O/A 10-5-84

SUPREME COURT OF FLORIDA

CASE NO. 64,838

FIFTH DISTRICT CASE #82-1002

ALLSTATE INSURANCE COMPANY,

Defendant/Petitioner,

vs.

RICHARD B. BOYNTON and LINDA O. BOYNTON, his wife,

Plaintiffs/Respondents.

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BRIEF OF AMICUS CURIAE ACADEMY OF FLORIDA TRIAL LAWYERS SUPPORTING POSITION OF RESPONDENTS

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On Behalf of Amicus Curiae,
ACADEMY OF FLORIDA TRIAL LAWYERS

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QUESTIONS PRESENTED

POINT I

WHETHER THE FIFTH DISTRICT COURT OF APPEAL CORRECTLY HELD THAT A MOTOR VEHICLE IS "UNINSURED" WHEN NEITHER THE OWNER'S POLICY NOR THE DRIVER'S POLICY PROVIDED COVERAGE FOR THE PARTICULAR OCCURRENCE RESULTING IN INJURY.

POINT II

WHETHER THE FIFTH DISTRICT COURT OF APPEAL CORRECTLY RULED THAT AN INSURED IS NOT BARRED FROM UNINSURED MOTORIST COVERAGE BECAUSE OF THE FACT THAT THE AT-FAULT DRIVER ENJOYED LEGAL IMMUNITY FROM SUIT.

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STATEMENT OF THE CASE AND FACTS

This brief is submitted on behalf of the ACADEMY OF FLORIDA TRIAL LAWYERS, a large statewide association of trial lawyers specializing in litigation in all areas of the law, in support of the position of the Respondents in this case.

Since the ACADEMY does not have a complete copy of the Record On Appeal, we will assume the accuracy of the Statement of the Case and Facts as set forth by Petitioner, ALLSTATE in its initial brief on the merits.

In this brief, reference to the Defendant/Petitioner, ALLSTATE INSURANCE COMPANY, will be by name or as the INSURER; reference to RICHARD B. BOYNTON and LINDA O. BOYNTON, his wife, Plaintiffs/ Respondents, will be by name or as the INSUREDS. Any emphasis appearing in this brief is that of the writer unless otherwise indicated.

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ARGUMENT

POINT I

THE FIFTH DISTRICT COURT OF APPEAL CORRECTLY HELD THAT A MOTOR VEHICLE IS "UNINSURED" WHEN NEITHER THE OWNER'S POLICY NOR THE DRIVER'S POLICY PROVIDED COVERAGE FOR THE PARTICULAR OCCURRENCE RESULTING IN INJURY.

The ACADEMY is of the opinion that the Fifth District Court of Appeal reached a correct ruling in this case, based on the case law and long standing public policy of this State as enunciated by this Court, emphasizing the importance of affording maximum uninsured motorist protection to the motorists of this state. For this reason, as more fully discussed below, we support the position of the Respondents in this matter.

With respect to the particular facts of this case, under ALLSTATE'S policy a motor vehicle is considered uninsured if it has "no bodily injury insurance policy in effect at the time of the accident" or if such a policy exists but its insurer "denies coverage." It appears to us that the District Court of Appeal's decision that the vehicle in this case was "uninsured" could well be upheld on the relatively simple premise that both the owner's and the driver's liability insurers denied coverage for this incident. This is clearly the case with the driver's policy, where the carrier denied coverage because of a clause excluding coverage for injuries occasioned during the pursuit of a business. Indeed, that finding does not appear to be contested by ALLSTATE in its initial brief on the merits.

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ALLSTATE does argue, however, that there was no "denial of coverage" by the owner's insurer. Rather, ALLSTATE claims that the insurer simply denied "liability". No authority is cited, however, for drawing this distinction. If a liability insurer refuses to defend and/or pay a claim, the result is obviously the same -- there is no insurance available to cover the loss. It makes no difference whether the lack of coverage arises from an exclusionary clause, or from the fact that the occurrence did not fall within the insuring agreement of the policy because the insured had incurred no liability. There is still no coverage, and the company has refused to pay.

