IN THE SUPREME COURT
STATE OF FLORIDA

LUCIA BULONE,

Plaintiff/Appellants,

CASE NO.: 86,689

vs.

UNITED SERVICES AUTOMOBILE ASSOCIATION,

Defendant/Appellees. /

APPELLANT CASE NO.:
APPEAL FROM THE SECOND DISTRICT OF COURT OF APPEAL

HONORABLE GASPER J. FICARROTTA, HILLSBOROUGH COUNTY CIRCUIT JUDGE

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I. TABLE OF CONTENTS

II. TABLE OF CITATIONS

Statutes

III. STATEMENT OF THE CASE AND THE FACTS.

A. Statement of the Case.

Lucia Bulone appeals a final summary judgment denying her claim for uninsured motorist benefits. The trial court ruled that United Services Automobile Association (USAA) was not statutorily required to provide as part of the tortfeasor's automobile coverage both insured and uninsured motorist benefits under the same policy. The Second District Court of Appeals affirmed the trial courts opinion and certified conflict with Warren v. Travelers Insurance Co., 650 So.2d 1082 (Fla. 1st DCA), review granted No.85,337 (Fla. July 6, 1995).

B. Statement of Facts

Stipulated and Undisputed Facts

The following facts in this case have been stipulated to:

1. The accident in question occurred on the 12th day of April, 1992, in Tampa, Hillsborough County, Florida, on Kelly Road approximately fifty-seven (57) feet north of the intersection of Caracas Road.

2. Witnesses to this accident indicate this was a single vehicle accident.

3. At the time of the accident, the driver, John G. Moeller, resided at Avenue, Tampa, Florida 33614, and was, in fact, the son of Defendant's **UNITED SERVICES AUTOMOBILE ASSOCIATION**, named insured, John A. Moeller.

4. At the time of the accident, the owner of the vehicle involved in this accident was, in fact, John A. Moeller, who

resided at , Tampa, Florida 33615.

5. John G. Moeller was a permissive user of the vehicle owned by John A. Moeller and had, in fact, received his permission to use the vehicle on the date of the accident.

6. At the time and date of this accident, John A. Moeller was the named insured on a policy of insurance issued by Defendant, **UNITED SERVICES AUTOMOBILE ASSOCIATION**, under Policy Number . The effective period of said policy was February 1, 1992, to August 1, 1992, and said policy listed as a vehicle covered thereunder the vehicle involved in this accident (a 1990 Mitsubishi pick-up truck, VIN JA7FL24W1LP018477, a true and correct copy of sid policy has been filed with the Court on March 10, 1993, by the Defendant.

7. At the time of the accident, the Plaintiff, **LUCIA BULONE**, was a front seat passenger in the vehicle owned by John A. Moeller and being driven by John G. Moeller.

8. On the 29th day of May, 1992, Plaintiff, **LUCIA BULONE**, received the sum of $100,000.00 (One Hundred Thousand and no/100'S Dollars) from Defendant, **UNITED SERVICES AUTOMOBILE ASSOCIATION**, and executed a Release.

9. Plaintiff contends that the damages she is entitled to recover from the injuries she received in this accident exceed the $100,000.00 she has received to date.

Additionally the following facts are not in dispute:

1. That on or about April 12, 1992, Lucia Bulone was a front seat passenger in a vehicle owned by John A. Moeller.

2. That said vehicle was insured by Defendant USAA ($100,000 Liability: $100,000 Uninsured Motorist) and that on May 9, 1992, Defendant USAA tendered it's bodily injury liability policy limits at $100,000.00 to Plaintiff.

IV. SUMMARY OF ARGUMENT

Lucia Bulone who has been provided coverage under the liability policy of the tortfeasor John Moeller is a "person insured" under Fla. Stat. 627.727(1) and the applicable case law namely Mullis v. State Farm, 252 So.2d 229 (Fla. 1971); Valiant Insurance co. v. Webster, 567 So.2d 408 (Fla. 1990) and is thus entitled to uninsured motorists benefits. The seeming illogic caused by the family exclusion established by Reid v. State Farm, 352 So.2d 1152 (Fla. 1977) and recently addressed by this court in Brixious v. Allstate Insurance Co., 589 So.2d. 236 (Fla. 1991) pointed to by the Second District Courts of Appeal which would allow recovery by a third party while not protecting the person who paid for the coverage can best be dealt with by abandoning the Reid exclusion whose purpose in preventing "over friendly or collusive suits among family members" has been called into serious question by the Courts of this state Chrysler v. United Services Auto Association, 625 So.2d 69, 74-75 (Fla. 1st DCA 1993). J. Zehmer concurrent). In light of this court's abrogation of interspousal immunity in Waite v. Waite, 618 So.2d 1360.

