FLORIDA SUPREME COURT
TALLAHASSEE, FLORIDA

CASE NO. 85,337

THE TRAVELERS INSURANCE COMPANY, and THE PHOENIX INSURANCE COMPANY,

Petitioners,

v.

BRETT ALLAN WARREN, personal representative of the Estate of DIANNA LYNN WARREN, deceased,

Respondent.

BRIEF OF AMICUS CURIAE, NATIONWIDE INSURANCE COMPANIES, IN SUPPORT OF PETITIONERS' POSITION

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[1] Table of Authorities prepared by Lexis.

STATUTES

STATEMENT OF THE CASE AND FACTS

Amicus Curiae, Nationwide Insurance Companies (Nationwide), accept and adopt Petitioner's Statement of the Case and Facts.

SUMMARY OF THE ARGUMENT

This case is not complicated. Florida courts have traditionally held that a motor vehicle which is insured for purposes of liability coverage may not be considered uninsured for purposes of a claim for UM benefits under the same policy by the same claimant. Here, the First District determined the exact opposite to be true and concluded that the claimant was entitled to both liability coverage and uninsured motorists (UM) coverage under the same policy in a one-car accident.

To reach this decision, the First District misapplied the "reciprocal" liability coverage analysis first recognized in Mullis v. State Farm Mut. Auto. Ins. Co., 252 So.2d 229 (Fla. 1971). As recent cases demonstrate, that analysis is to be applied to a situation where an insured is operating a vehicle which is not identified under the policy from which he is seeking UM benefits. See, e.g., Worldwide Underwriters Ins. Co. v. Welker, 640 So.2d 46 (Fla. 1994), Nationwide Mut. Fire Ins. Co. v. Phillips, 609 So.2d 1385 (Fla. 5th DCA 1992), quashed, 640 So.2d 53 (Fla. 1994). That analysis simply has no application to the present issue.

The court also relied upon Mullis for the proposition that any attempt to exclude UM coverage under these circumstances would be against Florida's public policy. In doing so, the First District has overlooked the fact that the UM statute has been amended more than 25 time since this Court's decision in Mullis, and as such, the statute bears little resemblance to the one discussed in Mullis. Perhaps even more importantly, at the time

that Mullis was decided, a guest passenger in Florida did not even have a cause of action for negligence against the owner or operator of the motor vehicle that he or she occupied at the time of the accident. Therefore, it makes little sense to even suggest that the Mullis court considered the issue presently before the court, much less that the decision in Mullis mandates the result reached by the First District.

The First District also attempted to distinguish several cases in which provisions similar to the one at issue here had been enforced by Florida courts. The First District determined that such provisions were enforced in Florida law only when used in conjunction with a family-member exclusion contained in a liability policy. In reaching that decision, the First District overlooked its own decision in Nicholas v. Nationwide Mut. Fire Ins. Co., 503 So.2d 993 (Fla. 1st DCA 1987) and decisions from the Second District which have specifically enforced similar definitions of an uninsured motor vehicle even in the absence of an applicable family-member exclusion.

Finally, the decision of the First District creates a variety of practical problems including an improper doubling of liability limits, creation of greater and far superior rights in Class II insureds as opposed to the named insured and resident relatives who have traditionally enjoyed greater rights under UM policies in this state and the effective destruction of subrogation rights of UM carriers under the circumstances. This Court should

answer the certified question in the negative and quash the decision of the First District.

ARGUMENT

I.

THE FIRST DISTRICT ERRED WHEN IT CONCLUDED THAT A PASSENGER WHO IS INJURED IN A ONE-CAR ACCIDENT MAY RECOVER BOTH THE BODILY INJURY LIABILITY COVERAGE AND UNINSURED MOTORISTS COVERAGE UNDER THE SAME POLICY INSURING THAT VEHICLE.

