IN THE SUPREME COURT OF FLORIDA

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner,

v.

DANIEL McCARTHY, JR.,

Respondent.

CASE NO. 87,123

District Court of Appeal
1st District - No. 94-3765

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

INITIAL BRIEF OF PETITIONER STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

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PRELIMINARY STATEMENT

In this brief, the petitioner, State Farm Mutual Automobile Insurance Company, will be referred to as "State Farm." The respondent, Daniel McCarthy, Jr., will be referred to as "McCarthy." The driver of the only vehicle involved in the accident at issue, Clyde Matthew Gallo, will be referred to as "Gallo." References to the record on appeal will be to the page(s) on which the reference appears, as follows: "(R. _____)". The terms "uninsured motorist" or "underinsured motorist" will be referred to herein as "UM."

STATEMENT OF THE CASE AND OF THE FACTS

Petitioner, State Farm Mutual Automobile Insurance Company, appeals the decision of the First District Court of Appeal below which affirmed a final summary judgment entered on November 2, 1994 by the Honorable W. O. Beauchamp, Jr., Circuit Judge, Eighth Judicial Circuit, in and for Alachua County, Florida. (R. 124) In that final summary judgment, the trial court invalidated a provision in a State Farm uninsured motorist (UM) policy and declared that respondent, Daniel McCarthy, Jr., was entitled to UM coverage under an insurance policy insuring the motor vehicle he was riding in as a passenger at the time of a one car accident and under which he had already recovered liability benefits. (R. 124)

On September 13, 1992, McCarthy was riding as a passenger in a 1987 Toyota Camry owned and operated by Clyde Matthew Gallo when Gallo lost control of his automobile resulting in a single car accident injuring McCarthy. (R. 63)[1] On that date, Gallo had an insurance policy with State Farm on the Toyota Camry providing $100,000 in bodily injury liability coverage and $100,000 in UM coverage. (R. 63) McCarthy made a claim against Gallo and State Farm under the liability portion of the State Farm policy for the injuries he received in the accident based upon Gallo's negligence. (R. 64) The parties settled McCarthy's liability claim for the $100,000 policy limits. (R. 2, 37, 64)

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[1]The parties stipulated to the facts and the authenticity of the State Farm policy attached to the "Stipulated Facts." (R. 63-91)

McCarthy claimed his damages exceeded the liability limits of the State Farm policy so that he was entitled to payments under the UM portion of the same insurance policy. (R. 64) State Farm denied that McCarthy was entitled to UM coverage based upon the following specific exclusion in the policy:

> An **uninsured motor vehicle** does not include a land motor vehicle:
>
> 1. Insured under the liability coverage of this policy.

(R. 64) Since the motor vehicle in which McCarthy was riding as a passenger was insured under the liability coverage of the policy, it was State Farm's position that there was no UM coverage available to McCarthy.

State Farm filed a declaratory judgment action asking the trial court to declare that the State Farm policy insuring the vehicle involved in the one car accident did not provide UM coverage for McCarthy because of the above-referenced policy exclusion. (R. 1-34A) The trial court entered a final judgment on November 2, 1994 in favor of McCarthy ruling that he was entitled to UM coverage under the State Farm policy notwithstanding the policy provision excluding UM coverage under the same policy that provided liability coverage. (R. 124)

On November 14, 1994, State Farm filed a notice of appeal from the final summary judgment declaring that McCarthy was entitled to UM coverage. (R-127) On December 8, 1995, the First District Court of Appeal affirmed the trial court's final summary judgment. The District Court held that its precedent mandated its decision and

cited its previous decision in Warren v. Travelers Ins. Co., 650 So. 2d 1082 (Fla. 1st DCA 1995).[2] However, the District Court 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 LIMIT FOR LIABILITY COVERAGE, ALSO RECOVER UNDER THE SAME POLICY FOR UNINSURED MOTORIST BENEFITS, WHERE THE POLICY EXCLUDES THE INSURED VEHICLE FROM ITS DEFINITION OF "UNINSURED VEHICLE"?**

Additionally, the District Court certified its decision herein to be in conflict with the Second District Court of Appeal's recent decision in Bulone v. United States Automobile Assoc., 660 So. 2d 399 (Fla. 2d DCA 1995).

On January 4, 1996, State Farm filed with this Court a timely notice to invoke discretionary jurisdiction.

SUMMARY OF ARGUMENT

The State Farm policy excludes from the definition of "uninsured motor vehicle" any motor vehicle which is "insured under the liability coverage of this policy." Thus, under the express language of the State Farm policy, McCarthy cannot recover UM benefits under the same policy which insured the car he was riding in as a passenger and under which he had already recovered liability benefits.

