ORIGINAL

IN THE SUPREME COURT OF FLORIDA

TRAVELERS COMMERCIAL INSURANCE COMPANY, AN AFFILIATE OF TRAVELERS INSURANCE CO.,

PETITIONER,

Docket No. SC12-1257
First DCA No.: ID11-15

v.

CRYSTAL MARIE HARRINGTON,

RESPONDENT.

RESPONDENT'S BRIEF ON JURISDICTION

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, STATE OF FLORIDA

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I. THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN THE INSTANT CASE DOES NOT CONFLICT WITH ANY OF THE CITED CASES ON THE ISSUE OF THE FAMILY EXCLUSION.

The Notice invoking this Court's jurisdiction asserts only generic conflict with unspecified case law, and does not specify a single allegedly conflicting case, even though the cases cited in Travelers' jurisdictional brief as allegedly conflicting were cited and discussed in its briefs in the District Court.

For example, Travelers' asserted in its Notice to Invoke Discretionary Jurisdiction of Supreme Court ("Notice") seeking to invoke the discretionary jurisdiction of the Florida Supreme Court that:

> "Furthermore, the Opinion also expressly and directly conflicts with other decisions of other district courts of appeal and of the Florida Supreme Court on the same questions of law. Fla.R.App.P. 9.030(a)(2)(A)(iv)".

In response however, the three (3) judge panel of the First District Court of Appeal clearly stated in their Opinion that:

> "The Trial Court's interpretation of section 627.727(3) accords with the supreme court's pronouncements in Travelers Insurance Co. v. Warren, 678 So.2d 324 (Fla. 1996)"

Consequently, the representation contained in the Notice that the Opinion "expressly and directly" conflicts with other decisions of the district courts of appeal and of the Florida Supreme Court is false, frivolous, and without merit.

Nowhere in the Opinion did the First District Court state that its Opinion, or any district court of appeal opinion, conflicted with any opinion. Further, no such "conflict" cases were cited by Defendant/Petitioner to support the representation. In short, Travelers' deficient paper argument calling for a "conflict" doesn't make it so.

Travelers' assertion of conflict rests largely on a fundamental misperception of the significant differences between Class I insureds (the named insured, spouse, and resident relatives) and Class II insureds (other persons who were additional insureds under the facts of a particular case), as those classes were first defined in *Mullis v State Farm Mutual Automobile Insurance Co,* 252 So. 2d 229 (Fla. 1971). That distinction remains the law to this day. See *Young v Progressive Southeastern Ins. Co.,* 753 So. 2d 80 (Fla. 2000); *Sommerville v Allstate Ins. Co.,* 65 So. 3d 558 (Fla. 2nd DCA 2011). *Mullis* established the principal that, as to Class I insureds, an exclusion (in that case, a family car exclusion) from UM coverage, which diminishes the coverage required by the statute, was void.

Travelers is also mistaken in its statement (Brief at 5-6) that a UM policy cannot exclude from the definition of "uninsured vehicle" an insured or family vehicle operated by a nonfamily member if the insurer **excludes** liability coverage to a nonfamily member whose operation of that vehicle causes injuries to a Class I insured. In point of fact, Florida Statutes Section 627.727 (3) includes as one of

three alternative definitions of an uninsured motor vehicle when the insurer of the vehicle provides limits of liability for its insured which are less than the total damages sustained by the person legally entitled to recover damages—which is precisely the situation in the instant case.

Travelers is also mistaken in its assertions that any liability under its policy is solely as the insurer of Williams as a permissive user. As stated in *Alamo Rent-A-Car,Inc. v Hayward,* 858 So. 2d 1238, 1240 (Fla. 5th DCA 2003), *Mullis* established that the coverage applied "so long as the injury is caused by an uninsured motorist." *Alamo* held that the coverage required by statute was not to be whittled away by exclusions and exceptions, and that Class I insureds "are covered so long as the injury is caused by an uninsured motorist." *Id.* at 1240. As espoused in the *Alamo* opinion, "It is apparent that the public policy of this state is to require that named and other Class I insureds who own the vehicle or actually purchased the policy have the benefit of full and unrestricted uninsured motorist coverage." *Id.* at 1240 (citing *Mullis*). On the other hand, the public policy of this state has not been offended by a more limited coverage in situations involving Class II or additional insureds." *Id.* at 1240.

