IN THE SUPREME COURT OF FLORIDA

THE TRAVELERS INSURANCE COMPANY and THE PHOENIX INSURANCE COMPANY,

Petitioners,

vs.

BRETT ALLAN WARREN, Personal Representative of the Estate of DIANNA LYNN WARREN, deceased,

Respondent.

CASE NO.: 85,337

DISTRICT COURT OF APPEAL
CASE NO.: 93-2716

ON REVIEW FROM THE DISTRICT COURT OF APPEAL,
FIRST DISTRICT

RESPONDENT'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Petitioners, The Travelers Insurance Company and The Phoenix Insurance Company, will be referred to herein as "Travelers" or "Petitioners". Respondent will be referred to as "Respondent" or "Warren". References to the record on appeal shall be referred to by "R" followed by the appropriate page citation.

STATEMENT OF THE CASE AND FACTS

Respondent adopts Petitioners' Statement of the Case and Facts.

ISSUES PRESENTED FOR REVIEW

MAY AN INJURED PERSON WHO IS ENTITLED TO RECOVER BODILY INJURY LIABILITY BENEFITS, BUT WHOSE DAMAGES EXCEED THE POLICY LIMIT FOR LIABILITY COVERAGE, ALSO RECOVER UNDER THE SAME POLICY FOR UNINSURED MOTORIST BENEFITS, WHERE THE POLICY EXCLUDES THE INSURED VEHICLE FROM ITS DEFINITION OF "UNINSURED VEHICLE?"

SUMMARY OF ARGUMENT

The certified question should be answered in the affirmative.

The Chancey vehicle, insured by Petitioners, is an uninsured/underinsured motor vehicle as defined in the subject insurance policy itself and by Section 627.727, Florida Statutes (1989) since the bodily injury liability coverage available to Respondent is less than the total damages suffered by reason of Mrs. Warren's death resulting from the accident. (This is provided that Respondent can prove damages in excess of the $50,000 in liability coverage.)

Pursuant to Florida law an injured party can recover both liability insurance benefits and uninsured motorist benefits under the same policy, in circumstances where a passenger is injured or killed by the negligence of the insured driver and the passenger's damages exceed the available liability insurance limits. The provision of the subject policy which excludes the insured vehicle from its definition of "uninsured vehicle" should be declared invalid.

ARGUMENT

Provided that Respondent can ultimately prove damages of more than $50,000, uninsured motorist coverage should be available from Petitioners to satisfy those damages, pursuant to the policy issued by Petitioners, case law, and pursuant to Section 627.727(3)(b), Florida Statutes (1989).

The policy provisions for uninsured motorists coverage, with amendment, under the subject policy, provide, in pertinent part, as follows:

> We will pay damages that the insured is legally entitled to recover from the owner or operator of an uninsured motor vehicle because of bodily injury suffered by the insured and caused by accident. Liability for such damages must arise out of the ownership, maintenance or use of the uninsured motor vehicle.
>
> We will make payment under this coverage only after the limits of liability have been used up under all applicable bodily injury liability bonds or policies.
>
> * * *

Definition

Uninsured motor vehicle means a highway vehicle or trailer of any type:

> * * *
>
> 2. to which a bodily injury liability insurance policy or bond applies at the time of the accident, but the limits are less than the total damages for bodily injury or death resulting from the accident. (emphasis supplied)

* * *

Who Is An Insured

> You and a relative are insured. Anyone else while occupying your car if the occupancy is (or was reasonably believed to be) with your permission or while occupying a non-owned car which you are operating with the owner's permission is also an insured. ...

This policy amendment, concerning the definition of uninsured motor vehicle (this amendment is found at R 10, Amendment Endorsement - Florida) conforms to the requirements of Section 627.727(3)(b), Florida Statutes (1989), the uninsured and underinsured vehicle coverage provision:

> (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:
>
> * * *
>
> (b) has provided limits of bodily injury liability for its insured which are less than the total damages sustained by the person legally entitled to recover damages. (emphasis supplied)

The clear language of the policy states that an "uninsured motor vehicle" includes a vehicle to which a liability insurance policy applies, but the limits of liability are less than the total damages incurred in the accident. That is exactly the situation in this case. The statute clearly includes in the definition of "uninsured motor vehicle" an insured motor vehicle, where the

liability insurance limits are less than the damages sustained by the person legally entitled to recover damages. Again, that is exactly the situation in this case.

Petitioners rely heavily upon the following policy provision, to-wit:

> "an uninsured motor vehicle does not mean:
> 1. your car," where "your car" is the vehicle named on the declarations page and insured under the policy. (R at 21-27)

Florida courts, conforming to Mullis vs. State Farm Mut. Auto. Ins. Co., 252 So.2d 229 (Fla. 1971), have not shied away from invalidating policy provisions which would attempt to limit the definition of "uninsured motor vehicle" in a way contrary to the statutory definition. See also, Brown vs. Progressive Mutual Insurance Co., 249 So.2d 429 (Fla. 1971). Since the above policy provision is in conflict with Section 627.727(3)(b), Florida Statutes (1989), it, too, should be voided.