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[2]The matter of Travelers Ins. Co. and Phoenix Ins. Co. v. Warren, Case No. 85,337 (Fla. 1996), is presently pending before this Court. Oral argument was held before this Court in Warren on January 5, 1996.

This Court held in Mullis v. State Farm Mutual Automobile Ins. Co., 252 So. 2d 229 (Fla. 1971), that UM coverage is "statutorily intended to provide the reciprocal or mutual equivalent of automobile liability coverage prescribed by the financial responsibility law" so that if someone is covered under the liability portion of an automobile insurance policy, that person cannot be excluded from coverage under the UM portion of the policy. In the present case, McCarthy was not covered under the liability portion of the State Farm policy. Therefore, the provision of the State Farm policy which excludes McCarthy from UM coverage is not invalid and against public policy.

The District Court's previous opinions in Warren and Traveler's Ins. Co. v. Chandler, 569 So. 2d 1337 (Fla. 1st DCA 1990), were improperly decided and should not control in the instant case. Warren and Chandler confused the concept of "coverage" under the liability portion of the policy with the concept of "recovery" under that portion of the policy. There are no facts in the written opinions in either of these cases which supports the conclusion that the plaintiffs therein were covered under the liability portion of the insurance policy. Instead, as in the present case with McCarthy, these plaintiffs merely recovered under the liability portion of the policy because of the driver's negligence.

To the extent Warren and Chandler suggest that the State Farm policy exclusion in the present case is invalid and contrary to Florida's UM statute, the decisions are in conflict with several of

this Court's decisions and district court decisions which have upheld the validity of the same UM policy exclusion here. The effect of the District Court's decision below essentially doubles the liability limits under State Farm's policy when no premium has been paid for it.

The facts before the Second District Court of Appeal in Bulone are virtually identical to those now before this Court. The court in Bulone specifically held that the plaintiff therein was not covered by the liability policy at issue as a potential tortfeasor but he merely collected benefits under that coverage as a claimant. Therefore, the policy exclusion of UM benefits to the plaintiff in Bulone was not against public policy. The Bulone decision makes it clear that the State Farm policy at issue was not required to insure Gallo's vehicle both as an insured motor vehicle for the purposes of liability coverage to Gallo and as an uninsured motor vehicle for the purposes of UM coverage to an individual such as McCarthy, a class II claimant. State Farm respectfully urges this Court to adopt the rationale and holding set forth in Bulone and reverse the District Court's decisions in Warren and Chandler.

ARGUMENT

I. STATE FARM'S POLICY PROVISION WHICH EXCLUDES FROM THE DEFINITION OF "UNINSURED MOTOR VEHICLE" ANY MOTOR VEHICLE "INSURED UNDER THE LIABILITY COVERAGE OF THE POLICY" SHOULD BE GIVEN FULL FORCE AND EFFECT THUS DISALLOWING McCARTHY FROM RECOVERING BOTH LIABILITY AND UNINSURED MOTORIST BENEFITS UNDER THE SAME STATE FARM POLICY IN THE SINGLE CAR ACCIDENT IN THIS MATTER.

Under the facts before the Court, the District Court erroneously held that McCarthy is entitled to collect UM benefits under the State Farm policy issued to Gallo. The State Farm policy contains the following exclusion from UM coverage:

> An **uninsured motor vehicle** does not include a land motor vehicle:
>
> 1. Insured under the liability coverage of this policy

Page 13 of the State Farm policy attached to the "Stipulated Facts." (R. 63-91) This exclusion applies in the present case because Gallo's vehicle was a land motor vehicle insured under the liability coverage of the State Farm policy. (R. 63). The above exclusion prevents a vehicle insured under the liability portion of the State Farm policy from being both an insured vehicle and an uninsured or underinsured vehicle under the same State Farm policy. Thus, Gallo's automobile is excluded from the definition of "uninsured motor vehicle" under the express language of the policy unless the policy provision is against public policy or contrary to Florida's UM statute.

Section 627.727, Florida Statutes (Supp. 1992), the UM statute in effect at the time of the accident, required an insurer to offer

UM coverage to those insured under the liability portion of a motor vehicle liability insurance policy:

> **627.727 Motor Vehicle insurance; uninsured and underinsured vehicle coverage: insolvent insurer protection.**
>
> (1) No motor vehicle liability insurance policy which provides bodily injury liability coverage shall be delivered or issued for delivery in this state with respect to any specifically insured or identified motor vehicle registered or principally garaged in this state unless uninsured motor vehicle coverage is provided therein or supplemental thereto for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness, or diseases including death, resulting therefrom....