In the case at bar, the First District recognized, and Travelers admits (Brief at 1, 2), that Respondent was a Class I insured. It is also undisputed that UM

coverage includes situations, such as the instant one, in which the underlying liability limits are insufficient to cover the full extent of the plaintiff's injuries.

In *Reid v State Farm Fire and Cas. Co.,* 352 So. 2d 1172 (Fla. 1977), the vehicle in question was owned by the plaintiff's father, and the State Farm policy at issue in *Reid* excluded liability coverage to a member of the insured's family. Such a provision, the Court reasoned, was permissible. In that situation, the Court ruled: UM coverage did not apply because the car was insured, even though that coverage was not available to the particular plaintiff. As discussed below, however, that decision was superseded, in situations in which the driver was a nonfamily member who injured a class I insured, by a subsequent amendment to the statutory language.

Brixius v Allstate Ins. Co., 589 So. 2d 236 (Fla. 1991), involved essentially the same fact pattern and, relying on *Reid,* reached the same result. However, it too was superseded by a subsequent statutory amendment, as recognized in *Travelers Ins. Co. v Warren,* 678 So. 2d 324 (Fla. 1996). In *Brixius,* this Court pointed out that the Legislature had not amended the statute to address the situation. As discussed below, the Legislature thereafter did so.

This Court in *Travelers Ins. Co. v Warren,* 678 So. 2d 324 (Fla. 1996), addressed the issue in this case, and resolved it exactly as the First District did in the instant case. In *Warren,* plaintiff was a passenger in a nonfamily member's car

(a Class II insured), and sought to recover UM benefits under the coverage on that car after collecting the liability limits under the same policy. The issue before the Court was whether Florida Statutes Section 627.727(3)(b) prohibited recovery under the policy's "your car" exclusion from UM coverage. The Court observed that it had previously upheld such exclusions in *Brixius v Allstate Ins. Co.,* 589 So. 2d 236 (Fla. 1991), which had in turn relied upon *Reid v State Farm Fire and Cas. Co.,* 352 So. 2d 1172 (Fla. 1977). However, the Court continued, the Legislature had responded to the *Brixius* decision by amending Florida Statutes Section 627.727(3) by adding a new subsection (3)(c) "to avoid the inequity of denying benefits to a class I insured who had paid for the liability coverage to protect permissive users and had also paid for UM coverage.", thereby superseding those decisions.

As amended, the *Warren* Court pointed out, the section "provides that where a nonfamily permissive user is driving an insured vehicle and causes injury to a *class I insured passenger,* the insured vehicle will be considered uninsured for UM coverage". *Id.* at 328. Class II insureds, the Court held, would not be entitled to recover under both the liability and UM provisions of the same policy, but Class I insureds were entitled to do so. In the Court's words: "it does not stack UM coverage on top of liability coverage under one policy *for the benefit of class II insureds.*" *Id.* at 327 (emphasis added). The rationales and language cited by

Travelers in its brief all deal with the distinct issue of how the statutory language is to be applied in the context of claims by class II insureds, not those of class I insureds as in this case.

Here, Williams, a nonfamily permissive user was driving an insured vehicle and caused injury to Harrington, a class I insured passenger. Accordingly, the *Warren* Court's holding is that the insured vehicle is considered uninsured for UM coverage, just as the First District held; **therefore, there is no express and direct conflict of decisions here**.

The other case cited by Travelers for conflict is *Bullone v United Services Auto. Ass'n.,* 660 So. 2d 399 (Fla. 2nd DCA 1995). In *Bullone*, the plaintiff was a passenger in a pickup truck owned by a nonfamily member i.e. a class II insured. Plaintiff sought recovery under both the liability and UM coverage on that vehicle. The *Bullone* Court rejected that claim, making a clear distinction between the situations of class I and class II insureds, The Second District Court held that in Florida "the 'owned vehicle' clause is not used to determine coverage for most claims involving class I insureds." *Id.* at 401 (citing *Reid* and *Brixius*). Instead, this definition normally is 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 (emphasis added).

