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' REPLY BRIEF

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PRELIMINARY STATEMENT

Petitioners, 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.)

SUMMARY OF THE ARGUMENT

Respondent, as a result of the death of the decedent who was a passenger in this single car accident, has received the full liability limits covering the owner and driver of the car and now seeks UM benefits under the same policy. Respondent is not entitled to collect both liability insurance benefits and uninsured motorist benefits under the single policy of insurance covering this single vehicle. The Respondent's theory is that the same insured vehicle under which he recovered liability benefits becomes uninsured to the extent that his damages exceed the liability coverage. 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 has a "your car" exclusion which excludes from the definition of uninsured motor vehicle the car which is insured under the policy. Thus, the sole vehicle involved in this accident cannot be an insured and uninsured motor vehicle under this single policy of insurance covering the automobile. This "your car" exclusion is consistent with the legislative intent of the UM statute.

In several recent decisions, the Florida Supreme Court has upheld the validity of this "your car" exclusion and has reaffirmed the well-established rule in Florida that a single vehicle cannot be both insured and uninsured under a single 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"

Respondent contends that the sole motor vehicle involved in this accident which was insured for liability purposes is an "uninsured motor vehicle" under the same automobile insurance policy for purposes of UM coverage and that this result is mandated by section 627.727(3)(b), Fla. Stat., and the provisions of the policy in question. Thus, Respondent argues that the sole automobile in question is both insured and uninsured under the same policy. This argument ignores the legislative intent of the UM statute, the provisions of the policy in question which were bargained and paid for by the owner of the car (not the Respondent or the decedent), past decisions of this court, and the fact that the decedent chose not to purchase any UM coverage for herself that would have provided coverage under the circumstances of this case.

Petitioners agree that the UM statute was amended in 1984 to provide "excess over" uninsured motorist coverage without any setoff for liability coverage. Section 627.727(1), Fla. Stat.

(1984). Petitioners also agree that section 627.727(3)(b), Fla. Stat., was amended in 1989 to provide as follows:

> (3) For the purpose of this coverage, the term "uninsured motor vehicle" shall, subject to the terms and conditions of 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.

Petitioners submit that the intent of this statute was to allow an injured plaintiff who had "purchased" UM benefits under an automobile insurance policy or was a spouse or resident family member of the named insured to be able to recover these benefits under his or her own policy of UM coverage if the tortfeasor's separate policy providing liability coverage was not sufficient to cover the plaintiff's damages. Under those circumstances, the tortfeasor's insured vehicle would be an uninsured motor vehicle for purposes of the plaintiff's own UM policy if the plaintiff had purchased such UM protection for himself or was the spouse, resident family member, or permissive driver of the named insured. See, for example, State Farm Mutual Automobile Ins. Co. v. Anderson, 332 So. 2d 623 (Fla. 4th DCA 1976), cert. denied 345 So. 2d 428 (Fla. 1977). In Anderson, the court interpreted a predecessor to the above statutes which provided that, for purpose of UM coverage, the term uninsured motor vehicle shall be deemed to include an insured motor vehicle when the liability insurer has provided liability limits less than the UM limits under the injured person's UM coverage. The court ruled that the intent of the legislature in adopting the statute was to prevent the persons

"buying" the UM coverage from losing the coverage if the motorist inflicting the injury had some but not enough coverage to adequately compensate the injured person.

Petitioners further submit that the above statute was meant to include the type situation found in Allstate Ins. Co. v. Boynton, 486 So. 2d 552 (Fla. 1986). In Boynton, this court held that a vehicle insured for liability purposes may also be an uninsured motor vehicle if the liability coverage does not otherwise provide coverage for the particular occurrence giving rise to the plaintiff's injuries. In footnote 5, page 555, of that decision, this court referred to its decision in Reid v. State Farm Fire & Casualty Co., 352 So. 2d 1172 (Fla. 1977), which held that a vehicle cannot be both an insured and uninsured vehicle under the same policy. This court notes in the footnote that the "present case is distinguishable because it involves separate policies. Reid is inapplicable." (emphasis supplied)

Petitioners contend that it is these type situations mentioned above that led to the enactment of § 627.727(3)(b), Fla. Stat. in 1989. In a single car accident, however, where the injured plaintiff is a passenger who has not "purchased" UM coverage or is not the spouse or resident family member of a named insured who has purchased UM coverage, the tortfeasor's vehicle which is insured for liability coverage would not be an uninsured motor vehicle for purposes of the same automobile policy. As pointed out in Petitioners' Initial Brief, this was not the intent of the UM statute and constitutes an effort on the part of a claimant to obtain double recovery under the tortfeasor's liability

coverage. Further, this court has consistently held that a single vehicle cannot be insured and uninsured under the same policy. See Reid v. State Farm Fire & Casualty, supra,

It is the UM coverage purchased by a named insured for himself and his resident family members as Class I insureds which comes under the umbrella of public policy protection under Mullis v. State Farm Mutual Automobile Insurance Co., 252 So. 2d 229 (Fla. 1971) and which entitles an injured plaintiff to UM coverage "whenever or wherever bodily injury is inflicted upon him by the negligence of an uninsured motorist." Mullis, supra, at 238.

