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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC12-1257

TRAVELERS COMMERCIAL INSURANCE COMPANY

Petitioner,

vs.

CRYSTAL MARIE HARRINGTON

Respondent.

ON DISCRETIONARY REVIEW FROM THE DISTRICT
COURT OF APPEAL, FIRST DISTRICT
L.T. NO. 1D11-0015

BRIEF OF THE FLORIDA JUSTICE ASSOCIATION, AMICUS CURIAE SUPPORTING RESPONDENT'S POSITION

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PRELIMINARY STATEMENT OF AMICUS CURIAE

The Florida Justice Association ("FJA") has appeared in this case to address the first certified question. FJA is a large voluntary statewide association of more than 3,000 attorneys concentrating on litigation in all areas of the law. The members of FJA are pledged to the preservation of the American legal system, the protection of individual rights and liberties, the evolution of the common law, and the right of access to courts. FJA has been involved as amicus curiae in hundreds of cases in this Court and other Florida appellate courts, including cases involving uninsured motorist coverage, an issue which affects all Florida motorists and those injured by the negligent operation of motor vehicles. See, e.g., Young v. Progressive Se. Ins. Co., 753 So. 2d 80 (Fla. 2000); Travelers Indem. Co. v. Warren, 678 So. 2d 324 (Fla. 1996); Worldwide Underwriters Ins. Co. v. Welker, 640 So. 2d 46 (Fla. 1994); Michigan Millers Mut. Ins. Co. v. Bourke, 607 So. 2d 418 (Fla. 1992).

ISSUE PRESENTED FOR REVIEW

(as framed by the first certified question)

WHETHER THE FAMILY VEHICLE EXCLUSION FOR UNINSURED MOTORIST BENEFITS CONFLICTS WITH SECTION 627.727(3), FLORIDA STATUTES, WHEN THE EXCLUSION IS APPLIED TO A CLASS I INSURED WHO SEEKS SUCH BENEFITS IN CONNECTION WITH A SINGLE-VEHICLE ACCIDENT WHERE THE VEHICLE WAS BEING DRIVEN BY A CLASS II PERMISSIVE USER, AND WHERE THE DRIVER IS UNDERINSURED AND LIABILITY PAYMENTS FROM THE DRIVER’S INSURER, WHEN COMBINED WITH LIABILITY PAYMENTS UNDER THE CLASS I INSURED’S POLICY, DO NOT FULLY COVER THE CLASS I INSURED'S MEDICAL COSTS.

SUMMARY OF ARGUMENT

This Court's decision in Reid v. State Farm Fire & Cas. Co., 352 So. 2d 1172 (Fla. 1977), has been repeatedly cited under varying facts and versions of the uninsured motorist coverage statute for the proposition that a vehicle cannot be both insured and uninsured under the same policy when the policy contains a "your-auto" provision which excludes the insured vehicle from the definition of uninsured motor vehicle. Recognizing the evolution of the UM statute in the thirty-five years since Reid was decided, and the continued viability of this Court's landmark decision in Mullis v. State Farm Mut. Auto. Ins. Co., 252 So. 2d 229 (Fla. 1971), the Court should, if necessary, recede from Reid and hold that "your-auto" exclusions such as the one found in the Travelers policy in this case are invalid as contrary to public policy.

Based on Young v. Progressive Se. Ins. Co., 753 So. 2d 80, 85 (Fla. 2000), FJA also urges the Court to hold that no exclusions or limitation in the uninsured motorist coverage provisions in an automobile liability insurance policy are valid except those exclusions and limitations expressly enumerated in section 627.727(9), Florida Statutes. In Young, this Court held a policy provision which excluded self-insured vehicles from the definition of an uninsured motor vehicle was invalid, in part, because that exclusion was not authorized by section

627.727(9). Section 627.727(9) likewise does not authorize the "your-auto" exclusion in the Travelers policy in this case.

ARGUMENT

Because the parties have thoroughly briefed the statutory and decisional law affecting the answer to the first certified question, FJA will not repeat those arguments here. FJA, however, offers these additional arguments for the Court's consideration.

A. Standard of Review

The standard of review is de novo. See Chandler v. Geico Indem. Co., 78 So. 3d 1293, 1296 (Fla. 2011).