(emphasis added).

In Mullis, 252 So. 2d at 229, this Court dealt with the validity of exclusions from UM coverage in the face of the UM statute found at Section 627.0851, Florida Statutes (now Section 627.727):

> In sum, our holding is that uninsured motorist coverage prescribed by §627.0851 is statutorily intended to provide the reciprocal or mutual equivalent of automobile liability coverage prescribed by the financial responsibility law, i.e., to say coverage where an uninsured motorist negligently inflicts bodily injury upon a named insured, or any of his family relatives resident in his household, or any lawful occupant of the insured automobile covered in his automobile liability policy. To achieve this purpose, no policy exclusions contrary to the statute of any of the class of family insureds are permissible since uninsured motorist coverage is intended by the statute to be uniform and standard motor vehicle accident liability insurance for the protection of such insureds thereunder as "if the uninsured motorist had

> carried the minimum limits" of an automobile liability policy.

Id. at 237-238 (citations omitted) (emphasis added).

Mullis shows that there are two basic principles to be applied in determining the validity of a policy provision that excludes UM coverage:

> First, uninsured motorist coverage is statutorily required to be provided for all persons who are insured under a policy for basic liability coverage.... Second, exclusions from uninsured motorist coverage which is required under the foregoing first principle are legally impermissible.

Auto Owner's Ins. Co. v. Bennett, 466 So. 2d 242, 243 (Fla. 2d DCA 1984) (citations omitted). "[T]he persons for whom uninsured motorist coverage [is] required to be provided [are] persons who [are] covered under the liability provisions of the automobile policy." Valiant Ins. Co. v. Webster, 567 So. 2d 408, 410 (Fla. 1990).

Thus, the question to be decided in determining whether the UM exclusion in the State Farm policy is valid is whether McCarthy is entitled to basic liability coverage under Gallo's policy. Bennett, 466 So. 2d at 244. If McCarthy is not entitled to basic liability coverage for the accident in question under that policy, then under Mullis and its progeny McCarthy can be excluded from UM coverage under that policy.

The State Farm policy defines an "insured" under the liability portion of the policy in the following way:

Who is an insured?

When we refer to **your car**, a **newly acquired car**, or a **temporary substitute car**, an insured means:

1. **You**;
2. **Your spouse**;
3. The **relatives** of the first **person** named in the declarations;
4. Any other **person** while using such a **car** if its use is within the scope of consent of **you or your spouse**;
5. Any other **person** or organization liable for the use of such **car** by one of the above insureds.

Page 6 of the State Farm policy (R. 63-91) (highlighting in policy).[3] The State Farm policy in question was issued to Gallo and insured his 1987 Toyota Camry. (R. 63) As stipulated by both parties, McCarthy was occupying Gallo's automobile as a passenger and McCarthy was not related to Gallo by blood, marriage, or adoption. (R. 63). Additionally, McCarthy cannot be considered a person using the insured's car within the scope of consent of the insured or the insured's spouse since McCarthy was not driving, and McCarthy was not responsible for the use of the car by Gallo at the time of the accident. Instead, McCarthy was occupying the insured automobile merely as a passenger. Therefore, McCarthy is not an insured under the liability portion of the State Farm policy because he is neither a named insured, named insured's spouse, resident relative, nor was he using the car or responsible for its

[3]"You" or "your" is defined in the policy to mean "the named insured or the named insured shown on the declarations page." Page 4 of the State Farm policy. "Spouse" is defined to mean "**your** husband or wife while living with **you**." Page 3 of the State Farm policy. Finally, "relative" is defined as "a **person** related to **you** or **your spouse** by blood, marriage or adoption...who lives with **you**." Page 3 of the State Farm policy.

use. Since McCarthy is not entitled to basic liability coverage under the State Farm policy for the accident in question, Section 627.727 does not require the policy to extend UM coverage to him and exclusions applicable to McCarthy are not contrary to statute or against public policy.

McCarthy was entitled to recover, and did recover, under Gallo's bodily injury liability policy since Gallo was driving the car which allegedly caused his injuries. (R. 63). However, Gallo (and not McCarthy) was the "insured"--the one "covered"--under the liability section of the policy, and McCarthy, as the injured passenger, recovered damages under Gallo's liability policy. However, under the facts of this case, McCarthy is not also entitled to UM benefits because of State Farm's valid exclusion limiting the definition of "uninsured motor vehicle" to exclude vehicles insured under the liability portions of the same State Farm policy.

