IN THE SUPREME COURT OF FLORIDA

THE TRAVELERS INSURANCE COMPANY AND THE PHOENIX INSURANCE COMPANY,

Petitioners,

v.

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

Respondent.

CASE NO: 85,337

REVIEW OF A CERTIFIED QUESTION
OF THE FIRST DISTRICT COURT OF APPEAL

PETITIONERS' INITIAL BRIEF

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PRELIMINARY STATEMENT

Petitioner, The Travelers Insurance Company and The Phoenix Insurance Company, will be referred to herein as "Travelers" and "Phoenix" or "Petitioners". Respondent will be referred to as "Respondent" or "Warren". References to the record on appeal will be to the pages on which the reference appears, as follows: (R.)

STATEMENT OF THE CASE AND OF THE FACTS

Petitioners, The Travelers Insurance Company and The Phoenix Insurance Company, appeal the decision of the First District Court of Appeal below which reversed a final summary judgment entered by the trial court in favor of the Petitioners. In the final summary judgment, the trial court held that Petitioners were entitled to judgment as a matter of a law and that Respondents were not entitled to collect uninsured motorist benefits under the circumstances of this case since the terms of the automobile policy in question prohibited recovery of liability and uninsured motorist or underinsured motorist coverage under the same policy. (R 52-53)

The decedent, Dianna Lynn Warren, died after injuries sustained from a single car accident on April 5, 1990 while a passenger in a motor vehicle owned by Edward Chancey and driven by Mr. Chancey's daughter, Celeste Chancey Bryant. At the time of the accident, the Chancey motor vehicle was insured under a policy issued by The Travelers Insurance Company and The Phoenix Insurance Company. The policy provided bodily injury liability coverage in the amount of $50,000.00 for each person and uninsured motorist coverage in the amount of $50,000.00 for each person.

The Respondent, as personal representative of the estate of the decedent, alleged that decedent's injuries and death were caused by the negligent operation, use and/or maintenance of the Chancey motor vehicle. Petitioners settled with the Respondent for the full liability policy limits of $50,000.00. Respondent reserved all claims against Petitioners for uninsured motorist

coverage under the policy insuring the Chancey vehicle. (See paragraph 8 of Respondent's Complaint and paragraph 8 of Petitioners' Answer to Complaint)

Respondent then sought to recover uninsured motorist benefits against the Petitioners under the same automobile policy for the full uninsured motorist policy limits available of $50,000.00. Petitioners denied that Respondent was entitled to uninsured motorist coverage under the policy on the grounds that the Chancey motor vehicle could not be an insured motor vehicle and an uninsured motor vehicle under the same policy. (See Joint Stipulation of Facts; R 35-36). The policy in question excludes the insured vehicle from the definition of an uninsured vehicle. (R 21-27, and particularly page 9 of the automobile policy in question)

Under Count I of the Respondent's Complaint filed against the Petitioners, Respondent sought a declaration from the trial court that uninsured motorist coverage was available to him under the same automobile policy covering the Chancey vehicle from which Respondent had already received the full $50,000.00 liability coverage limits. Petitioners filed their Motion for Summary Judgment regarding Count I of the Complaint. (R 32-36) Respondent also filed his Motion for Summary Judgment regarding the same Count. (R 49-51)

On August 4, 1993, the trial court entered a Final Summary Judgment, finding there were no genuine issues of material fact and that Petitioners were entitled to judgment as a matter of law. The trial court held that under the provisions of the automobile policy

in question, the Respondent was prohibited from recovering both liability and uninsured motorist coverage under the same policy. The trial court also held that its decision was controlled by Brixius v. Allstate Insurance Company, 589 So. 2d 236 (Fla. 1991). (R 52-53)

Respondent filed a timely notice of appeal on August 20, 1993. (R 55-57) On February 21, 1995, the First District Court of Appeal entered its opinion and reversed the trial court's Final Summary Judgment. The District Court held that precedent mandated its reversal and cited its previous decision in Travelers Ins. Co. vs. Chandler, 569 So. 2d 1337, Fla. 1st DCA 1990). The District Court of Appeal also certified to this court the following question to be one of great public importance:

> **May an injured person who is entitled to recover bodily injury liability benefits, but whose damages exceed the policy limits of 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"?**

Additionally, on February 21, 1995, the District Court granted Respondent's Motion for Appellate Attorney's Fees.