Travelers Insurance Companies vs. Chandler, 569 So.2d 1337 (Fla. 1st DCA 1990), is almost directly on point. Like here, Chandler was injured in a one-car accident while a passenger in a car owned and driven by Williams. The accident was due entirely to the negligence of Williams, who Travelers' insured. Chandler and Williams were not related and no family exclusion provision applied. The Travelers policy provided liability coverage of $300,000 for each occurrence, and UM coverage of $300,000 for each accident. Pursuant to a settlement, Travelers paid Chandler $240,000 in liability benefits and an additional $60,000 in

liability benefits to another passenger injured in the same accident. Chandler then sued Travelers for payment of $60,000 in UM benefits, as his damages exceeded the amount of liability benefits paid him. Travelers refused to pay the uninsured/underinsured claim, in part, because the policy language excluded as an insured motor vehicle, "your [the insured's] car," defined in part as "any vehicle described on the declarations page of this policy with premium charges showing which coverages apply." (see Footnote 3 at page 1339 of decision). The First District rejected Travelers' argument and held as follows on pages 1338-1339 of the opinion:

> Travelers also argues, however, that because another provision in the policy excludes the motor vehicle in question from the definition of an uninsured motor vehicle, Chandler is disentitled to UM benefits. We can not agree. UM coverage is required by Section 627.727(1) to be provided to all persons who are insured under a policy for basic liability coverage. Valiant Ins. Co. vs. Webster, 567 So.2d 408, 409-10 (Fla. 1990); Mullis vs. State Farm Mut. Auto. Ins. Co., 252 So.2d 229 (Fla. 1971); Auto-Owners Ins. Co. vs. Bennett, 466 So.2d 242 (Fla. 2d DCA 1984). Exclusions to UM coverage are not enforceable if the injured person is covered by the BIL provisions of the policy. Mullis, 252 So.2d at 233-34.
>
> In the instant case, Chandler was undisputedly covered under the BIL provisions of the policy, in that he received $240,000 in such benefits. Therefore, in accordance with Mullis, any attempt to bar him from UM coverage would be contrary to public policy....

In Chandler, supra, the First District reasoned that the policy endorsement defined an uninsured motor vehicle as a vehicle

"to which a bodily injury liability insurance policy or bond applies at the time of the accident, but the limits are less than the total damages for bodily injury or death resulting from the accident." The court further reasoned that by the very terms of the policy, the automobile in which Chandler was injured was an underinsured motor vehicle. The court also noted that the 1989 amendment to Section 627.727, Florida Statutes, is very similar to the definition in the policy. Here, the policy definition of "uninsured motor vehicle" is identical to the definition in the Chandler case. In fact, Travelers is the insurer in the Chandler case and this case. The result in this case should be no different than the result in Chandler.

Travelers also relies on Brixius vs. Allstate Insurance Company, 589 So.2d 236 (Fla. 1991), Reid vs. State Farm Fire & Cas. Co., 352 So.2d 1172 (Fla. 1977), and other "family exclusion" cases. Those cases are not on point. Those cases involve family exclusion provisions in insurance policies which the courts upheld. Because of the valid family exclusion provisions, there was no liability coverage in those cases; therefore, Mullis, supra, did not apply and the courts in those cases upheld exclusions to uninsured/underinsured coverage. Additionally, the court in Reid, supra, noted that the reason for permitting the family exclusion in automobile liability insurance policies is to protect the insurer from overly friendly or collusive law suits between family members. That rationale certainly has no application to this case.

Insurance policies are generally construed liberally in favor

of the insured and strictly against the insurer. State Farm Mut. Auto. Ins. Co. vs. Mallard, 548 So.2d 733 (Fla. 3d DCA 1989), and cases cited therein. Additionally, the favored construction of an insurance contract is to uphold uninsured motorist coverage. General Insurance Company of Florida vs. Sutton, 396 So.2d 855 (Fla. 3d DCA 1981).

For the above reasons, provided that Respondent can prove damages at trial which are in excess of the liability coverage limits of $50,000 for which he has already settled, he would be entitled to UM coverage for the damages which exceed $50,000, up to the limits of the UM coverage.

The First District Court's ruling was correct.

The certified question should be answered in the affirmative.

CONCLUSION

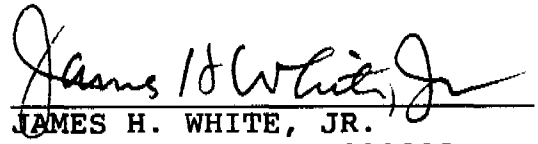
The motor vehicle insured by Travelers in this case is clearly included within the definition of "uninsured motor vehicle" as that term is defined in Section 627.727(3)(b), Florida Statutes (1989), and within the policy itself. Florida case law specifically authorizes the recovery of UM benefits by claimants in situations such as this, provided those claimants can prove damages in excess of the BIL limits.

Based upon the foregoing reasons, Respondent is entitled to UM benefits, provided that he can prove damages in excess of $50,000.

The certified question should be answered in the affirmative and the decision of the District Court approved.

DATED this 8th day of May, 1995.

STAATS, WHITE & CLARKE



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U. S. Mail to Cecil L. Davis, Jr., Esq., R. William Roland, Esq., P. O. Drawer 229, Tallahassee, FL 32302-0229; George A. Vaka, Esq., P. O. Box 1438, Tampa, FL 33601, and Louis K. Rosenbloum, Esq., P. O. Box 12308, Pensacola, FL 32581, on this 8th day of May, 1995.

JAMES H. WHITE, JR.