In the case at bar, however, the only policy of automobile insurance is the policy "purchased" by the tortfeasor/owner of the car, not the Respondent or decedent. Further, it was the liability coverage and not the UM coverage under this policy that was purchased by the owner to cover this situation where a passenger was injured by the negligence of the driver and owner of the car and has sued the driver and owner for damages and benefits under this single policy of insurance.

Respondent does not mention the fact that the decedent involved in this accident could have purchased UM coverage for herself. If she had purchased UM coverage or if she had been the spouse or resident family member of a named insured under a separate UM policy, then her estate could have potentially recovered class I UM benefits under her separate automobile insurance policy, assuming the damages claim exceeded the liability coverage of the tortfeasor. See Woodard v. Pa. Nat. Mut. Ins. Co., 534 So. 2d 716 (Fla. 1st DCA 1988) and Deville v. Allstate

Insurance Co., 603 So. 2d 556 (Fla. 3d DCA 1992). The record does not reflect that the decedent purchased any UM coverage for herself, nor was she the spouse or resident family member of a named insured who purchased UM coverage under a separate policy.

The UM provisions of the policy in question, including the "your car" exclusion, are consistent with the above statutory definition of an "uninsured motor vehicle." Under the policy in question, UM coverage is provided to a class II passenger in the vehicle if the liability coverage benefits of the negligent driver and owner are insufficient to cover the plaintiff's damages and the plaintiff is injured as well by the negligence of a driver and owner of a separate vehicle which is uninsured or underinsured. See, for example, Woodard v. Pa. Nat. Mut. Ins. Co., supra, and Lee v. State Farm Mutual Automobile Ins. Co., 339 So. 2d 670 (Fla. 2d DCA 1976)

Further, UM coverage is provided under this policy to the named insured who has "purchased" the coverage and to his spouse and resident family members if they are injured by a tortfeasor who is an uninsured or underinsured motorist. Under such circumstances, if the tortfeasor's liability coverage was not sufficient to cover the plaintiff's damages, then the injured plaintiff who was insured as a class I insured under the family policy would be entitled to recover UM benefits under his own UM coverage which he or a family member purchased. See Allstate Insurance Co. v. Boynton, supra.

Moreover, a review of the history and purpose of the uninsured motorist statute and its definition of an "uninsured

motor vehicle" does not support the Respondent's arguments that the sole vehicle in this case is both an insured and uninsured vehicle under the same policy. Since the decision of this court in Reid v. State Farm Fire and Casualty Co., supra, and its successors, the Florida Legislature has not chosen to amend the uninsured motorist statute to provide that an injured party can recover both liability and uninsured motorist benefits under the same policy in a case involving a single-car accident and a single policy of insurance. The legislature is presumed to know the existing law when it enacts a statute. 49 Fla. Jur. 2d, Statutes, section 166. When the legislature amended section 627.727(3)(c), Florida Statutes in 1992 to respond to Brixius v. Allstate Ins. Co., 589 So. 2d 236 (Fla. 1991), it obviously knew of the history of Reid v. State Farm Fire and Casualty Co., supra, and the similar cases decided by this court after Reid which are cited in Petitioners' Initial Brief. Even so, it did not define an "uninsured motor vehicle" to include an insured vehicle for purposes of a single policy of insurance and a single car accident when liability coverage had already been paid under the tortfeasor's policy to the plaintiff and the plaintiff's damages exceeded the liability coverage. Section 627.727(3)(c), Fla. Stat. (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 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)

Under this amendment, when a family member insured as a class I insured under the family car is injured by the negligence of a non-family member who is operating the car, an "uninsured motor vehicle" can include the "insured vehicle" when the injured party has been excluded from recovering under the liability coverage under the circumstances described in the amendment. Further, it is clear that although this amendment expands UM coverage for class I insureds under a Brixius type situation where the class I injured party has been excluded from recovering under liability coverage, it does not define an "uninsured motor vehicle" to include an "insured vehicle" even for class 1 insureds in a situation where the liability insurer has provided liability coverage benefits to the injured plaintiff in a single-car accident. Petitioners submit this is further evidence that the legislature did not intend by its amendment of section 627.727(3)(b), Florida Statutes, in 1989 to broaden the definition of an "uninsured motor vehicle" to include the insured vehicle under the same policy of insurance where the insured vehicle was the sole vehicle involved in the accident, the plaintiff/class II insured was able to recover against the liability policy of the owner of the vehicle, and the plaintiff was not insured for UM purposes under a separate policy of insurance purchased by the plaintiff herself or by her spouse or resident relative.