On March 13, 1995, the Petitioners filed with this court a timely Notice to Invoke Discretionary Jurisdiction.

SUMMARY OF THE ARGUMENT

Respondent is not entitled to collect both liability insurance benefits and uninsured motorist benefits under the same policy of automobile insurance, based on the theory that the insured vehicle under which he recovered liability benefits becomes

uninsured to the extent that his damages exceed the liability coverage available. The policy at issue in this case provides uninsured motorist benefits to an insured under the policy for damages the insured is entitled to recover from the owner or operator of an uninsured vehicle. However, the policy also excludes from the definition of uninsured vehicle the car which is insured under the policy.

In several recent decisions, the Florida Supreme Court has upheld the validity of this policy provision and has reaffirmed the well-established rule in Florida that a vehicle cannot be insured and uninsured under the same automobile insurance policy. The only decision cited by the District Court in support of Respondent's right to recover double benefits is in conflict with previous decisions of this court and, therefore, is not determinative of the instant case. On this basis, this court should reverse the District Court's decision and affirm the trial court decision below which granted final summary judgment in favor of petitioners.

ARGUMENT

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

The District Court incorrectly concluded that Respondent is entitled to collect uninsured motorist benefits from Petitioners under the circumstances of this case. Respondent has already

collected the $50,000 policy limits of the driver's bodily injury liability coverage under the subject policy. Respondent is not entitled to recover an additional $50,000 in uninsured motor vehicle benefits under the same policy. Such a result would be inconsistent with the purpose of Florida's uninsured motor vehicle insurance law, with the terms of the insurance policy at issue in this case, and with the controlling legal authority in Florida. The District Court's decision should be reversed and the final summary judgment entered in favor of the petitioners by the trial court should be affirmed.

There is no dispute that the death of Respondent's decedent was caused by the sole negligence of an insured driver under the subject policy. The insured was driving a car specifically covered under the policy, and Respondent's decedent was a passenger in the insured car. There was no other vehicle involved in the accident. Petitioners did not contest Respondent's right to recover the per person limit of the bodily injury liability coverage provided to the insured driver under the policy, and the full amount of such coverage has been paid pursuant to a settlement agreement.[1]

Respondent now claims, however, that because the liability insurance coverage limits provided by the policy have been

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[1] It is important to note that petitioners did not pay respondent benefits under the Liability Insurance coverage of the policy because respondent's decedent was an insured for purposes of such liability coverage. Rather, the insured under the Liability Insurance coverage provided by the policy was the driver of the car, a resident relative of the named insured, who was legally responsible for damages appellant suffered. Under the terms of the Liability Insurance coverage, petitioners were responsible for paying such damages on behalf of its insured, up to the limits of the liability coverage. (R at 19.)

exhausted without satisfying the total amount of his claim for damages, the car in which his decedent was riding is changed from an insured into an uninsured motor vehicle, and he is now entitled to recover uninsured motor vehicle benefits under the same policy. The District Court incorrectly determined that Petitioners are required to pay Respondent uninsured motorist benefits under these circumstances. Respondent is not entitled to uninsured motorist benefits in this case because a vehicle simply cannot be both an insured vehicle for liability insurance purposes and an uninsured vehicle for uninsured motor vehicle insurance under the same policy. The automobile policy in question provides in relevant part on page 9 of the policy as follows:

> "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) (emphasis in original.)

This provision plainly provides that an uninsured vehicle cannot be the same vehicle as the vehicle insured under the policy. This policy provision applies to this case because Chancey's vehicle involved in this accident was a motor vehicle insured under the liability coverage of the Travelers' policy. Thus, Chancey's automobile is excluded from the definition of "uninsured motor vehicle" by the express language of this policy. The question remains as to whether this policy provision is against public policy or unauthorized by Florida's uninsured motorist statute.