The 1989 legislative amendment of 627.727 requires that a tortfeasor's owned automobile be treated as an uninsured vehicle when the limits of the tortfeasor's liability coverage are less

than the total damages sustained by the claimant. Thus the standard "owned vehicle" limitation on underinsured motorist coverage wherein an insurer in the policies definitions section excludes vehicles owned by the insured or the insured's family from the definition of an uninsured vehicle in order to prevent a single insurance policy from treating and tortfeasor's owned auto as both insured and underinsured for the same accident and which the Second DCA has relied upon in a series of cases. State Farm Mutual Auto Insurance Co. v. McClure, 501 So.2d 141 (Fla. 2d DCA), review denied 511 So.2d 299 (Fla.) op. corrected in 512 So.2d 296 (Fla. 2d DCA 1987); Fidelity & Casualty Co. of NY v. Streicher, 506 So.2d 92 (Fla. 2d DCA) review denied 515 So.2d 231 (Fla. 1987); Peel v. Allstate Insurance Co., 522 So.2d 505 (Fla. 2d DCA 1988) has been supplanted by the legislative definition. Warren, supra; Travelers Insurance Co. v. Chandler, 569 So.2d 1337 (Fla. 1st DCA 1990).

V. ARGUMENT

Lucia Bulone is entitled to collect both liability and underinsured benefits under the same policy.

The appellee insurer has taken the position adopted by both the trial court and the Second DCA that the definition of uninsured motor vehicle contained in the definition section located in the policies main body does not operate as a Reid type exclusion of uninsured motorist benefits and therefore does not conflict with Mullis and its progeny, stating instead that the policy definition of uninsured motor vehicle is employed to prevent a single

insurance policy from treating an owned auto both as an uninsured and an underinsured vehicle. It was on this basis that the Second District decisions in McClure, supra Streicher, supra and Peel, supra stand. However, these three cases were all decided prior to the legislature's 1989 amendment of section 626.727's definition of uninsured motor vehicle.

In 1989, the legislature amended section 627.727, in pertinent part, deleting and adding language as follows:

> (1) . . . The coverage described under this section shall be over and above, but shall not duplicate, the benefits available to an insured . . . under any motor vehicle liability insurance coverage; . . . and such coverage shall cover the difference, if any, between the sum of such benefits and the damages sustained, up to the maximum amount of such coverage provided under this section. The amount of coverage available under this section shall not be reduced by a setoff against any coverage, including liability insurance . . . .
>
> . . . .
>
> (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 liability for its insured which are less than the total damages sustained

by the person legally entitled to recover damages ~~limits applicable to the injured person provided under uninsured motorist's coverage applicable to the injured person.~~

Ch. 89-234, § 1, at 1024-25, Laws of Fla.

As the Appellate Court concedes Ms. Bulone's position is supported by Warren, supra and Travelers Insurance Co. v. Chandler, 569 So. 2d 1337 (Fla. 1st DCA 1990).

In Chandler, the First District Court of Appeals held that Chandler should receive underinsured motorist coverage because he was covered under the bodily injury liability policy. The Second District thereupon attempted to draw a factual distinction stating that he was not covered by the liability policy as a potential tortfeasor but merely collected benefits under the coverage as a claimant. This position however directly conflicts with the definition of "persons insured" under an automobile liability insurance policy set forth in Mullis, supra and recently reaffirmed by this court in Valiant, supra.

