d) to validate its otherwise invalid exclusion".
>
> Phillips, 609 So.2d 1390.

Likewise, the same reasoning was employed by the Fourth District Court of Appeal in the case at bar to find the UM exclusion invalid. The Fourth District held:

> "that the insured's UM coverage under the GEICO policy provides coverage because the insurer failed to comply with section 627.727(9)".
>
> Government Employees Ins. Co. v. Douglas, 627 So.2d 102 (Fla. 4th DCA 1993).

This Court, however, in its decision in Nationwide v. Phillips, reversed the Fifth District Court and held that UM coverage was not afforded to Kevin Phillips even though the statute's requirements were not met by the insurer. This Court held:

> "We expressly disapprove the district court's decision in the instant case for the reasons expressed in our decision in Worldwide Underwriters Ins. Co. v. Welker, 80,478 (Fla. Mar. 31 1994)[19 FLW S153]".
>
> Phillips, at S157.

Based on the reasoning in Welker, this Court remanded and ordered judgment be entered in favor of the insurer. Therefore, Respondents attempt to distinguish the Welker case must fail. In Phillips, as here, the requirements of subsection (9) did form the basis for the insurer's denial, yet this Court held that the insurer was not obligated to provide UM coverage to the insured.

It is axiomatic that an insurer under the UM Statute is not required to provide uninsured motorists coverage to an insured for a owned vehicle which is not listed in that policy when the policy does not provide liability coverage. In finding no coverage, the Supreme Court noted that its conclusion was consistent with Mullis v. State Farm Mutual Automobile Inc. Co., 252 So.2d 229 (Fla. 1991).[3]

Respondent does not dispute that he did not have any liability coverage with Petitioner on the motor vehicle he was driving on the date he was injured. Hence, under Valiant Insurance Co. v. Webster, 567 So.2d 408 (Fla. 1990) and

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[3] "...after the Mullis decision, 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..."

Welker, at S154, citing, Valiant, 567 So.2d at 410.

Mullis, Petitioner is not obligated to provide UM coverage where there was no reciprocal liability protection afforded to DOUGLAS.

As seen, this Court's Opinion in Phillips is on all fours with the case sub judice. Therefore, the exclusion is valid even though Petitioner did not comply with the requirements of §627.727(9), Florida Statutes. Thus, an insurer's non-compliance with subsection (9) of the UM Statute does not disturb the general principles enunciated in Mullis, Valiant and Welker; that UM coverage must mirror the available liability coverage.

It is clear that this Court's holding in Phillips is consistent with the rationale in Mullis that "uninsured motorist coverage...is statutorily intended to provide reciprocal or mutual equivalent or automobile liability coverage". Welker, at S155. The case at bar represents one of the instances to which this Court was explicitly referring. Therefore, Respondent's argument is without merit and unsupported by the existent case law.

CONCLUSION

Based on this Court's decisions in Welker and Phillips, Petitioner respectfully requests this Court reverse the

Fourth District Court of Appeal's Opinion and remand this case with instructions to enter judgment on behalf of Petitioner.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was mailed this 27th day of June, 1994, to: CHRISTOPHER M. CANNON, ESQUIRE, 633 South Andrew Avenue, Box 14519, Fort Lauderdale, Florida 33302. Telephone: (305) 463-0585; and, DANIEL D. DYKEMA, ESQUIRE, Young & Dykema, P.A., Suite 1730 - The 110 Tower, 110 Southeast Sixth Street, Fort Lauderdale, Florida 33301. Telephone: (305) 779-1105.

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