Beginning with Reid v. State Farm Fire & Casualty Co., 352 So. 2d 1172 (Fla. 1977), this court has specifically upheld automobile policy provisions such as the one in question which provide that an "uninsured motor vehicle" may not be the same

vehicle defined in the policy as the insured motor vehicle. In Reid, the plaintiff was a passenger in an automobile driven by her sister and owned by her father. The plaintiff contended that she was entitled to liability coverage under the automobile policy insuring her father's vehicle. In the alternative, she contended that if she was not entitled to liability coverage under the policy because of the family-household exclusion, she was then covered by the uninsured motorist provision of the policy. This court framed the issued on appeal to be whether an automobile can, at the same time, be both an insured and an uninsured motor vehicle due to the operation of Florida Statues and a valid liability exclusion provision contained in an insurance policy.

This court held that the plaintiff was not entitled to liability coverage under the policy because of the family-household exclusion. The court noted that the reason for this exclusion is to protect the insurer from over friendly or collusive lawsuits between family members. Secondly, this court held that the plaintiff could not recover uninsured motorist coverage under the policy because of the exclusion which provided that an "uninsured motor vehicle" may not be the vehicle defined in the policy as the insured motor vehicle. The court stated as follows:

> We hold that the family car in this case is not an uninsured motorist vehicle. It is insured and it does not become uninsured because liability coverage may not be available to a particular individual. 352 So. 2d, at 1173.

While explaining the general rule under Mullis v. State Farm Mutual Automobile Ins. Co., 252 So. 2d 229 (Fla. 1971), that

an insurer may not limit the applicability of uninsured motorist protection, this court in Reid held as follows:

> "We believe, however, that the present case is factually distinguishable from previous cases and is an exception to the general rule. Here the family car, which is defined in the policy as the insured motor vehicle, is the same vehicle which appellant, under the uninsured motorist provision of the policy, claims to be an uninsured motor vehicle. We find no merit in appellant's argument that this exclusion conflicts with section 627.727 (Florida Statues) (1975). 352 So. 2d, at 1174. (Emphasis supplied)

Similarly, in Brixius v. Allstate Ins. Co., 589 So. 2d 236 (Fla. 1991), the plaintiff was a passenger in her own vehicle when the vehicle was being driven by an uninsured friend at the time of the accident. The plaintiff sought to recover liability insurance benefits under her policy with Allstate Insurance Company because her friend who was driving her car was uninsured. The plaintiff was unable to recover liability benefits under the Allstate policy because the policy excluded liability coverage for the injuries sustained by a named insured. The plaintiff contended that because the policy excluded her vehicle from liability coverage for her injuries, then her vehicle was uninsured as to her and she was entitled to uninsured motorist coverage under the same policy. However, under the uninsured motorist provisions of the policy, the plaintiff was excluded from coverage because "an uninsured auto is not a vehicle defined as an insured auto under the liability portion of this policy." Id. at 237.

This court in Brixius had to consider separately the viability of (1) the family exclusion applicable to liability coverage and (2) the policy provision excluding the vehicle insured

for liability coverage under an automobile insurance policy from the definition of an uninsured motor vehicle for purposes of payment of uninsured motorist coverage under the same policy. Id. at 237. In approving both of these policy exclusions, the supreme court in Brixius revisited its opinion in Reid v. State Farm Fire & Casualty Co., 352 So. 2d 1172 (Fla. 1977), and reaffirmed the principle in Reid that "a vehicle cannot be both an insured and uninsured vehicle under the same policy." Brixius, 589 So. 2d at 237 (quoting Allstate Insurance Co. v. Boynton, 486 So. 2d 552, 555 n. 5 (Fla. 1986)). In the process, this court expressly disapproved the holding of the Fifth District Court of Appeal in Jernigan v. Progressive American Insurance Co., 501 So. 2d 748 (Fla. 5th DCA 1987), that "'a vehicle can be insured and uninsured under the same policy.'" Brixius, 589 So. 2d at 237. Accord Palacino v. State Farm Mutual Automobile Ins. Co., 598 So. 2d 239 (Fla. 1991), appr'g 562 So. 2d 837 (Fla. 4th DCA 1990); Allstate Ins. Co. v. Croakman, 591 So. 2d 297 (Fla. 1st DCA 1991).