In this case, the First District determined that an automobile insurer in Florida is required to provide both liability coverage benefits and UM benefits under the same policy to a passenger injured in a one-car accident. The court determined that the insurer was required to pay UM benefits despite the policy's definition of uninsured auto which stated that a vehicle insured for liability coverage could not be considered uninsured for UM coverage under the policy. To reach its conclusion, the First District relied upon its previous decision in Travelers Ins. Co. v. Chandler, 569 So.2d 1337 (Fla. 1st DCA 1990), and this Court's decision in Mullis v. State Farm Mut. Auto. Ins. Co., 252 So.2d 229 (Fla. 1971) and determined that such a provision is prohibited under Florida law. It is respectfully submitted that the analysis and conclusion of the First District is erroneous, and this Court should answer the certified question posed by that court in the negative and quash the decision with directions on remand to enter judgment in favor of Travelers.

The cornerstone of the First District's analysis in the present case is its decision in Travelers Ins. Co. v. Chandler, 569 So.2d 1337 (Fla. 1st DCA 1990). In Chandler, the plaintiff was injured while a passenger in a one-car accident in a vehicle owned

by Mrs. Williams. Travelers provided automobile liability coverage in the aggregate amount of $300,000 for each occurrence and UM coverage in the amount of $300,000 for each accident. The injuries sustained by Chandler resulted in damages exceeding $300,000. Pursuant to a settlement agreement, Travelers paid $240,000 in liability benefits to Chandler and an additional $60,000 in such benefits to another passenger who was likewise injured in the same accident. As such, the liability coverage was exhausted. Thereafter, Chandler brought an action against Travelers for payment of UM benefits in the amount of $60,000 and maintained that his damages exceeded the amount of liability benefits available to him. Travelers denied coverage on the grounds that it had no obligation to pay UM benefits because its liability limits were not less than those provided for UM, and the vehicle could not be both insured and uninsured under the same policy. The trial court entered summary judgment in favor of Chandler.

The First District affirmed the decision of the trial court and found that under the language in the Travelers policy, the vehicle constituted an underinsured motor vehicle. Travelers maintained that another provision in its policy excluded a vehicle insured for liability coverage under the policy from likewise being considered an uninsured motor vehicle. The First District also rejected that argument.

As the analytical foundation for its conclusion, the Chandler court stated that UM coverage is required by Fla. Stat. § 627.727(1) to be provided to all persons who were insured under a

policy for basic liability coverage. Citing, Valiant Ins. Co. v. Webster, 567 So.2d 408, 409-410 (Fla. 1990); Mullis v. State Farm Mut. Auto. Ins. Co., 252 So.2d 229 (Fla. 1971). The court explained that liability coverage was indisputably provided to Chandler since he had received $240,000 in liability benefits. As such, the court concluded that in accordance with Mullis, any attempt to bar him from UM coverage would be contrary to public policy.

With all due respect to the First District, its analysis in Chandler is both confused and flawed. First, the "reciprocal" liability coverage analysis relied upon by the court applies in situations when the person claiming UM benefits, usually the named insured or resident family member, is seeking those benefits for injuries sustained while operating a vehicle which is not insured under the policy from which the benefits are sought. See, e.g., Worldwide Underwriters Ins. Co. v. Welker, 640 So.2d 46 (Fla. 1994), Nationwide Mut. Fire Ins. Co. v. Phillips, 609 So.2d 1385 (Fla. 5th DCA 1992), quashed, 640 So.2d 53 (Fla. 1994). Even in cases where that analysis applies, the issue is whether the claimant would be provided liability coverage for his liability to third parties which resulted from his negligent operation of the automobile. The analysis has never focused upon the question of whether the claimant was entitled to receive liability coverage benefits for injuries the claimant received by the tort-feasor. Therefore, even if the "reciprocal" liability coverage analysis was

relevant to the present situation, which it is not, the Chandler court misinterpreted and misapplied the analysis.

The Chandler court also relied upon Mullis as support for its conclusion that any attempt to exclude UM coverage under those circumstances would be against public policy. Once again, with all due respect to the First District, it appears to have both misinterpreted and misapplied Mullis. It is important to remember that the Mullis court was interpreting a far different UM statute than the one that is applicable to the present case. Indeed, the UM statute has been amended more than 25 times since this court's decision in Mullis. As such, one must avoid the easy temptation to answer any UM question that arises today, based on the Mullis "rule" derived from a statute that hardly resembles the current statute from which the issue has arisen. Instead, the answers to today's questions should be reached after consideration is given to amendments to the statute which followed certain decisions of this Court, and as importantly, those instances where the legislature has chosen not to amend the statute in the face of a conclusive interpretive decision by this Court.