The trial court ruled that this case was governed by Chandler, 569 So. 2d at 1337. The facts included in the Chandler opinion are similar to the facts in the present case. Chandler was a passenger in a car owned by Williams. Williams had a policy of insurance with Traveler's that provided both bodily injury liability coverage and UM coverage. Id. at 1338. Williams was driving the insured car which was involved in a one car accident resulting in damages to Chandler exceeding the liability limits for Williams' insurance policy with Traveler's. Id. Traveler's paid Chandler the limits under Williams' bodily injury liability policy. Id.

Traveler's argued that Chandler was not entitled to UM benefits because its policy excluded as an uninsured motor vehicle "your (the insured's) car," defined in part as "any vehicle described on the declarations page of this policy." Id. at 1339 n. 3. Relying upon Mullis, the First District found this exclusion to be invalid and unenforceable because the injured person--Chandler--was "covered" under the bodily injury liability provisions of the policy:

> 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.

Id. (emphasis added). The First District concluded that "exclusions to UM coverage are not enforceable if the injured person is covered by the BIL provisions of the policy." Id. (citations omitted).

The First District, however, incorrectly reasoned that Chandler was "covered" under the bodily injury liability provisions of the policy because he received $240,000 in such benefits under the liability policy. Id. This fact did not make Chandler "covered" under the liability portion of the Traveler's policy. Williams, the driver and owner of the car, was the insured under the bodily injury liability portion of the policy and the one who was "covered" under the liability portion. Chandler was able to "recover" from Traveler's under the policy because Williams, the insured, was the negligent driver who caused the accident.

"Recovering" under the liability portion of a policy is not the same as being "covered" under the same policy.

There may be facts in the Chandler case which place Chandler under the bodily injury liability provisions of the policy, but the opinion is silent as to those facts. Based upon either the misapplication of the law or additional facts making Chandler "covered" under the liability portions of the policy, Chandler should not control the present case on the issue of the validity of the UM provision in the State Farm policy. In McCarthy's case, he was not "covered" under the bodily injury liability provisions of Gallo's insurance policy with State Farm.

In affirming the decision of the trial court in the present case, the First District relied upon its previous decision in Warren. Warren, 650 So. 2d at 1082. The facts in Warren, for the purposes of the issues presented therein, were indistinguishable from the facts in the Chandler case. Therefore, the First District in Warren held that its decision was controlled by Chandler. Warren, 650 So. 2d. at 1083.

The decisions in Warren and Chandler appear to be in conflict with, or at least inconsistent with, this Court's decisions in Reid v. State Farm Mutual Automobile Ins. Co., 352 So. 2d 1172 (Fla. 1977), Brixius v. Allstate Ins. Co., 589 So. 2d 236 (Fla. 1991), and Smith v. Valley Forge Ins. Co., 591 So. 2d 926 (Fla. 1992). In these cases, this Court found no public policy considerations which invalidated UM exclusions similar to the one contained in Gallo's

State Farm policy when the claimant was a class I[4], named insured involved in a single car accident. All three cases demonstrate that Florida courts have consistently upheld the principle that a motor vehicle cannot be insured and uninsured under the same insurance policy.[5]

In Reid, this Court specifically upheld the exclusion under the State Farm policy that an "uninsured motor vehicle" may not be the same vehicle defined in the policy as the insured motor vehicle. Reid. 352 So. 2d at 1173. The plaintiff in Reid was a passenger in an automobile in which she was insured as a member of the named insured's family or household. State Farm denied liability when the passenger plaintiff sued the driver, relying upon a provision in the policy that the insurance does not apply to bodily injury to any insured or any member of the family of an insured residing in the same household as the insured. Id. at 1172-1173. Because Reid could not recover under the State Farm policy liability provisions, she argued that the automobile was uninsured. Id. at 1173.

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[4]A class I insured consists of the named insured and resident family members while a class II insured consists of those who are insured only because they are drivers or passengers in an insured motor vehicle with the consent of the named insured. Florida Farm Bureau Cas. Co. v. Hurtado, 587 So. 2d 1314, 1317 (Fla. 1991). In the case before this Court, McCarthy is clearly a class II insured.

[5]In Nationwide Mutual Fire Ins. Co. v. Olah, 662 So. 2d 980 (Fla. 2d DCA 1995), the court reversed the trial court "because the vehicle was an insured vehicle under the liability portion of the policy and cannot be uninsured under the same policy." Id. at 981. Furthermore, the court held that since the vehicle in question was "insured under the liability portion of the policy, it cannot be uninsured under the UM portion of the policy." Id. at 982; citing Reid, 352 So. 2d at 1172.