B. Mullis remains controlling authority.

Any discussion of uninsured motorist coverage necessarily begins with this Court's seminal decision in Mullis v. State Farm Mut. Auto. Ins. Co., 252 So. 2d 229 (Fla. 1971). In language that resonates throughout our insurance jurisprudence, the Mullis court emphasized that uninsured motorist coverage mandated by section 627.727, Florida Statutes, protects the named insured and the named insured's resident relatives (Class I insureds) under an automobile liability insurance policy "Whenever or Wherever bodily injury is inflicted upon him by the negligence of an uninsured motorist." Mullis, 252 So. 2d at 238. Owing to the importance of this valuable coverage required by law, Florida courts have repeatedly held that any

attempt by insurers to deny UM coverage to Class I insureds through policy exclusions and limitations is invalid as contrary to Florida's public policy as expressed by the UM statute, section 627.727, Florida Statutes. See Young v. Progressive Se. Ins. Co., 753 So. 2d 80, 83 (Fla. 2000) ("Because the uninsured motorist statute 'was enacted to provide relief to innocent persons who are injured through the negligence of an uninsured motorist; it is not to be "whittled away" by exclusions and exceptions.") (quoting Mullis, 252 So. 2d at 238); Salas v. Liberty Mut. Fire Ins. Co., 272 So. 2d 1, 5 (Fla. 1972) ("As a creature of statute rather than a matter for contemplation of the parties in creating insurance policies, the uninsured motorist protection is not susceptible to the attempts of the insurer to limit or negate that protection.").

Although this Court effectively overruled Mullis in World Wide Underwriters Ins. Co. v. Welker, 640 So. 2d 46 (Fla. 1994), and Nationwide Mut. Fire Ins. Co. v. Philips, 640 So. 2d 53 (Fla. 1994), the Court in Government Employees Ins. Co. v. Douglas, 654 So. 2d 118 (Fla. 1995), receded from Welker and Philips and reinstated Mullis as controlling precedent. Thus, the Court should examine the Travelers policy at issue in this case under Mullis's exacting standards.

C. The Court should, if necessary, recede from Reid.

This Court's decision in Reid v. State Farm Fire & Cas. Co., 352 So. 2d 1172 (Fla. 1977), forms the foundation for Travelers' arguments that (1) "Courts, including this Court, have upheld 'your-auto' exclusions even broader than the one

here;" and (2) "Courts, including this Court, also have concluded that a vehicle cannot be both insured and uninsured under the same policy." Initial Brief at 14, 17 (emphasis in original). See also Gares v. Allstate Ins. Co., 365 F.3d 990, 993 (11th Cir. 2004) (citing Reid for the proposition "that uninsured motorist coverage is not available if the claim is made against the same policy which provides liability coverage to the automobile in question and if the policy says that an insured automobile cannot also be considered an uninsured automobile.").

The facts in Reid, however, bear little resemblance to the facts of this case. Reid was based on the 1975 version of the UM statute and thus was decided before the 1984 amendment to section 627.727(1), Florida Statutes, which made UM coverage "excess over" all other coverages, including liability coverage,[1] and before the 1989 amendment to section 627.727(3)(b), Florida Statutes, which

[1] See Ch. 84-41, § 1, Laws of Fla. As noted by the First District, albeit under different facts:

> The effect of the changes made by the 1984 amendment are abundantly clear. The references to "other person's liability insurer" were 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.

Woodard v. Pennsylvania Nat'l Mut. Ins. Co., 534 So. 2d 716, 719 (Fla. 1st DCA 1988) (emphasis the court's).

amended the definition of “uninsured motor vehicle” “to include an insured motor vehicle when the liability insurer thereof . . .[h]as 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.”[2]

Further, Reid involved only one insurance policy while the present case involves two separate policies written by different insurance companies covering unrelated insureds. In the Boynton case, this Court found the existence of multiple policies was a valid reason for distinguishing Reid:

> Allstate, citing Reid v. State Farm Fire & Casualty Co., 352 So. 2d 1172 (Fla.1977), asserts in its brief that a valid exclusion in a liability policy does not make a vehicle uninsured for uninsured motorist purposes. In Reid, we held that a vehicle cannot be both an insured and uninsured vehicle under the same policy. The present case is distinguishable because it involves separate policies. Reid is inapplicable.

Allstate Ins. Co. v. Boynton, 486 So. 2d 552, 555 n.5 (Fla. 1986) (emphasis the court’s). The Eleventh Circuit in Gares similarly noted:

> Florida’s intermediate appellate courts have generally concluded that Reid controls where there is one policy providing that an automobile insured under the liability portion of the policy cannot also be an uninsured vehicle. They have also sometimes suggested (but not held) that Boynton is limited to those situations where there are separate policies, without explaining how a multiple-policy scenario is different.

[2] See Ch. 89-243, § 1, Laws of Fla.