The error in relying upon the Mullis "rule" to require insurance carriers to provide both bodily injury liability limits and UM coverage under the same policy to a non-family member passenger involved in a one-car accident becomes obvious when Mullis is viewed in an appropriate historical context. In 1971, when Mullis was decided, Fla. Stat. § 320.59 (1971) was an effective law in this state. That "guest passenger statute" stated

that no person transported by the owner or operator of a motor vehicle (who did not pay a fare) shall have a cause of action against the owner or operator for injuries or death absent gross negligence or willful and wanton misconduct. The guest statute was not repealed until 1972. See, § 1, Chapter 72-1, Laws of Florida. Thus, it could hardly be said that the Mullis court even contemplated the present legal question, much less that the decision mandates such coverage under the circumstances.

In this case, the First District also rejected Travelers' argument that the definition of uninsured motor vehicle in its policy, which excluded a vehicle insured for purposes of liability coverage from being considered an uninsured motor vehicle had been approved by this Court and several District Courts of Appeal. The First District stated that the definition was enforced only in the limited circumstances where there existed a valid exclusion which barred recovery of liability benefits, such that the injured person could not claim that the vehicle was uninsured as to herself, in order to recover UM benefits in lieu of the liability policy limits. As such, the court distinguished the decisions in Reid v. State Farm Fire & Cas. Co., 352 So.2d 1172 (Fla. 1977), Smith v. Valley Forge Ins. Co., 591 So.2d 926 (Fla. 1992), and Brixius v. Allstate Ins. Co., 589 So.2d 236 (Fla. 1991).

While it is true that each of those cases involved a corresponding family-member exclusion in the liability coverage, that fact alone does not mean that Florida courts have not otherwise held that the "your car" exclusion from UM coverage is

not otherwise enforceable. Indeed, the First District itself had previously determined that a plaintiff could not recover under the liability coverage on the vehicle insured by a policy and then claim that the same vehicle was uninsured under the same policy for purposes of recovering UM benefits under that policy. See, Nicholas v. Nationwide Mut. Fire Ins. Co., 503 So.2d 993 (Fla. 1st DCA 1987). Likewise, the Second District has also held that a vehicle insured for purposes of liability coverage and for which liability benefits have been paid to the plaintiff cannot be uninsured as to that same plaintiff under the same policy. See, Peel v. Allstate Ins. Co., 522 So.2d 505 (Fla. 2d DCA 1988).

In Fidelity & Cas. Co. of New York v. Streicher, 506 So.2d 92 (Fla. 2d DCA), rev. den., 515 So.2d 231 (Fla. 1987). Streicher was injured when she was a passenger in her family's Datsun automobile driven by a permissive user, Richard Conger. Conger's negligence was the sole proximate cause of the accident. As a result, Ms. Streicher sustained serious bodily injury.

Fidelity had issued a policy of insurance to Streicher's parents which provided liability and UM coverage on three family vehicles including the Datsun involved in the accident. The policy extended liability coverage to permissive users such as Conger. Conger had no other insurance, and was insured solely by virtue of an omnibus insured clause under Fidelity's policy. Fidelity paid its $100,000 in liability limits to Streicher. Thereafter, she claimed that she was entitled to $100,000 of UM coverage for each vehicle insured under the policy. Fidelity's policy defined an

uninsured or underinsured motor vehicle to exclude any vehicle owned by the insured or a relative, and it denied UM benefits to her. The trial court granted summary judgment for Streicher finding that she was entitled to UM benefits under the policy.

On appeal, the Second District reversed that summary judgment. Noting that the statute had been changed since its previous decision in State Farm Mut. Auto. Ins. Co. v. McClure, 501 So.2d 141 (Fla. 2d DCA 1987), the court concluded that the amendment to the statute should not change the result. The court explained it was not the intent of the legislature to require that an automobile insurance policy provide both liability and UM coverage to the same injured party. The result sought by the plaintiff would effectively double the limits of liability under the insurance contract. The court stated that it was confident that Fidelity intended to provide limited liability coverage and to provide UM coverage, but not to the same injured party, and Fidelity had charged a premium accordingly. The court concluded that Fidelity should not be required to double its liability limits under the circumstances, and the Fidelity policy in question did not provide UM benefits to the plaintiff.