The Reid Court framed the issue on appeal as "whether an automobile can, at the same time, be both an insured and an uninsured motor vehicle due to the operation of Florida Statutes and a valid liability exclusion provision contained in an insurance policy." Id. at 1172. In upholding this UM exclusion, this Court recognized the general rule set forth in Mullis:

> We recognize, as a general rule, that an insurer may not limit the applicability of uninsured motorist protection....Mullis v. State Farm Mutual Automobile Insurance Company, 252 So. 2d 229 (Fla. 1971). . . 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 §627.727 (Florida Statutes)(1975).

Id. at 1173-1174.

In Brixius, 589 So. 2d at 236, this Court upheld the validity of the exact same exclusion at issue in the present case. Brixius had a policy of insurance with Allstate providing both liability coverage and UM coverage. Id. at 237. Brixius was a passenger in her car which was being driven by a friend when an accident occurred injuring Brixius. Id. at 236-237. Brixius sought to recover liability insurance benefits under her policy with Allstate because the driver was uninsured. Id. at 237. However, the Allstate policy excluded liability benefits for injuries sustained by a named insured. Id. Brixius argued that since she was excluded from liability coverage under the policy, she was entitled

to UM coverage. Id. However, the Allstate policy excluded UM coverage for Brixius as well because "an uninsured auto is not a vehicle defined as an insured auto under the liability portion of this policy." Id.

This Court held that the UM exclusion was valid, relying upon its earlier decision in Reid. Brixius, 589 So. 2d at 237-238. Even though Brixius was uninsured under the liability policy because of an exclusion, this Court reaffirmed the principle that a valid exclusion in a liability policy does not make a vehicle uninsured for uninsured motorist purposes. Id. at 237-238; (quoting Allstate Ins. Co. v. Boynton, 486 So. 2d 552, 555 n. 5. (Fla. 1986)). "In Reid, we held that a vehicle cannot be both an insured and an uninsured vehicle under the same policy." Brixius, 589 So. 2d at 237-238 (emphasis in original) (quoting Boynton, 486 So. 2d at 555 n. 5.). The Brixius court noted that, as of that time, the legislature under Section 627.727, Florida Statutes, had not required that UM benefits be provided to an insured when liability benefits are unavailable because of a valid liability exclusion in the same policy under which UM benefits are sought. Id. at 237.[6]

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[6]In 1992, the legislature amended Section 627.727(3), Florida Statutes (1992), to include in the definition of uninsured motor vehicle situations where the liability insurance "excludes the 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 insured's household." Ch. 92-381, Section 79, at 2600, Laws of Fla. Of course, this amendment does not apply to the present facts because the insured vehicle was not being driven by a non-family member. McCarthy was not a named insured or a resident relative of the named insured, nor was the vehicle excluded under the liability

Finally, Smith, 591 So. 2d at 926, again shows that this Court will uphold an exclusion from UM coverage like that found in the instant case even when it is applied against a class I insured. Smith was injured in a car accident while a passenger in her own automobile being driven by her adult daughter who did not reside with Smith and had no liability insurance. Id. at 927. Smith's insurance policy provided both liability and UM coverage, but contained a family household exclusion preventing her from recovering under her liability policy. Id. Additionally, the policy had a family car exclusion in the UM coverage similar to the exclusion in the instant case, precluding her from recovering as well. Id. The definition of an uninsured motor vehicle contained in the policy in Smith excluded any vehicle that is "owned by or furnished or available for the regular use of you or any family member." Id. Recognizing both the Reid and Brixius cases, this Court ruled that this provision precluded UM coverage for Smith. Citing Reid, "the Court recognized that the family car exclusion in the uninsured motorist coverage was not against public policy...." Smith, 591 So. 2d at 927.

The UM exclusions in Brixius, Reid, and Smith are identical or substantially similar to the State Farm exclusion in the present case. Even though the results in Brixius, Reid, and Smith were harsh--the plaintiffs could not recover under their liability policy, nor could they recover under their UM policy--this Court, nevertheless, upheld the exclusion as valid and not against public

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section of the policy.

policy. This Court upheld the principle that a motor vehicle cannot be insured and uninsured under the same policy and asserted this in the context of a class I insured who was injured while riding as a passenger in the insured automobile.

The exclusion in Gallo's State Farm policy in the instant case is also valid and should prevent the Gallo vehicle from being insured and uninsured under the same policy with regard to a class II insured such as McCarthy who was injured while riding as a passenger. Unlike Brixius, Reid, and Smith, McCarthy was actually able to collect under the bodily injury liability provisions of the State Farm policy. He is simply prevented from claiming UM benefits under the same policy that paid him bodily injury liability benefits.