This court held that the relevant policy provisions were substantially the same as those upheld in Reid and upheld the validity of the uninsured motorist provisions which provided that "an uninsured auto is not a vehicle defined as an insured auto under the liability portion of this policy."

Likewise, in Smith v. Valley Forge Ins. Co., 591 So. 2d 926 (Fla. 1992), the plaintiff was injured while a passenger in her own automobile driven by her adult daughter. Her daughter did not reside with her and did not own a car or have liability insurance. The plaintiff's insurance policy provided for both liability and

uninsured motorist coverage. The plaintiff's insurance policy contained a family household exclusion which prevented her from recovering under her liability policy. The policy also had within the uninsured motorist portion of the policy a definition of an uninsured motor vehicle which excluded any vehicle which is "owned by or furnished or available for the regular use of you or any family member." Based upon both Reid and Brixius, this court found that this policy provision precluded uninsured motorist coverage for the plaintiff.

Further, in Hartland v. Allstate Insurance Co., 575 So. 2d 290 (Fla. 1st DCA 1992) appr'd 592 So. 2d 677 (Fla. 1st DCA 1991), the First District Court of Appeal considered a case involving the question of whether the daughter of the named insureds was entitled to uninsured motorist benefits under an automobile insurance policy issued to her parents. The daughter, who was insured under her parents' policy as a resident relative, was injured while a passenger in a car insured under her parents' policy. The car was being driven by an uninsured friend. The daughter claimed uninsured motor vehicle benefits under her parents' policy because the driver of the car was uninsured. Summary judgment was entered in favor of Allstate Insurance Company denying uninsured motor vehicle benefits, and this court affirmed. 575 So. 2d at 290-91. At issue in Hartland were two policy exclusions. First, the family exclusion applicable to liability coverage was raised by Allstate as a bar to the payment of benefits to the injured daughter under the liability insurance portion of her parents' policy. Id. at 291. In addition, Allstate claimed that the daughter's recovery

under the uninsured motor vehicle insurance coverage of the parents' policy was barred by a second policy exclusion, a policy exclusion which is virtually identical to the provision at issue in this case and "which stated that an uninsured automobile could not be a vehicle defined as an insured automobile under the liability portion of the policy." Id. In affirming summary judgment for Allstate, the district court observed that "the exclusions from coverage relied upon by the appellees [insurance carriers] have been consistently upheld." Id.(emphasis added.) The result in the Hartland case was to deny the injured daughter any benefits under her parents' insurance policy as to both liability and uninsured coverage. In approving the First District's opinion in Hartland, the Supreme Court relied on its opinion in Brixius v. Allstate Ins. Co., 589 So. 2d 236 (Fla. 1991). 592 So. 2d at 677.

Since the decision of this court in Brixius v. Allstate Ins. Co., supra, the Florida legislature has not amended the uninsured motorist statute to provide that an injured party can recover both liability coverage benefits and uninsured or underinsured motorist benefits under the same policy in a case involving a single-car accident. The legislature did amend section 627.727(3), Fla. Stat., in 1992 to specifically address the particular situation found in Brixius. This 1992 amendment would not apply to this case because it does not address the factual circumstances of this case and the accident in question occurred on April 5, 1990, well before the amendment. Section 627.727(3)(c), Florida Statutes (1992), provides 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 insureds' household. (emphasis supplied)

Although this amendment broadens uninsured motorist coverage under the uninsured motorist statute for Brixius type situations involving class I insureds which occur after this 1992 amendment, it clearly and plainly does not provide for a party to recover uninsured motorist benefits after the same party has already collected liability insurance coverage benefits under the same policy for the same accident. Further, this amendment does not define an "uninsured motor vehicle" to include an "insured vehicle" when the liability insurer has provided liability coverage to the negligent operator of the vehicle and has paid the entire liability insurance coverage benefits to the injured party or parties. It only allows an "uninsured vehicle" to include an "insured motor vehicle" when liability coverage has been excluded under the policy under the circumstances described in the amendment. Petitioner submits this is further evidence that the legislature, since this court's decisions in Reid and Brixius, has not chosen to broaden the uninsured motorist statute to provide that a motor vehicle can be insured and uninsured under the same policy for the same accident under the circumstances where the liability insurance coverage limits have been paid out to the injured party or parties. As noted earlier, to allow a claimant to recover liability insurance coverage and uninsured motorist

coverage under the same automobile insurance policy for the same accident would have the effect of doubling the liability insurance coverage under the policy. Petitioners submit this was not the intent of the legislature under section 627.727, Florida Statutes, nor was it the intent of the insurance policy in question.