Gares, 365 F.3d at 995. Nevertheless, the Gares court followed Reid, relying on the Second District's decision in National Mut. Fire Ins. Co. v. Olah, 662 So. 2d 980 (Fla. 2d DCA 1995), which apparently found the multiple-policy scenario an insufficient basis to distinguish Reid.

Although "[s]tare decisis provides stability to the law and to the society governed by that law," the doctrine "does not command blind allegiance to precedent." State v. Gray, 654 So. 2d 552, 554 (Fla. 1995). See also Haag v. State, 591 So.2d 614, 618 (Fla.1992) ("[S]tare decisis is not an ironclad and unwavering rule that the present always must bend to the voice of the past, however outmoded or meaningless that voice may have become."). To that end, "[t]his Court has departed from precedent to correct legally erroneous decisions, when such departure is necessary to vindicate other principles of law or to remedy continued injustice, and when an established rule of law has proven unacceptable or unworkable in practice." Allstate Indem. Co. v. Ruiz, 899 So. 2d 1121, 1131 (Fla. 2005) (citations and internal quotations omitted).

Although respondent had made several persuasive arguments for upholding the district court's decision, FJA respectfully suggests that if necessary to approve the decision below, the Court should recede from Reid and the decisions from this

Court which follow it[3] and hold that "your-auto" exclusions such as the one found in the Travelers policy in this case are invalid as contrary to public policy as expressed by the Court in Mullis. In this regard, FJA adopts the views expressed by Justice Kogan in his dissenting opinion in Brixius to which Justice Barkett concurred:

> There may be reasons for allowing enforcement of certain types of exclusionary clauses expressly limiting uninsured motorist coverage in circumstances consistent with public policy. E.g., § 627.727(9), Fla. Stat. (1987) (naming some such circumstances); Reid v. State Farm Fire & Cas. Co., 352 So.2d 1172 (Fla.1977) ("family exclusion"). However, I do not believe this assumption requires the conclusion that motorists can be denied coverage simply because they were injured by an uninsured driver using their own cars.
>
> An exclusion of this type, which was embodied in the Brixius' policy, is so directly contrary to the policies of no-fault and the uninsured motorist statute as to be void on its face. It is nothing less than allowing insurance companies to exclude coverage for certain classes of vehicles that happen to be driven by uninsured motorists. With only slight extension, insurance companies might be allowed to exclude uninsured motorist coverage for specific types of vehicles deemed to be particularly risky. In time, the exception would swallow the rule. Such a result would render uninsured motorist coverage an absurdity, and the statute meaningless.
>
> The line must be drawn, and I would draw it here. The policy of uninsured motorist coverage is to protect policy holders from injuries caused by uninsured motorists. This policy and the policies underlying no-fault insurance cannot be achieved if insurers can exclude any class of vehicles from uninsured motorist coverage. Other types of exclusions may be permissible, but not this one. Unlike the majority, I

[3] Smith v. Valley Forge Ins. Co., 591 So. 2d 926, 927 (Fla. 1992); Brixius v. Allstate Ins. Co., 589 So. 2d 236, 237 (Fla. 1991).

> agree with the court in Jernigan v. Progressive American Insurance Co., 501 So. 2d 748, 750 (Fla. 5th DCA), review denied, 513 So. 2d 1062 (Fla. 1987), when it concluded that
>
>> the test for determining whether a vehicle is insured for purposes of uninsured motorist coverage, is not whether the owner or operator of the vehicle has a liability insurance policy, but whether insurance is available to the injured plaintiff.
>
> It makes no difference that injured parties happen to hold the same insurance policies they are claiming against.

Brixius v. Allstate Ins. Co., 589 So. 2d 236, 238-39 (Fla. 1991) (Kogan, J. dissenting) (emphasis in original; footnote omitted).

D. The "your-auto" exclusion is not authorized by section 627.727(9), Florida Statutes.

Neither party nor Traveler's amici has addressed the effect of section 627.727(9), Florida Statutes, on the answer to the first certified question. Enacted in 1987, section 627.727(9) authorizes a variety of exclusions and limitations to statutorily mandated uninsured motorist coverage provided the insurer satisfies the notice and premium reduction requirements set forth in this subsection. See Ch. 87-213, § 1, Laws of Fla.

This Court addressed section 627.727(9) in Young v. Progressive Se. Ins. Co., 753 So. 2d 80, 83 (Fla. 2000), in determining the validity of a provision in an automobile liability insurance policy which excluded self-insured vehicles from the policy's definition of uninsured motor vehicle. Based on Mullis and the statutory definition of uninsured motor vehicle set forth in section 627.727(3), the Court

held the self-insurance exclusion was invalid. See Young, 753 So. 2d at 87 ("We thus conclude that a self-insured motorist exclusion is contrary to the statutory scheme set forth in the uninsured motorist statute, and that the provision in the Progressive uninsured motorist policy refusing to treat a self-insured motorist as either an underinsured or uninsured motorist is void.").