As indicated at footnote 6 above, a subsequent legislative change in Section 627.727(3), Florida Statutes, specifically amended the UM statute to require UM coverage in the Brixius situation. However, no such legislation has been enacted that would apply to McCarthy and require UM coverage to passengers who have liability benefits available to them under the same policy in which they are claiming UM benefits. This Court has upheld the validity of the exact same UM exclusion applied to a class I named insured riding as a passenger who could not recover liability benefits. Therefore, it is logical that the exclusion in the UM policy in the instant case is valid as it does not give any greater protection to a class II insured who is a passenger and who could recover liability benefits. An interpretation consistent with

McCarthy's position below creates the illogical result that a class I named insured actually could be excluded (prior to the 1992 legislation) from both liability and UM coverage if they are a passenger in the named vehicle, but a class II insured occupying the same position could not only recover under the liability portion of the policy but could not validly be excluded from UM coverage. In fact, the First District in Nicholas v. Nationwide Mutual Fire Ins. Co., 503 So. 2d 993 (Fla. 1st DCA 1987), and the appellate courts in State Farm Mutual Automobile Ins. Co. v. McClure, 501 So. 2d 141 (Fla. 2d DCA 1987), rev. denied, 511 So. 2d 299 (Fla. 1987), and Fidelity and Cas. Co. v. Streicher, 506 So. 2d 92 (Fla. 2d DCA 1987), rev. denied, 515 So. 2d 231 (Fla. 1987), considered and upheld the validity of UM policy exclusions similar to that in the instant case when applied against class II insured passengers injured in single car accidents. The McClure and Nicholas courts reasoned that allowing recovery of UM and liability benefits in a single car accident appeared contrary to the intent of the statute as the legislature did not intend to allow claims that the same vehicle was "insured" and "uninsured" under the same policy. McClure, 501 So. 2d at 143; Nicholas, 503 So. 2d at 994. Additionally, the Streicher court wrote:

> We do not feel it was the intent of the legislature to require that an automobile insurance policy provide both liability and uninsured motorist coverage to the same injured party.

Streicher, 506 So. 2d at 93.

The McClure court analyzed and upheld the validity of the exact same UM policy exclusion contained in Gallo's policy under the 1983 version of Section 627.727. The Nicholas and Streicher cases analyzed and upheld the validity of similar UM policy exclusions under the 1984 statute with the plaintiffs in those cases arguing that the changes in the 1984 statute required coverage to extend UM benefits.[7] Both the Nicholas and Streicher courts acknowledged the different versions of the UM statute, but held that the result was still the same: no UM benefits were required to be extended under the same policy providing liability

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[7]The applicable provision relied on in McClure was §627.727(2)(b), Florida Statutes (1983), which provided, that an:

> Insurer shall make available, . . . , excess underinsured motor vehicle coverage, providing coverage for an insured motor vehicle when the other person's liability insurer has provided limits of bodily injury liability for its insured which are less than the damages of the injured person purchasing such excess under insured motor vehicle coverage. Such excess coverage shall. . . also be over and above, but shall not duplicate, the benefits available under the other person's liability coverage.

Section 627.727(2)(b), Fla. Stat. (1983) (emphasis added). The emphasized portions of the statute were the provisions that the McClure court based its decision upon.

The 1984 amendment deleted subsection (2)(b) of this statute. It also deleted references to "other person's liability insurer" in favor of language referring to "any motor vehicle liability insurance coverage." Section 627.727(1), Fla. Stat. (Supp. 1984). "The effect of which [was] 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. . . ." Woodard v. Pennsylvania National Mutual Ins. Co., 534 So.2d 716, 719 (Fla. 1st DCA 1988), rev. dismissed 549 So. 2d 989 (Fla. 1989).

benefits. Nicholas, 503 So. 2d at 994; Streicher, 506 So. 2d at 93.

In the present case, allowing McCarthy to recover means that Gallo's 1987 Toyota will be "insured" for liability purposes and "uninsured" for UM purposes. Under the reasoning of McClure and Nicholas, this result is as impermissible as the same result for class I insured passengers occupying the exact same position. Nowhere does the UM statute require that a class II injured passenger in a single car accident be entitled to recover under both the UM and the liability portions of the same policy.

