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DEC 22 1995
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IN THE SUPREME COURT
STATE OF FLORIDA

LUCIA BULONE,

Plaintiff/Appellants,

v.

Case No.: 86-689

UNITED SERVICES AUTOMOBILE ASSOCIATION,

Defendant/Appellees.

______________________________/

ANSWER BRIEF

HONORABLE GASPER J. FICARROTTA, HILLSBOROUGH COUNTY CIRCUIT JUDGE

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SUMMARY OF ARGUMENT

Appellant was a passenger in a vehicle driven by a permissive user of a USAA insured, and was injured when the vehicle was involved in a single-car accident. Appellant was previously paid the policy limits of the insured's bodily injury coverage. She now claims that the insured vehicle was "uninsured" and seeks to collect uninsured motorist benefits under the same policy of insurance. Appellant is prohibited from making this type of inconsistent claim under Sec. 627.727, Florida Statutes, and long-standing case law. Therefore, the exclusionary policy language which also prevents this double recovery is not against public policy and is enforceable. The decision of the Second District upholding this policy provision should be AFFIRMED, and the *Warren* case should be overruled since it is inconsistent with Sec. 627.727 and the decisions of the First and Second District Courts of Appeal in *Nicholas*, *Peel*, *Streicher*, and *McClure*.

ARGUMENT

A party injured by a single tortfeasor is not permitted to recover both bodily injury and uninsured motorist benefits under the same policy of insurance under Sec. 627.727, Florida Statutes, by claiming that the motor vehicle involved in an accident was both "insured" and "uninsured" at the same time. *State Farm Mut. Auto. Ins. Co. v. McClure*, 501 So. 2d 141, modified by 512 So. 2d 296 (Fla. 2d DCA 1987); *Fidelity & Cas. Co. of New York v. Streicher*, 506 So. 2d 92 (Fla. 2d DCA 1987); *Nicholas v. Nationwide Mut. Fire Ins. Co.*, 503 So. 2d 993 (Fla. 1st DCA 1987); *Peel v. Allstate Ins. Co.*, 522 So. 2d 505 (Fla. 2d DCA 1988). The rejection of this inconsistent claim by Class II insureds is not contrary to the public policy of this state, as this Court has likewise rejected similar inconsistent assertions by plaintiffs whose bodily injury claims are barred by a family exclusion and contend that the vehicle covered by the liability policy is also "uninsured" under the same policy in an effort to recover UM benefits. *See Reid v. State Farm Fire and Cas. Co.*, 352 So. 2d 1172 (Fla. 1977); *Brixius v. Allstate Ins. Co.*, 589 So. 2d 236 (Fla. 1991). Since Florida law does not permit a plaintiff to recover twice under the same policy of insurance for an accident involving a single tortfeasor, an insurance policy provision which prohibits this "double-dipping" cannot possibly be against the public policy of this State.[1]

In *McClure*, the survivor of a Class II passenger killed in a one-vehicle accident sued under

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[1]The policy issued by USAA to Appellant provides at page 6 of the Insuring Agreement and page 1 of the Florida Uninsured Motorists Coverage Endorsement:

... However, "uninsured motor vehicle" does not include any vehicle or equipment:

1. Owned by or furnished or available for the regular use of you or any family member ....

the driver/insured's UM policy after collecting the limits of the driver's BI insurance. The Second District Court of Appeals held that the plaintiff was not entitled to UM benefits since BI benefits had already been recovered under the driver's policy. The court stated that the intent of the UM statute was to provide both UM and BI benefits under a single policy only where there is a separate tortfeasor who is entirely uninsured or underinsured under a separate policy of insurance, and not to provide both UM and BI benefits for a single vehicle which a plaintiff claims is both insured and uninsured under the same policy of insurance. Although this case interpreted the 1983 version of the UM statute, the same rationale applies to the 1984 version of 627.727(1) and the 1989 version of 627.727(3), which made UM true excess coverage.

Appellant's assertion that no cases have prohibited double recovery under the newer version of the UM statute, which made UM true excess coverage, is incorrect. In *Nicholas v. Nationwide Mut. Fire Ins. Co.*, the First District interpreted the 1984 version of the statute and held that the Second District's decision in *McClure* construing the 1983 version was equally applicable despite the changes in the statute. In *Nicholas*, a passenger was killed in a one-car accident involving a named insured. The passenger's survivor recovered under the BI portion of the applicable insurance policy and then sought UM benefits under the same policy. The First District rejected the contention that the 1984 amendments to the UM statute permitted a plaintiff to recover under both the BI and UM provisions of the same policy of insurance for injuries caused by a single tortfeasor. Instead, the First District relied upon the Second District's interpretation of the UM statute in *McClure* which stated "we think that uninsured motorist benefits were only intended to be provided when a negligent *third party* was actually uninsured, or underinsured because that person's liability coverage was less than the amount of damages caused by the injury." *McClure*, 501 So. 2d at 143 (emphasis in original).