The District Court held in its decision below that its previous decision in Travelers Ins. Co. v. Chandler, 569 So. 2d 1337 (Fla. 1st DCA 1990), controlled in this case. In Chandler, the plaintiff, Charles Chandler, was injured in a one car accident while a passenger in a vehicle owned by Joan Williams and insured under a policy issued by Travelers to Joan and James Williams. The parties stipulated that the plaintiff's injuries exceeded $300,000.00. The policy insuring the automobile provided bodily injury liability coverage in the amount of $300,000.00 for each occurrence and UM coverage of $300,000.00 for each accident. Based upon a settlement agreement, Travelers paid $240,000.00 in bodily injury liability benefits to Mr. Chandler and an additional $60,000.00 in such benefits to another passenger injured in the same accident. The plaintiff then filed suit against Travelers for payment of UM benefits in the amount of $60,000.00, arguing that his damages exceeded the amount of bodily injury liability benefits made available to him.

Travelers argued in Chandler that a provision in the policy excluded the insured motor vehicle of Mr. and Mrs. Williams from the definition of an uninsured motor vehicle. The District Court refused to uphold this provision and held that 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. The District Court in Chandler also held that exclusions to UM coverage are not enforceable if the injured person is covered by the bodily injury liability provisions of the policy. The court cited Mullis as the principal authority for its holding and stated that since the plaintiff was covered under the liability portion of the policy, any attempt to bar the plaintiff from UM coverage would be contrary to public policy.

Petitioners contend that a careful review of the Mullis decision will show that the reasoning and public policy statements found within that decision do not support the conclusion reached by the District Court in the Chandler decision or in the decision below that a party is entitled to liability insurance coverage benefits and uninsured motorist benefits under the same policy in a case involving a single car accident.

This court held in Mullis that "uninsured motorist coverage ... is statutorily intended to provide the reciprocal or mutual equivalent of automobile liability coverage ...." Mullis, 252 So. 2d at 237-38. This court, for example, stated in Mullis, at 233 as follows:

> "When uninsured motorist coverage was obtained by Shelby Mullis pursuant to Section 627.0851 for himself as the named insured, for his spouse and for his or his spouse's relatives who are residents of his household, they were given the same protection in case of bodily injury as if the uninsured motorist had purchased automobile liability insurance in compliance with the Financial Responsibility Law." (emphasis supplied)

In the case at bar, however, the alleged uninsured motorist and owner of the vehicle, Edward Chancey, had purchased automobile

liability insurance in the amount of $50,000.00 which exceeded the requirements of the Financial Responsibility Law, and these liability insurance coverage limits have been paid in full to the Respondent.

This court went on to state in Mullis, at 234, as follows:

> Insurers or carriers writing automobile liability insurance and reciprocal uninsured motorist insurance are not permitted by law to insert provisions in the policies they issue that exclude or reduce the liability coverage prescribed by law for the class of persons insured thereunder who are legally entitled to recover damages from owners or operators of motor vehicles because of bodily injury.

This court further explained its reason for denying such exclusions and exceptions by quoting from Judge Rawls in Standard Accident Insurance Co. v. Gavin, 184 So. 2d 229, at 232, as follows:

> "In Davis v. United States Fidelity & Guaranty Company [cited above] this Court held that the uninsured motorist statute, Section 627.0851 established the public policy of this state to be that every insured is entitled to recover for the damages he or she would have been able to recover if the offending motorist had maintained a policy of liability insurance. Insurance companies are without power to insert provisions in the policy which would restrict the coverage afforded by the policy in a manner contrary to the intent of the statute." (emphasis supplied)

Again, in the case at bar, the offending motorist had maintained a policy of liability insurance at the time of the accident, and the limits of the liability insurance coverage under the policy have been paid in full to the Respondent. Therefore, it simply cannot be validly argued in this case that the public policy of the Financial Responsibility Law, Chapter 324, Fla. Stat., and its counterpart, the uninsured motorist statute, section 627.0851,

Fla. Stat., (now section 627.727, Fla. Stats.) has not been upheld in this case under the automobile insurance policy provided by the Petitioners.