The First District in Woodard, 534 So. 2d at 720, explained that the Nicholas and Streicher holdings denying a recovery were correct, but for the wrong reason. The Woodard court explained that, in both cases, the motor vehicle involved did not meet the statutory definition of a uninsured motor vehicle and that is why the policies in each of those cases did not need to extend UM benefits to the injured passenger. Id. at 720-721. However, Woodard involved a class II passenger injured in a two vehicle accident. Id. at 717. The claimant, who had already received liability benefits under the policy insuring the car in which he was a passenger, was attempting to collect UM benefits from the same policy, not based upon the liability of the vehicle in which he was riding, but based upon the argument that the other vehicle was also at fault and it fit the definition of "uninsured motor vehicle." Id. at 721. The Woodard court permitted the claimant to collect both liability benefits and UM benefits from the same

policy as to do so "under the facts of [the Woodard] case comports with the manifest purpose of the uninsured motorist statute." Id. (emphasis added).

Although Woodard clarified the basis of the decisions in Nicholas and Streicher, the case does not change nor correct prior appellate court interpretation of legislative intent surrounding the UM statute when applied to class II insureds injured in single car accidents. Nowhere does the Woodard case challenge the principle that a motor vehicle cannot be both "insured" and "uninsured" under the same policy. In fact, the First District wrote:

> Woodard, unlike the plaintiff in Nicholas, did not claim that the same vehicle was insured for one purpose and uninsured or underinsured for another; he admitted that the vehicle in which he was riding was insured and was simply claiming that the other vehicle, Fairfield's, was uninsured.

Woodard, 534 So. 2d at 721. Even though Woodard permitted an injured passenger to recover both liability and UM benefits under the same policy, the First District wrote that allowing benefits to be collected under both portions of the same policy, "under the facts of this case comports with the manifest purpose of the uninsured motorist statute." Id. (emphasis added) In limiting its holding to the facts of the Woodard case, the First District observed the following concerning Streicher and Nicholas:

> Apart from the fact that in neither case did the vehicle involved qualify as an "uninsured motor vehicle," in each of those cases liability insurance on that vehicle had been paid and the plaintiff was trying to effectively stack the uninsured motorist

> coverage on top of the liability coverage. We discern no language in the 1984 act which mandates such a result.

Woodard, 534 So. 2d at 721 (emphasis added).

The District Court's decision below invalidating the UM exclusion in question has the effect of doubling the liability limits under Gallo's State Farm policy. As discussed above, both the First District in Woodard and the court in Streicher recognized that it was not the intent of the legislature to require an insurer to provide both liability coverage and UM coverage to the same injured party. The Streicher court wrote of the negative consequences which would follow if the policy provided UM and liability benefits to an injured passenger involved in a single car accident:

> 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. In the present case, McCarthy is, in effect, impermissibly attempting to double the liability limits under the State Farm policy by attempting to recover UM benefits under the same policy in which he was paid liability benefits.

II. THE STATE FARM POLICY AT ISSUE IS NOT REQUIRED TO INSURE GALLO'S VEHICLE BOTH AS AN INSURED MOTOR VEHICLE FOR PURPOSES OF LIABILITY COVERAGE TO GALLO AND AS AN UNINSURED MOTOR VEHICLE FOR PURPOSES OF UNINSURED MOTORIST COVERAGE TO CLASS II CLAIMANTS.

As referenced above, the District Court below certified conflict with the Second District Court of Appeal's recent decision in Bulone, 660 So. 2d at 399. For the reasons set forth below, State Farm respectfully urges this Court to approve the rationale and holding set forth in the Bulone decision and reverse the First District's decisions in Chandler and Warren.

The facts in Bulone are virtually identical to those now before the Court. On April 16, 1992, Bulone was injured while a passenger in a vehicle owned by John A. Moeller and operated by his son, John G. Moeller. Bulone, 660 So. 2d at 400. Moeller's truck was insured by United States Automobile Association ("USAA") under a policy which provided $100,000.00 per person coverage for bodily injury liability and $100,000.00 per person for UM coverage. Id. Bulone accepted USAA's bodily injury liability limits of $100,000.00 and then proceeded to claim entitlement to UM benefits as a class II insured under the USAA policy. Id. The definition of "uninsured motor vehicle" under USAA's policy excluded any vehicle "owned by or furnished or available for the regular use of you or any family member." Id. "You" in USAA's policy included the named insured as well as any residents of his household. Id. In the case now before this Court, Gallo's automobile insurance policy with State Farm similarly excludes from the definition of "uninsured motor vehicle" any motor vehicle which is "insured under the liability coverage of this policy." This "owned vehicle"

clause found in Gallo's State Farm policy as well as the policy before the Bulone court is a standard restriction found in the majority of automobile insurance policies providing UM coverage throughout the United States. Id.