Additionally, the Second District concedes that while the legislative language created underinsured motorist coverage the results of Warren, supra and Chandler, supra would be mandated only if the language expresses a clear legislative intent to stack both the insured and UM coverage under one policy. A review of the applicable statutory language demonstrates the intent of the legislature to supplant any existing policy's definition of uninsured motor vehicle with a mandate. In other words if the liability insurer provides the limits of bodily injury liability

for its tortfeasor insured and if those limits are less than the total damages sustained by the person legally entitled to recover damages then the vehicle is uninsured and the policy definitions are moot. At this point the question of valid UM exclusions become controlling. If a valid UM exclusion is present the policy may not be stacked if it is not present then they may.

It is in this context that the cases most frequently cited by insurers for the proposition that the same party cannot collect liability and uninsured motorist benefits under the same policy must be understood. Brixius v. Allstate Ins. Co. 589 So.2d 236 (Fla. 1991); Smith v. Valley Forge Insurance 591 So. 2d. 926 (Fla. 1992) and Hartland v. Allstate Insurance Company 592 So 2d 677 (Fla. 1992).

Brixius, Smith and Hartland all involved claims made by the injured party while a passenger in their own vehicle so that the family car exception applied in those cases and allowed the enforcement of the family car exclusionary language. Such an exclusion is not applicable based upon the stipulated facts of this case which preclude any possibility of collusion.

Secondly, in Brixius, Smith and Hartland liability coverage was not available due to the family exclusion clause recognized in Reid. In the case at hand there is no question that the liability provisions of the policy at issue herein are available since they were paid by the insurer. Therefore, the Supreme Court case directly on point herein is not Brixius but Valiant Ins. Co. v. Webster 567 So.2d.408 (Fla. 1990) which involved a passenger killed

in a car driven by an uninsured driver whose estate attempted to collect under the fathers policy. The court denied uninsured motorist coverage since the son did not reside with his father and thus was not entitled to possible liability coverage. The key to Webster though is in the reaffirmation of Mullis ("Since our decision in Mullis the courts have consistently followed the principle that if the liability portions of an insurance policy would be applicable to a particular accident, the uninsured motorists provisions would likewise be applicable; whereas if the liability provisions did not apply to a given accident; the uninsured motorist provisions for that policy would also not apply.") Webster at 410.

Several cases decided before Brixius denied the recovery of uninsured motorist benefits after liability benefits had been paid State Farm Mutual Auto Insurance v. McClure 501 So. 2d. 141 (Fla.2d DCA 1987); Nicholas v. Nationwide Mutual Fire Insurance Company 503 So. 2d 993 (Fla. 1st DCA 1987); Peel v. Allstate Insurance Company, 522 So. 2d 505 (Fla. 2d DCA 1988) and Fidelity & Casualty Company of New York v. Streicher 506 So. 2d 92 (Fla. 2d DCA 1987). As stated previously these cases are easily distinguishable in that none interpreted section 627.727 as amended in 1984 but instead relied upon the pre 1984 language of the statute which had been defined by the Florida courts to make underinsured coverage additional insurance over and above third party liability insurance only McClure supra; Streicher supra.

"The effect of the changes made by the 1984 amendment are

abundantly clear. The reference to "other persons liability insurer" was deleted in favor of language referring to "any motor vehicle liability insurance coverage" the effect of which is to make underinsured coverage additional insurance over and above all liability insurance not only over and above that covering a third party as held in McClure but also over and above the liability coverage contained in the policy providing underinsured coverage as well. The provisions allowing set off by the uninsured motorist liability insurer were deleted and replaced in 1984 by a provision prohibiting any reduction of uninsured coverage or set off by reason of any liability insurance coverage applicable, including that in the policy providing underinsured coverage. Rather than prohibiting the payment of both liability benefits and uninsured motorist benefits under the same policy to the same insured these amendments clearly indicate that in appropriate circumstances both liability coverage benefits and uninsured motorist benefits may be paid under the same policy to the same injured person. These statutory changes, however, would require such a result only if the vehicle involved were shown to fall within the definition of "uninsured motor vehicle" contained in section 627.727(3)(b) Woodard v. Pennsylvania National Mutual Insurance Company 534 So.2d 716, 719-20 (Fla. 1st DCA 1988).