Mullis provides as a general rule that exclusions of uninsured motorist coverage are impermissible as to class I insureds. See Mullis, supra, and Nationwide Mutual Fire Insurance v. Phillips, 609 So. 2d 1385 (Fla. 5th DCA 1992). Class I insureds consist of the named insured and resident family members. Class II insureds consist of those who are insured only because they are drivers or passengers in an insured vehicle with the consent of the named insured. See Mullis, supra, and Florida Farm Bureau Casualty Company v. Hurtado, 580 So. 2d 1314 (Fla. 1991). The focus of Mullis was principally upon class I insureds. As to class I insureds, the named insured and resident family members, Mullis held that such an insured was covered by uninsured motorist coverage "whenever and wherever bodily injury is inflicted upon him by the negligence of an uninsured motorist." Mullis, at 238. This court in Mullis did not extend this broad principle of protection to class II insureds who did not purchase the automobile policy, who were not resident family members of the named insured, and who were permissive passengers in the vehicle.

It is important to note that the passenger involved in the case at bar whose injuries and death led to this claim was a class II insured, not a class I insured. She was not the named insured who purchased the coverage, nor was she a resident family member of the named insured. She was a permissive passenger riding in a vehicle owned by Mr. Chancey and driven by Mr. Chancey's daughter.

Under Mullis, a class II insured is simply not entitled to be included within the broad principles and public policies stated within that decision.

Further, it is important to note that all of the passengers in the Reid, Brixius, Hartland, and Smith decisions, supra, rendered by this court were class I insureds, entitled to the full protection of this court's decision in Mullis. Even so, this court upheld in those decisions the "family law exclusions" under the liability coverage of the policy which resulted in no liability coverage for the class I insured and further upheld the "your car" exclusions under the uninsured motorist coverage of the policies so that these class I insureds were also not entitled to uninsured motorist benefits under the policy. Although this result seemed harsh, this court found that the separate provisions of the liability coverage and uninsured motorist coverage were not violative of public policy, legislative intent, or the Mullis decision, and should be upheld.

If the Supreme Court in Reid, Brixius, Smith, and Hartland, supra, upheld the validity of "your car" exclusions under UM provisions almost identical to the provisions in question and applied this to class I insureds who were passengers and who could not recover liability benefits because of the "family exclusion", then it is logical that the "your car" exclusion in the uninsured motorist policy in this case is valid under the circumstances of a class II insured who was a passenger and who could recover liability benefits under the same policy. Again, a class II insured is entitled to less protection under Mullis than a class I

insured for uninsured motorist purposes. If the District Court's rationale in the decision below and in Chandler are followed, then an illogical result is created such that a class I insured actually could be excluded (before the 1992 legislative amendment) from both liability and uninsured motorist coverage if he is a passenger in a named vehicle, but a class II insured occupying the same position could recover under both the liability coverage and the uninsured motorist coverage under the same policy, thus making a double recovery. This result would clearly not be consistent with Mullis, supra, or the provisions of the uninsured motorist statute.

Further, such a result was specifically disapproved by the court in Fidelity & Casualty Co. v. Streicher, 506 So. 2d 92 (Fla. 2d DCA 1987), when it refused to allow the injured plaintiff to recover uninsured motor vehicle benefits under the same policy under which she had recovered the full policy limits of bodily injury liability coverage. The court in Streicher observed

> But we do not feel it was the intent of the legislature to require that an automobile insurance policy provide both liability and underinsured motorist coverage to the same injured party. The result which the plaintiff seeks in this case would have the effect of doubling the limits of liability under the Fidelity policy. Id. at 93.