In *Bullone,* the Court went to great length to make clear that it was deciding the issue "only as it applies to a class II insured involved in a one car accident". *Id.* at 401. It reiterated that restriction on its holding repeatedly throughout the decision. In short, *Bullone* expressly did not address the issue presented by the present case; **therefore, there can hardly be an express and direct conflict on this point of law when the *Bullone* Court expressly decided not to address that issue**.

Finally, Travelers claims that the decision below would deprive it of its subrogation rights against Williams. That claim overlooks the fact that by approving the acceptance of Williams' liability limits, Travelers had already waived any subrogation rights against him under the provisions of Florida Statutes Section 627.727 **and, in any event, that would hardly constitute an express and direct conflict of decisions so as to support conflict review**.

Bullone, which was approved in *Warren*, is not only **not** in conflict with the instant decision, it is entirely consistent with that decision. The same is true of *Warren, Reid* and *Brixius* have been superseded by statutory amendment. There simply is no express and direct conflict of decisions on this issue, and the Court should deny review.

II. THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN THE INSTANT CASE DOES NOT CONFLICT WITH ANY OF THE CITED CASES ON THE ISSUE OF STACKING OF COVERAGE

The only case cited by Travelers as being in conflict with the instant decision of the First District is *Mercury Ins. Co. v. Sherwin,* 982 So. 2d 1266 (Fla. 4th DCA 2008). Certainly, Travelers' passing reference to "and cases cited therein" (Brief at 9-10) cannot refer to every case cited in *Mercury Ins. Co. v. Sherwin,* and Travelers has failed to explain how any of the individual cases cited in that decision are in conflict with the decision in the instant case.

Nor is there any express and direct conflict with *Mercury* on the same point of law. In the instant case, the First District applied the established rule of statutory construction that the use of language in one portion of a statute and different language in another portion of the same statute shows a legislative intent that different meanings are intended. See *Maddox v State,* 923 So. 2d 442 (Fla. 2006); *Bortell v White Mountains Ins. Group,* 2 So. 3d 1041 (Fla. 4th DCA 2009), *rev. den.,* 23 So. 3d 711 (Fla. 2009).

Mercury Ins. Co. v. Sherwin, 982 So. 2d 1266 (Fla. 4th DCA 2008), never even addressed that issue. Instead, it involved a husband who had acted as his wife's disclosed agent in applying for insurance in her name on her car. The husband signed each of the pages of the application, including the page rejecting stacking UM coverage. When he was later injured, he claimed that the rejection of

stacking did not apply to him, since he had not individually rejected that coverage. The District Court properly rejected that claim, since the husband had acted as the wife's agent both in procuring the insurance and in rejecting the stacking coverage. *Mercury* was decided on general principals of agency law, and never reached the issue of statutory interpretation on which the decision in the instant case rests. Since *Mercury* never addressed this issue, it cannot be in express and direct conflict with the First District's decision in the instant case.

III. THERE IS NO REASON FOR THE COURT TO EXERCISE ITS DISCRETION TO REVIEW THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN THE INSTANT CASE

Once Travelers' claims of conflict are seen to be erroneous, there is simply no reason for this Court to exercise its discretion to accept jurisdiction in this case on the basis of the two certified questions. The District Court in the instant case simply applied settled case law and principles of statutory construction in reaching its conclusion. Travelers' arguments attempting to manufacture purported conflicts are totally without merit and Travelers Brief fails to make an argument as to how these two issues are of great public importance so as to justify this Court exercising its discretion to accept jurisdiction in this case and further overburden its already overcrowded docket. Therefore, this Court should decline to review the District Court's decision in the instant case.

CONCLUSION

The decision of the District Court of Appeal in the instant case is not in express and direct conflict with the decisions cited by Travelers, and this Court should not exercise its discretion to grant review based on the District Court's certification of two questions of law. Therefore, this Court should deny review in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to James P. Waczewski, Luks, Santaniello, Petrillo & Jones, 2509 Barrington Circle, Suite 109, Tallahassee, Florida 32308, by U. S. Mail, this 3d day of July, 2012.

Stephen C. Bullock

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that this Brief has been prepared in Times New Roman 14 point font.

Stephen C. Bullock