The Young Court found this result entirely consistent with section 627.727(9) inasmuch as a self-insured vehicle exclusion was not among the exclusions and limitations authorized by that subsection:

> This statutory construction, which would prohibit a self-insurer exclusion as contrary to the uninsured motorist statute, is also consistent with section 627.727(9). That section provides a list of statutorily permissible policy exclusions to uninsured motorist coverage. Significantly, an exclusion for self-insured motorists is not among this list. See § 627.727(9). "Under the principle of statutory construction, expressio unius est exclusio alterius, the mention of one thing implies the exclusion of another." Moonlit Waters Apartments Inc. v. Cauley, 666 So. 2d 898, 900 (Fla. 1996). By failing to permit self-insured motorist policy exclusions in the list of authorized exclusions, the Legislature has further indicated its intent in section 627.727 not to permit self-insured motorist policy exclusions.

Young, 753 So. 2d at 85. Applying Young's rational to this case, by failing to include "your-auto" exclusions such as the one in Travelers' policy among the authorized exclusions and limitations found in section 627.727(9), the Legislature has indicated its intent that such exclusions are not permitted under Florida law.

The Second District in Varro v. Federated Mut. Ins. Co., 854 So. 2d 726 (Fla. 2d DCA 2003), reached a similar result. In that case, the court determined that a special endorsement in an automobile liability insurance policy issued to a corporation which provided UM coverage for the corporate principals and their family members while excluding UM coverage altogether for other insureds was invalid as contrary to Florida public policy as expressed by section 627.727, Florida Statutes. Like this Court in Young, the Second District found this result consistent with section 627.727(9):

> Section 627.727(9), Florida Statutes (1999), lists five limitations that insurance companies may place on UM coverage. These five limitations do not include a provision that allows an exclusion of particular individuals from UM coverage. See § 627.727(9)(a)-(e), Fla. Stat. (1999).

Varro, 854 So. 2d at 728. The same rationale applies here.

Young's potential effect on the first certified question in this case was anticipated by one commentator over ten years ago. See Tracy Raffles Gunn, Young v. Progressive Southeastern Insurance Company: The Florida Supreme Court Further Expands Mandated Uninsured-Motorist Coverage, 31 Stetson L. Rev. 383, 396-97 (2002) ("After Young, it is possible that the only valid exceptions, exclusions, or limitations on UM coverage, no matter what form they take, are those stated in Subsection (9).") Specifically addressing the issue now before this Court, the author stated with some degree of clairvoyance:

> This outcome could be significant because many policies contain various other limitations, including other exceptions from the definition of an "uninsured motor vehicle." The self-insured-vehicle exception is not the only such exception. A common such exception provides that the term "uninsured motor vehicle" does not include any vehicle "owned by or furnished or available for the regular use of" the named insured or any family member. These "family car exclusions" or "your car" exceptions to the definition of "uninsured motor vehicle" historically have been upheld by the Florida courts. In fact, in Travelers Insurance Company v. Warren, the Florida Supreme Court recently reaffirmed the validity of the "your car" exception. Interestingly, the court in Warren made clear that the validity of these exceptions did not depend on whether liability coverage was provided under the policy; in other words, it was irrelevant whether the vehicle was uninsured or underinsured.
>
> It is difficult to reconcile Warren with the language in Young to the effect that Subsection (9) provides the only valid limitations on UM coverage. However, Young potentially opens the door to arguments that any limitation not expressly listed in Subsection (9) is invalid.

Id. at 397-98 (footnotes omitted). FJA concurs with the author's comments.

CONCLUSION

The uninsured motorist "statute is designed for the protection of injured persons, not for the benefit of insurance companies or motorists who cause damage to others." Brown v. Progressive Mut. Ins. Co., 249 So. 2d 429, 430 (Fla. 1971). Indeed, uninsured motorist coverage remains "the only meaningful protection available to Floridians who daily are subjected to misguided missiles

on the highways of this state." Ferrigno v. Progressive Am. Ins. Co., 426 So. 2d 1218, 1219 (Fla. 4th DCA 1983). In keeping with this philosophy, FJA urges the Court to answer the first certified question in the affirmative.

Respectfully submitted:

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CERTIFICATE OF TYPE SIZE AND STYLE

The undersigned attorney hereby certifies that this brief was prepared using a 14-point Times New Roman font in accordance with Florida Rule of Appellate Procedure 9.210(a)(2).

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