In another case in which the operative facts were identical to those in the case at bar, Peel v. Allstate Insurance Co., 522 So. 2d 505 (Fla. 2d DCA 1988), the court likewise refused to allow double recovery. And, finally, in Nicholas v. Nationwide Mutual Fire Insurance Co., 503 So. 2d 993, 994 (Fla. 1st DCA 1987), the court held that

> a plaintiff cannot recover liability coverage on a vehicle insured by a policy and then claim that the same vehicle is "uninsured" under the same policy for the purpose of recovering uninsured motorist benefits under that policy.[2]

The only case cited by the District Court in support of its decision below that Respondent is entitled to recover both liability and uninsured motorist benefits under the same policy is Travelers Insurance Co. v. Chandler, 569 So. 2d 1337 (Fla. 1st DCA 1990). Petitioners respectfully submit that based upon the above analysis, the decisions in Chandler and the District Court below were incorrect, as they misapplied the principles of Mullis and were in conflict with Reid, Brixius, Smith, and Hartland, supra.

An insured buys liability coverage to protect himself and defined insureds under the policy from injuries caused by his negligence to others and to compensate others for their damages. An insured buys uninsured motorist coverage to protect himself and other defined insureds against "others" who may negligently injure him and to obtain compensation from those negligent parties who have failed to insure themselves for their negligent acts. It

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[2] The cases in which an injured party is trying to recover both liability and uninsured motorist coverage under the same policy must be distinguished from cases such as Woodard v. Pennsylvania National Mutual Insurance Co., 534 So. 2d 716 (Fla. 1st DCA 1988), review dismissed, 542 So. 2d 989 (Fla. 1989), where there were two vehicles involved in the accident and the passenger who had obtained liability benefits due to the negligence of the driver of the vehicle he occupied was claiming that um coverage should be provided as to the second driver's negligence where the second driver was uninsured; it was the second driver's vehicle that was considered an "uninsured motor vehicle", not the vehicle owned by the driver which was the insured vehicle for liability coverage; and Deville v. Allstate Insurance Co., 603 So. 2d 556 (Fla. 3d DCA 1992), where the injured plaintiff recovered liability benefits from the policy of the owner of the vehicle and um benefits from the completely separate insurance policy of the driver of the vehicle.

would appear to be inherently unfair to the "insurer" in a situation where the insured owner of a car has purchased liability and uninsured motorist coverage under the same policy to allow a class II passenger to recover the full limits under the liability coverage of the insured owner of the car and then allow the insured passenger to force the "insurer" to provide uninsured motorist benefits under the same policy because the insured owner purchased liability coverage which was not sufficient to cover all of the damages suffered by the passenger.

The passenger of the car involved in the subject accident did not purchase the automobile policy in question. In such a situation, as in this case, Petitioner submits that the clear intent of the policy as to class II insureds under uninsured motorist coverage was to protect those insureds under the UM portions of the policy from damages caused by the negligence of "others" who are third parties not insured under the same policy. It was not the intent of the uninsured motorist coverage in question to protect a passenger/class II insured from damages caused by the negligence of an insured owner or driver of the car who has purchased liability coverage under the policy and whose liability coverage has been paid in full for the damages suffered by the passenger.

This court should not impose upon the Petitioners a liability for uninsured motorist coverage which has not been provided under the policy nor required by the uninsured motorist statute. The Respondents's claim for uninsured motorist benefits is not supported by the clear provisions of the policy, the

legislative intent of the uninsured motorist statute, or this court's past decisions explaining the public policy of the uninsured motorist statute and upholding "your car" exclusions under uninsured motorist policy provisions.

CONCLUSION

For the reasons stated, Petitioners, The Travelers Insurance Company and The Phoenix Insurance Company, request that this court reverse the order of the District Court below and uphold the trial court's Final Summary Judgment in favor of Petitioners and against Respondent. Petitioners also request that this court reverse the award of the Respondent's appellate attorney's fees which were dependant upon a judgment in his favor.

Respectfully submitted,

McCONNAUGHHAY, ROLAND, MAIDA & CHERR, P.A.

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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 **James H. White, Jr.**, Esquire, 229 McKenzie Avenue, Panama City, FL 32401-3128, **George K. Vaka, Esquire**, Post Office Box 1438, Tampa, Florida 33601, and to **Louis K. Rosenbloum, Esquire**, Post Office Box 12308, Pensacola, Florida 32581, this 11th day of April, 1995.

CECIL L. DAVIS, JR.