At the time of the Woodard decision 627.727(3)(b) defined an uninsured motor vehicle as a motor vehicle whose bodily injury liability limits were less than the uninsured motorists coverage available In 1989 the Florida legislature substantially broadened

627.727(3)(b) by redefining an uninsured motorist vehicle as a vehicle whose bodily injury liability coverage is less than the damages sustained by the injured person. There is no dispute that Lucia Bulone injuries exceed the $100,000.00 in bodily injury liability coverage which have been paid by the tortfeasor.

II. The policy exclusion cited by the Trial and Appellate Court is void and non enforceable as a matter of public policy.

As previously noted it is firmly established public policy based on **Mullis** supra and reaffirmed by **Valiant** supra that uninsured motorist coverage must be provided to those covered for liability. This public policy is manifested statutorily within Fla. Stat. 627.727(1). In **Valiant** supra the Florida Supreme Court held that all automobile insurance policies must offer uninsured motorist protection as broad as section 627.721 (1) to "persons" insured thereunder. Such persons are "the owner or operator of an automobile, his spouse and other members of his family resident in his household and others occupying the insured automobile with the insured's permission Valiant at 410.

To legitimately limit this public policy mandate under 627.727(1) the insured is required to provide written notice of optional uninsured motorist coverage and to acquire the insured's written consent thereto Patterson vs. Cincinnati Insurance Company 564 So.2d 1149 (Fla. 1st DCA 1990). The problem of any runaway premiums pointed to by the Appellate Court to be accrued under family coverage by a doubling of the uninsured motorist coverage can be addressed by a waiver of that coverage for class two

insureds as long as written notice and consent is acquired by the insurer.

Secondly, as pointed out by the Appellate Court uninsured and underinsured motorist coverage evolved from unsatisfied judgment insurance whose goal to assure that families had protection to satisfy judgments or claims. It should be pointed out in this case that the family policy at issue herein covers the appellee insureds actions herein because he was the tortfeasor that caused this accident, which injured the appellant who was a non family passenger and since he did not have sufficient liability coverage he is exposed to a possible judgment.

Lastly, in Warren, the First District Court of Appeals recognized the authority which is the heart of the Appellant's argument, namely that Mullis v. State Farm, 252 So.2d 229, 233-34 (Fla.1071) stands for the proposition that, "exclusions to [uninsured motorists] coverage are not enforceable if the injured person is covered by the [bodily injury liability] provision of the policy," Warren at D504.

The only policy exclusion which have been granted to validity by the courts of this state in these types of situations are the so called "family member" exclusion and "family care" exclusion set forth in Reid v. State Farm, 352 So.2d 1172 (Fla. 1977). The bases of the Reid exclusions as set forth in Appellant's original brief is to prevent, "over friendly or collusive suits amount family members," (Reid at 1174).

The Appellant thus argues that the family car exclusion at

issue herein is valid but only to enforce the recognized public policy of preventing collusive suites among family members Chrysler v. United Services Automobile Association, 625 So.2d 69, 74, 75 (Fla. 1st DCA 1993). J. Zebner concurrence.

The facts in Warren are nearly exact to the facts herein that both cases involve injury to a passenger in an automobile insured under the policy of a non-family member so that the applicable public policy does not grant validity to the exclusionary language since no possibility of family collusion is present.

However, the validity of the exclusionary language is not the only test which applies before excluding coverage.

Warren further limits Reid to stand for the proposition that the family vehicle exception will be granted only where is it (a) a valid policy exclusion and (b) such an exclusion prevents the recovery of liability benefits.

As argued previously and set forth in the Warren decision, the fact that the family care exclusion must be set forth to prevent liability coverage is fully supported by the applicable precedent which grants full authority to the Mullis decision, Reid, supra, Smith v. Valley Forge Insurance Company, 591 So.2d 926 (Fla.1992); Brixious v. Allstate Insurance Company, 589 So.2d 236 (Fla.1991).

The Appellee's exclusion fails on two counts. One, it is not a valid exclusion based on the recognized public policy of this state and two, even if it can be interpreted as a valid exclusion, it is inoperative in light of Mullis since the effect of the exclusion is to deny uninsured motorist benefits to a person

covered by the liability provisions of a policy.

CONCLUSION

The appellant, Lucia Bulone, asks that this Honorable Court reverses the decisions of the trial and appellate court and remands this case to the trial court.

Dated this 16th day of November, 1995.

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