Several years later, in Brixius v. Allstate Ins. Co., 589 So.2d 236 (Fla. 1991), this Court again considered the enforceability of a policy provision which provided that an uninsured auto is not a vehicle defined as an insured auto under the liability portion of the policy. In Brixius, the claimant sought to recover UM benefits from Allstate for injuries she

received while a passenger in a motor vehicle owned by her, but driven by an uninsured friend. Brixius took the position that the liability coverage was excluded since she was the named insured, and as such, the vehicle was uninsured to her. Therefore, according to her contentions, she was entitled to UM benefits under the same policy. The trial court entered summary judgment in favor of Allstate, and that judgment was affirmed by the Second District which relied on this Court's decision in Reid v. State Farm Fire & Cas. Co., 352 So.2d 1172 (Fla. 1977). Approving the decision of the Second District, this Court stated that it should be noted that since its decision in Reid, the legislature had not amended Fla. Stat. § 627.727 (1987) to require UM benefits be provided an insured when liability benefits are unavailable because of a valid liability exclusion in the same policy under which UM benefits were sought. Justice McDonald dissented and respectfully requested that the Florida legislature look at the issue.

In 1992, the Florida legislature responded to Justice McDonald's request and amended the statute. The legislature amended the definition of uninsured motor vehicle to read as follows:

> (3) For the purpose of this coverage, the term "uninsured motor vehicle" shall, subject to the terms and conditions of such coverage, be deemed to include an insured motor vehicle when the liability insurer thereof:
>
> > (c) excludes liability coverage to a non-family member whose operation of an insured vehicle results in injuries to the named insured or to a relative of the

named insured who is a member of the named insured's household.[2]

The 1992 amendment is very limited in scope. It does not mandate that an insured be provided both the liability coverage and UM coverage under the same policy. Instead, it carved out only a narrow exception which is to be applied when the liability coverage specifically contains an exclusion that precludes a named insured (or resident family member) from obtaining liability coverage when he or she is injured by the negligent operation of the insured vehicle by a non-family member. Thus, as to the named insured or resident relatives, the legislature's response was to allow those persons the opportunity to recover liability coverage, or if excluded, UM coverage. The legislature certainly did not express an intent to allow the named insured to recover both coverages. Moreover, the amendment did not provide expanded rights to mere passengers.

Had the legislature intended that any person could obtain both the liability coverage contained in the policy and the UM coverage for a vehicle insured under the same policy, it could have easily said so in clear and succinct language. It chose not to do so. The First District should not have created that language under the auspices of enforcing this state's public policy.

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[2] In 1989, the legislature amended the definition of uninsured motor vehicle in Fla. Stat. § 627.727(3)(b). Chapter 89-243 § 1, Laws of Florida. That change appears to be responsive to interpretations of the statute as demonstrated in Shelby Mut. Ins. Co. v. Smith, 556 So.2d 393 (Fla. 1990).

The First District's decision in the present case also creates a variety of problems in practical application. First, under the rule announced in the present case, complete strangers to the policy (Class II insureds) have been granted greater rights than those provided to named insureds or resident family members. Florida law has traditionally recognized superior and more extensive rights in named insureds and resident family members (Class I insureds) in the UM law context. See, Mullis v. State Farm Mut. Auto. Ins. Co., 252 So.2d 229 (Fla. 1971); Florida Farm Bureau Cas. Co. v. Hurtado, 587 So.2d 1314 (Fla. 1991). Since UM coverage is purely a statutory creature, the legislature is certainly free to create such an anomaly, if it so chooses. It could do so after considering the impact that such a decision would have on a variety of factors including premiums, availability of insurance and the like. Based on its ability to gather this type of information, the legislature is best suited to make the decision that Florida policyholders should pay greater premium dollars to afford strangers broader coverage and benefits than those provided to the named insured and his family.