The Bulone court began its analysis of the issue before it by noting that the "owned vehicle" clause is customarily "employed to prevent a single insurance policy from treating an owned automobile both as an insured and an uninsured vehicle on claims of Class II insureds." Id. at 401. The Bulone court then identified the numerous Florida decisions which have held that an "owned vehicle" clause is not contrary to the legislature's strong public policy of promoting UM coverage. See Nicholas, 503 So. 2d at 994; see also Streicher, 506 So. 2d at 93; Peel v. Allstate Ins. Co., 522 So. 2d 505, 506 (Fla. 2d DCA 1988); McClure, 501 So. 2d at 143-144. Without disputing the correctness of these decisions, the plaintiff in Bulone asserted that the 1989 amendments to Section 627.727, Florida Statutes, required a family automobile insurance policy to provide class II UM coverage whenever a passenger's total damages exceeded said policy's liability limits. Bulone, 660 So. 2d at 401. The Bulone court noted that this argument was supported by the First District's decisions in Warren and Chandler and proceeded to explain the rationale for its disagreement therewith. Id. at 401-402.

After examining the Chandler decision, the Bulone court wrote that

> [t]he opinion explains that Chandler should receive underinsured motorist coverage because he was 'covered' under the bodily injury liability policy. Chandler was a passenger and not a permissive user. He was not

> covered by the liability policy as a potential tortfeasor, but merely collected benefits under that coverage as a claimant. The cases relied upon by the Chandler court involve a separate issue of coverage for class I insureds.

Id. at 402 n. 5 (emphasis in original). Additionally, the Bulone court noted that this Court's decision in Reid, 352 So. 2d at 1172, and its progeny, held that class I insureds are not entitled to UM benefits from their own policy when said policy's liability coverage excludes a claim involving a negligent family member. Bulone, 660 So. 2d at 401.[8] Therefore, the Reid decision mandates that, in a single car accident, a class I insured who is a passenger in an automobile driven by another class I insured under the same policy would have no protection whatsoever. However, the Bulone court noted ironically that the "First District's analysis in Warren would give a third party [a class II insured] both the liability and the uninsured motorist coverage." Bulone, 660 So. 2d at 401. The legislature has clearly not intended such an absurd result.

The Bulone court also noted that an insurance carrier does not have a right of subrogation against its own insured. Id. at 404. However, when an insurance company pays a UM claim involving a solvent tortfeasor, it customarily receives subrogation rights from its insured against said tortfeasor. Id. However, where the

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[8]The legislature's amendment to Section 627.727(3)(c) provided that a class I insured would not be precluded from receiving UM benefits under his or her own policy when a non-family permissive user is either uninsured or underinsured. Ch. 92-318, Laws of Florida. This amendment legislatively overruled the decision of Brixius, 589 So. 2d at 236. However, the 1992 amendment only affects claims involving non-family tortfeasors and, therefore, does not legislatively overrule Reid. Bulone, 660 So. 2d at 404 nn. 7-8.

"underinsured" tortfeasor is construed to encompass the insured under a policy, no subrogation right exists. Id. The Bulone court observed that

> [w]ithout a subrogation right, there is nothing to distinguish this theory of underinsured motorist coverage from liability coverage. Thus, the result is a policy that provides twice the disclosed limit of liability coverage for the claims of passengers.

Id. See also Streicher, 506 So. 2d at 93. (The court observed that a reading of the insurance policy before it which effectively doubled the liability limit of said policy was inappropriate.) In conclusion, the Bulone court held that

> [t]he strong policies that compelled the legislature to protect the Florida family from unsatisfied claims do not have the same force when applied to class II insureds who have greater protection under the family's liability coverage, and also have the option of purchasing adequate uninsured motorist coverage on their own family auto insurance policy.
>
> The interpretation of Section 627.727 in Warren creates statutory requirements never disclosed to the insurance carriers or to the families who have purchased the coverage. If such class II coverage is a desired public policy, the legislature should give the insurance companies notice of the change so that they can increase their premiums to cover the risk. Likewise, before the legislature requires Florida's families to pay the premiums necessary to double protection for class II insureds, this issue should be debated by the legislature.

Bulone, 660 So. 2d at 405. For the reasons clearly set forth in the Bulone opinion, State Farm respectfully urges this Court to reverse the First District's opinions in Chandler and Warren and hold that McCarthy is not entitled to UM benefits under the State Farm policy at issue.

CONCLUSION

Based upon the foregoing citations to authorities and arguments, the District Court erred in ruling that McCarthy was entitled to UM coverage under the State Farm policy issued to Gallo. The District Court's ruling in this regard should be reversed and this cause should be remanded for entry of an order in accordance therewith.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Jack M. Ross, Esquire, P.O. Box 1168, Gainesville, Florida 32602, by U.S. mail, this 14th day of February, 1996.

Attorney