The First District's decision in *Nicholas* with respect to *McClure*'s applicability to the 1984 version of the UM statute was adopted by the Second District in *Fidelity & Cas. Co. of New York v. Streicher*, 506 So. 2d 92, 93 (Fla. 2d DCA 1987). In this case, the Second District stated:

> [W]e 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. We are confident that Fidelity intended to provide limited liability coverage and to provide underinsured motorist coverage, but not to the same injured party, and that Fidelity charged a premium accordingly. We do not believe that Fidelity should be required to double, in effect, its liability coverage under the circumstances of this case.

Streicher, 506 So. 2d at 93. Furthermore, the *Streicher* court upheld a policy provision excluding the insured vehicle from the definition of an uninsured or underinsured motor vehicle, which is similar to the policy provision in the instant case, and found that this provision did not conflict with Sec. 627.727, Florida Statutes (1984) or violate public policy.

The instant case is also factually indistinguishable from *Peel v. Allstate Ins. Co.*, 522 So. 2d 505 (Fla. 2d DCA 1988), in which a passenger died as a result of the insured driver's negligence and sought both BI and UM benefits under the same policy covering the driver. The Second District relied upon *Streicher* and *McClure* and held that the passenger's survivor was not entitled to collect twice under the same policy of insurance under the 1984 version of the statute since "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." 522 So. 2d at 506.

Appellant's reliance on *Woodard v. Pennsylvania National Mut. Ins. Co.*, 534 So. 2d 716 (Fla. 1st DCA 1988) is misplaced since it is inapplicable to the case at bar. In *Woodard*, the plaintiff sought recovery under both the BI and UM provisions of the same policy of insurance. In this

instance, however, there were two different tortfeasors that were jointly and severally liable for the plaintiff's injury. As such, the plaintiff recovered under the BI portion of the policy for the "insured" vehicle, and under the UM portion of the policy for the second vehicle, which was truly "uninsured."

The instant case is before this Court on a certification of conflict by the Second District with the First District's opinion in *Warren v. Travelers Ins. Co.*, 650 So. 2d 1082 (Fla. 1st DCA 1995), which is factually similar. In its opinion, the *Warren* court ignored its own decision in *Nicholas v. Nationwide Mut. Fire Ins. Co.*, 503 So. 2d 993 (Fla. 1st DCA 1987), in which it held that an insured could not recover under the BI and UM provisions of the same policy of insurance for injuries caused by a single tortfeasor. The First District's decision in *Nicholas* was consistent with the Second District's decisions in *McClure*, *Streicher*, and *Peel,* which were decided under both the 1983 and 1984 versions of the UM statute and were binding precedent on the *Warren* court.

The *Warren* case is an aberration. It is contrary to the First District's previous decision in *Nicholas*, which is factually indistinguishable and was not even mentioned in the opinion. In addition, *Warren* is contrary to *McClure*, *Streicher*, and *Peel,* a line of cases which were adopted by the same court in *Nicholas.* This case instead focuses on general public policy arguments which were previously rejected by the same court and the Second District.

Appellant has placed great emphasis on the 1989 revisions to the UM statute in urging this Court to ignore long-standing case law which prevents Appellant from recovering UM and BI benefits from the same policy of insurance. The opinion of the court below contains an exhaustive review of the legislative history of the UM statute and all relevant revisions. The *Warren* court's decision contains no mention of the legislative history. As pointed out by the Second District, the relevant statute revision in this case is the 1984 amendment which made UM true excess coverage.

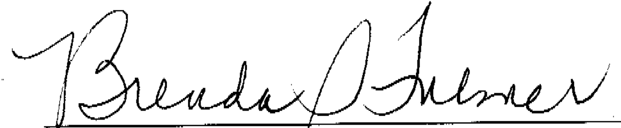
The 1989 amendment had the same effect, so the cases which interpreted the 1984 statute and found that UM benefits were not available under these circumstances, namely *Nicholas*, *Peel* and *Streicher*, are equally applicable. Furthermore, the legislative history accompanying the 1989 revisions does not directly or indirectly overrule *McClure*, *Streicher*, *Peel*, and *Nicholas* and fails to indicate a desire of the legislature to permit "double-dipping" for Class II insureds, a notion offensive to the public policy of this state since it effectively doubles the limits of an insurance policy under this limited factual situation without the payment of any insurance premium.

CONCLUSION

This Court should uphold the well-reasoned opinion of the court below and reject the *Warren* decision which fails to even mention controlling precedent on this issue or consider the legislative history of the UM statute. Section 627.727, Florida Statutes and applicable case law do not permit a double recovery to Appellant under these circumstances, and Appellee's policy exclusion which prohibits such "double-dipping" is not contrary to the public policy of this state.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Edward M. Albrecht, Esquire, Limberopoulos & Associates, P.A., SouthTrust Bank Building, 14802 North Dale Mabry Highway, Suite 333, Tampa, Florida, 33618, on this 21st day of December, 1995.



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