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IN THE SUPREME COURT OF FLORIDA

CASE NO. 76,749

DOROTHEA SMITH and JACK  
SMITH, her husband,

Petitioners,

vs.

VALLEY FORGE INSURANCE COMPANY,  
a foreign corporation,

Respondent.

**FILED**

SID J. WHITE

JAN 23 1991

CLERK, SUPREME COURT

By [Signature]  
Deputy Clerk

REPLY BRIEF OF PETITIONERS

*original*

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## ARGUMENT

MRS. SMITH IS ENTITLED TO UNINSURED MOTORIST COVERAGE WHERE SHE WAS UNQUESTIONABLY INJURED BY A MOTORIST WHO HAD NO INSURANCE OF HER OWN. THE "FAMILY CAR" EXCLUSION IN MRS. SMITH'S POLICY IS INVALID.

Mrs. Smith's argument before this Court is based on certain basic principles, which Valley Forge does not dispute: UM coverage follows an insured regardless of the insured's location at the time of injury; and exclusions from UM coverage generally are invalid as against public policy unless those exclusions have been specifically approved in the UM statute. Mrs. Smith was injured by the negligence of a driver who had no insurance of her own. Mrs. Smith was riding in her "family car" at the time of the injury and therefore is excluded from coverage. The "family car" UM exclusion is not specifically identified in the statute as a permissible exclusion. Therefore the narrow question is whether there is any reason to justify what is otherwise a presumptively invalid policy provision.

Valley Forge skips over, and therefore does not respond to, this preliminary analysis. Instead, it focuses solely on "family exclusions" in general and discusses how the various Florida courts have upheld such exclusions. The cases discussed in Valley Forge's brief fall into two basic categories: cases which rule on the "family exclusion" in the context of liability, not UM, coverage; and cases which rule on the "family car" exclusion in the context of UM coverage where the driver was a resident of the insured's household and therefore otherwise fell within the liability-

ty "family exclusion".<sup>1/</sup> However this case falls into neither of those categories. There are no decisions concerning injuries caused by an independent adult relative who does not live in the household. And the decisions concerning family friends are in conflict, resolution of which is presently pending before this Court. Compare Jernigan v. Progressive Am. Ins. Co., 501 So.2d 748 (Fla. 5th DCA 1987) and Gov't Employees Ins. Co. v. Fitzgibbon, 568 So.2d 113 (Fla. 5th DCA 1990) with Allstate Ins. Co. v. Baker, 543 So.2d 847 (Fla. 4th DCA 1989).

The holdings of the earlier cases just do not provide a simple answer to the problem posed here, or in cases like Jernigan.

Valley Forge's rote recitation of those cases therefore offers this Court no assistance in analyzing the problem.

The bottom line is that Valley Forge never explains why an insured should not have her own UM coverage when she has been injured by someone who should have, but did not, purchase her own insurance, simply because of the fortuity that the insured was riding in her own car at the time the uninsured driver caused the injury. Reid v. State Farm Fire & Casualty Co., 352 So.2d 1172 (Fla. 1978) does not satisfy that question. In Reid, this Court first held that the policy did not provide liability coverage because the injured passenger was a resident relative of the house-

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<sup>1/</sup> At times, Valley Forge confuses liability exclusion cases with UM exclusion cases. E.g., Newman v. Nat'l Indem. Co., 245 So.2d 118 (Fla. 3d DCA 1971) (cited in Valley Forge's brief at 9 in opposition to Mrs. Smith's arguments, even though Mrs. Smith's only arguments pertain to the UM exclusion). The two are not the same and the public policy reasons applicable to the two coverages are not the same.

hold and the "family household" exclusion specifically precluded such liability coverage. The Reid holding as to UM coverage simply followed:

We hold that the family car in this case is not an uninsured motor vehicle. It is insured and it does not become uninsured because liability coverage may not be available to a particular individual. [citations omitted].

352 So.2d at 1173. This holding is necessarily limited to a circumstance in which the driver's only potential source of insurance coverage is the insurance provided to the family household. But here, as in Jernigan, the driver had her own household and could have purchased her own insurance. She was uninsured because she failed to do so, not simply because her mother's family car became uninsured when liability coverage was not available under her mother's policy.

Mrs. Smith recognizes, as Valley Forge points out in its brief at 9, that the intent of the Reid court was in part to preclude "overly friendly or collusive" lawsuits between family members. But in context, that holding discussed the liability exclusion which pertained to insureds or relatives residing in the household. 352 So.2d at 1173 ("State Farm denied liability, 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"). If that is the limited intent of Reid, then the "family car" exclusion in Mrs. Smith's policy is invalid because it is far broader than the approved exclusion and it precludes coverage, regard-

less of whether a family member residing in the household, a family member not residing in the household or a friend is driving.

The question here is clearly one of public policy - can vague "fears" of collusive lawsuits between emancipated family members or friends outweigh the strong legislative policy to provide UM coverage to an insured regardless of that insured's location? It may be logical to find that the former outweighs the latter where the interested parties are all related and live under the same roof, subject to stronger pressures and controls. But the line should be drawn at that point. The former should not outweigh the latter where the interested parties maintain independent households and are less likely to be subject to each other's influences. In addition, the former should not outweigh the latter where the at-fault party could have, but did not, purchase her own insurance. The insured should reasonably expect to have UM coverage under the circumstances. Mullis v. State Farm Auto. Ins. Co., 252 So.2d 229 (Fla. 1971) commands that the "family car" exclusion be invalidated to the extent that it precludes an insured from obtain UM benefits simply because that insured is riding in her own car.

CONCLUSION

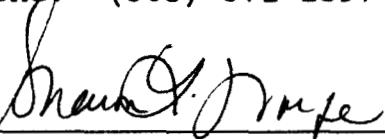
For the foregoing reasons and the reasons stated in the initial brief, Petitioners respectfully request this Court to reverse the judgment entered below and direct the trial court to enter summary judgment in favor of Petitioners.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 22nd day of January, 1991, to: Betsy E. Gallagher, Esq., KUBICKI, BRADLEY, DRAPER, GALLAGHER & McGRANE, P.A., Penthouse, City National Bank Building, 25 West Flagler Street, Miami, Florida 33130; and Robert Miertschin, Jr., Esq., 4000 Hollywood Boulevard, Hollywood, Florida 33025.

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