If Respondent's interpretation of the definition of "uninsured motor vehicle" under section 627.727(3)(b) is correct, there would have been no need for the legislature to amend section 627.727(3)(c) in 1992. Under the Respondent's interpretation of

the 1989 definition of "uninsured motor vehicle, the injured plaintiff would already have been entitled to UM coverage in a Brixius type case because he would have been a family member and class I insured under the family UM policy, his damages would have exceeded any liability coverage benefits available because there was none available as a result of the family exclusion clause upheld in Brixius, supra, and the automobile would have met the Respondent's interpretation of the definition of an "uninsured motor vehicle" because the plaintiff's damages exceeded any liability insurance benefits available to the plaintiff.

Therefore, Petitioners submit that the "your car" exclusion under the UM coverage in question and the particular circumstances of this case is fundamentally consistent with the purpose and legislative intent of UM coverage under section 627.727, Florida Statutes. Further, it was this "your car" exclusion which the insured bargained for and paid for and which the Petitioners bargained for and agreed to in entering into the insurance contract and setting premiums for the coverage under the policy.

Amicus, Academy of Florida Trial Lawyers, argues that Mullis does not allow class I and class II insureds to be treated differently under the circumstances of this case. This argument ignores fundamental distinctions made by this court in Mullis and by the legislature under the UM statute. In Mullis, this court obviously provided a basis for different treatment of class I and class II insureds by ruling that a class I insured is entitled to uninsured motorist coverage "whenever and wherever bodily injury is inflicted upon him by the negligence of an uninsured motorist."

Mullis, at 238. Mullis also provides as a general rule that exclusions of uninsured motorist coverage are impermissible as to class I insureds. This same type of broad coverage and protection was not provided to a class II insured such as the decedent in this case who had not purchased the UM coverage as the named insured or who was not the spouse or resident family member of the named insured. See Florida Farm Bureau Cas. Co. v. Hurtado, 587 So. 2d 1314 (Fla. 1991), where this court recognized the distinction between class I and class II insureds, stated that this distinction has been firmly entrenched in Florida law for more than twenty-five years, and stated that "Class-one insureds are covered regardless of their location when they are injured by an uninsured motorist." Id. at 1318.

Further, as indicated above, the legislature has clearly made a distinction between class I and class II insureds under section 627.727(3)(c), Fla. Stat. (1992). Under this amendment, it is only a class I insured injured in a single car accident who is entitled to UM benefits as the named insured or resident relative of the name insured if he has been excluded from receiving liability insurance benefits when injured by the negligence of a non-family member who was driving the insured vehicle of the family.

Finally, in Mullis, supra, this court ruled that the persons for whom uninsured motorist coverage is required to be provided, assuming they have not elected to reject this coverage, are those persons who are "covered" under the liability provisions of the automobile policy. Mullis, supra, at 233. In Government

Employees Insurance Company v. Douglas, 20 Fla. L. Weekly S113, March 9, 1995, this court clarified its holding in Mullis and subsequent cases concerning the relationship between liability coverage and UM coverage. In Douglas, supra, this court stated that it was receding from the statement that "courts have consistently tied uninsured motorist coverage to the applicability of liability coverage for a particular accident." This court then approved the rule that UM coverage is unavailable if liability coverage is inapplicable to a particular individual.

In applying the above analysis to this case, Dianna Warren, the injured individual who died from this single car accident, was not "covered" by the liability policy covering the automobile involved in the accident. Rather, it was the tortfeasors, the owner and driver of the car, who were covered by the liability coverage of the policy such that the Estate of Dianna Warren was entitled to recover benefits under the tortfeasor's liability coverage. The automobile policy in question begins describing the "coverage" for liability insurance on page 2 of the policy and then provides on page 3 of the policy as follows:

> **"Who Is An Insured**
>
> For your car - you, any relative, and anyone else using your car if the use is (or is reasonably believed to be) with your permission, are insureds...." (R 19)

The terms "you" and "your" are defined under the definitions' portion of the policy to mean "the person named in Item 1 of the declarations page. They also mean that person's spouse if residing in the same household."