Approving the decision of the First District will also essentially result in the doubling of liability limits available to an insured while denying the insurer the opportunity to voluntarily determine whether it would choose to insure this newly expanded risk. When underwriting liability coverage, the insurer is given the opportunity to analyze specific factors concerning particular people so that it may determine whether the risk is acceptable. If

the risk is acceptable, the insurer is given the opportunity to consider the extent to which it is willing to assume the risk and the amount of premium it will charge for the assumption of that risk. In the uninsured motorist context, on the other hand, an insurer does not evaluate the risks to the public posed by the operation of the insured vehicle by a particular person, its insured, but evaluates the risk of whether the insured will be injured by the negligence of some third party. Thus, the insurer is deprived of any meaningful opportunity to properly underwrite this newly-created risk.

Florida Statutes § 627.727(1) and (2) mandate that a liability insurer not only provide UM coverage in any policy for which liability coverage is provided, but also that the limits of the UM coverage be equal to the limits of liability coverage unless otherwise rejected by the insured. Under the ruling of the First District, if the insurance carrier was willing only to underwrite the risk of the insured's liability up to $100,000, it is now statutorily forced to provide $200,000 in essentially liability coverage to its insured. Under that scenario, the insurer was never given the opportunity to decline the risk or to charge a commensurate premium for accepting it. The Florida legislature has prohibited an insured from stacking liability coverages. See, Fla. Stat. § 627.4132. The decision of the First District here, not only avoids the statutory prohibition, but mandates that the insurer provide that stacked type of coverage.

In determining the amount of premiums for UM coverage, insurance carriers can consider the fact that the substantive law of this state confers upon them a subrogation right upon which to seek reimbursement from the person responsible for inflicting the injury upon their insured. That right is effectively destroyed if a Class II insured is allowed to recover both the bodily injury liability limits and the UM limits under the same policy in a one-car accident as occurred here. Florida law is well established that an insurance carrier may not subrogate and seek indemnity against its own insured. See, e.g., Allstate Ins. Co. v. Fowler, 480 So.2d 1287 (Fla. 1986). Under the First District's decision in the present case, if an owner or any permissive user was operating the vehicle and negligently injured a passenger, the insurer could have to pay twice the amount that Florida law previously recognized would be its maximum limit and have any opportunity at reimbursement thoroughly destroyed. Certainly, had this novel interpretation of Florida law been intended by the legislature, it would have said so in a clear, concise and obvious fashion. It is most respectfully submitted that the legislature has never intended this result, nor its consequences and instead, as demonstrated by the 1992 amendment to the statute, intended that any claimant receive either the liability limits or the UM limits, but not both.

This Court should answer the certified question of the First District in the negative, quash the decision and issue instructions on remand to enter judgment for Travelers.

CONCLUSION

Florida law has traditionally held that a motor vehicle cannot be both insured and uninsured under the same policy for purposes of a claim for UM benefits. After having the opportunity to change this traditional rule, the 1992 legislature created a very narrow exception not applicable here. Thus, the traditional rule should continue to be applied. This Court should answer the certified question in the negative and quash the decision of the First District.

Respectfully submitted,

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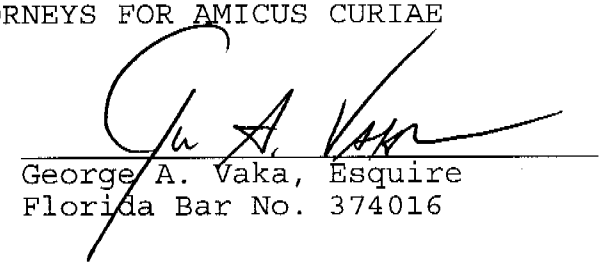
By: 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail to **R. William Roland, Esquire;** Post Office Drawer 229, Tallahassee, Florida, 32302-0229; **Cecil Davis, Jr., Esquire,** Post Office Drawer 229, Tallahassee, Florida, 32302-0229; and **James H. White, Jr., Esquire,** 229 McKenzie Avenue, Panama City, Florida 32401-3128, on April 11, 1995.

George A. Vaka, Esquire