The decedent was not insured or covered under the liability portion of the policy under the circumstances of this case because she was merely occupying the vehicle as a passenger. She was not the named insured, the named insured's spouse, a resident relative or a permissive user or driver of the car who could have been held liable for negligence in the operation or maintenance of the car. The Respondent was able to recover the liability "benefits" under the policy, not because the decedent was insured and covered under the liability coverage, but because the tortfeasors, the owner and permissive driver of the car, were insured and "covered" under the liability insurance portion of the automobile policy. Because there was no liability coverage for Respondent's decedent under the circumstances of this accident, the UM statute does not prevent the decedent from being excluded from UM coverage. This conclusion is consistent with the rationale of Mullis that "uninsured motorist coverage . . . is statutorily intended to provide the reciprocal or mutual equivalent of automobile liability coverage. . . . " Mullis, supra, at 237-38.

It appears that the First District Court of Appeal in the decision below and in Traveler's Insurance Companies v. Chandler, 569 So. 2d 1337 (Fla. 1st DCA 1990), mistakenly confused the distinction between an injured party being entitled to liability insurance "benefits" versus that same injured party being entitled to liability insurance "coverage" under an automobile insurance policy. The First District reasoned in Chandler that "exclusions to UM coverage are not enforceable if the injured person is covered

by the BIL provisions of the policy." 569 So. 2d, at 1339. (emphasis supplied) The court then stated:

> "In the instant case, Chandler was indisputably covered under the BIL [Bodily Injury Liability] 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. 569 So. 2d, at 1339. (emphasis supplied)

The First District then cited to three decisions in support of the above quoted statement, all of which involved class I injured parties who were determined to be covered and insured under the liability portion of the automobile policies and who were found to be entitled as class I insureds to UM coverage.

There appear to be no facts in the Chandler decision, however, which establish that Chandler, the injured plaintiff, was insured or "covered" under the liability coverage involved in that case. Rather, Chandler recovered benefits under the liability coverage because Williams, the negligent driver and owner of the car, was insured and "covered" under the liability portion of the automobile insurance policy purchased by Williams.

Therefore, based upon the above analysis and the analysis of Chandler in Petitioners' Initial Brief which further explained how Mullis was improperly applied in Chandler, Petitioners contend that the Chandler decision and the lower court decision in the case at bar were incorrectly decided and should not be followed by this court.

In following the legislative intent and fundamental purpose of the UM statute, surely it is just as wrong to improperly whittle away UM coverage as it is to try to improperly graft onto the UM

statute and a UM automobile policy a type of coverage and result that was never intended by the legislature or the policy.

In summary, there are two basic reasons why the Respondent should not be allowed to recover both liability benefits and uninsured motorist benefits under the same automobile insurance policy under the facts of this case. First, neither the decedent nor a spouse or parent of the decedent "purchased" UM coverage for the decedent to help protect her from injuries she may suffer while occupying another's vehicle as a passenger. If this had been done, then decedent would have been insured as a class I insured under a separate UM policy which would have provided her UM benefits regardless of whether she was driving her own vehicle or someone else's vehicle or riding as a passenger in another's vehicle. This class I UM coverage would have followed the person of the insured and not just her personally owned vehicle. The automobile policy in question was not purchased by the decedent or for the decedent under the circumstances of this case and she was not a class I insured under the policy.

Secondly, the tortfeasors involved in this case, the owner and driver of the car, purchased the questioned UM coverage under their automobile policy for a permissive passenger unrelated to the named insured such as the plaintiff (class II insured) only if she was injured by the negligence of a third party tortfeasor who was uninsured or underinsured. The owner and driver did not purchase UM coverage for the plaintiff under the circumstances of this single car accident case where they have been sued for negligence. Rather, the liability insurance was the coverage purchased by the

owner of the vehicle to cover these circumstances of a passenger suing him and the permissive driver for negligence in the operation of the vehicle. Based upon these circumstances, the "your car" exclusion is consistent with the rationale of Mullis and the legislative intent under the UM statute.

CONCLUSION

For the above-stated reasons, Petitioners request this court to reverse the order of the District Court below and uphold the trial court's Final Summary Judgment in favor of Petitioners. Petitioners also request the court to reverse the award of the Respondent's appellate attorney's fees which were dependent upon a judgment in his favor.

Respectfully submitted,

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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 2nd day of June, 1995.

CECIL L. DAVIS, JR.