Under this view, it would be entirely appropriate to hold that the owner's insurer also "denied coverage" within the meaning of the policy and thus the BOYNTON vehicle was uninsured according to the policy definition. Such a broad interpretation of the policy language is appropriate here because of the well recognized principles that ambiguous policy language is to be construed so as to afford maximum coverage, and because uninsured motorist coverage in particular is to be broadly construed. Hodges v. National Union Indemnity Company, 249 So.2d 679 (Fla. 1971); Mullis v. State Farm Mutual Autombile Insurance Company, 252 So.2d 229 (Fla. 1971). Under this interpretation, if both liability insurers denied coverage, the vehicle would clearly be "uninsured".

The Fifth District made the observation in its opinion that the owner's policy was irrelevant because Xerox (the vehicle owner)

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could not be held liable without some negligence on its own part for the operation of the vehicle when that vehicle had been turned over to a repair shop or garage. Boynton v. Allstate Insurance Company, 443 So.2d 427 (Fla. 5th DCA 1984) at 429, citing Castillo v. Bickley, 363 So.2d 792 (Fla. 1978). We believe this is a correct statement because since the owner was not at fault in any sense, its liability should not even enter into the equation. The accident was caused solely by the fault of the driver, and it is his coverage that is at issue here, not that of the wholly innocent owner.

Even in the event such an interpretation is not adopted by this Court, the ACADEMY believes that the District Court reached the correct conclusion after analyzing the case law on the question of whether the unavailability of coverage for a particular occurrence will render a vehicle "uninsured". Both the prevailing case law and public policy support this conclusion.

In its opinion in the present case, the District Court held that

> ...a motor vehicle is uninsured, as that term pertains to a specific loss, if the offending motorist has no insurance coverage available for the protection of the injured party. In our view, a policy which, because of exclusions, provides no coverage for a particular loss, is tantamount to no insurance at all as respects that loss.

Boynton, supra at 429 (citations omitted). In reaching that conclusion, the court relied upon this Court's opinion in Brown v. Progressive Mutual Insurance Company, 249 So.2d 429 (Fla. 1971) in which this Court stressed that the uninsured motorist statute is "designed for the protection of injured persons", and that its purpose is

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> ...to protect persons who are injured or damaged by other motorists who in turn are not insured and cannot make whole the injured party.

Brown, supra at 430.

In Brown, the Court went on to hold that the question to be answered in deciding whether a person is entitled to uninsured motorist protection is

> ...whether the offending motorist has insurance available for the protection of the injured party....

Brown, supra at 430.

ALLSTATE attempts to minimize the importance of this Court's pronouncements in Brown because it dealt with the "hit and run" clause of an uninsured motorist policy. ALLSTATE'S reading of that case would limit it only to hit and run cases, and indeed ALLSTATE claims that the Brown ruling was a "special exception" to provide a remedy to an injured party who otherwise would have no source of recovery (pointing out that the Respondent in the present case did receive some worker's compensation benefits, a fact to be discussed later in this brief). We can find no basis in the law to justify such a narrow reading of Brown. Indeed, this Court made it quite clear that the purpose of the uninsured motorist statute was to provide relief to parties injured on the highways of this State in instances where there was no liability insurance available. There is nothing in the Brown decision or subsequent decisions to indicate that such a purpose is applicable only to those injured by hit and run drivers.

We agree with the District Court of Appeal that its conclusion is further supported by American Fire and Casualty Company v. Boyd, 357 So.2d 768 (Fla. 1st DCA 1978). There, the accident was caused

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by a driver who had a policy of liability insurance which was inapplicable because it excluded coverage for insureds traveling on orders of a branch of the military, which was the case at the time of the accident. The court held that although the driver had procured a policy of insurance to cover his vehicle, it offered no coverage under the facts of the accident, and thus was "uninsured" within the meaning of that term as used in Section 627.727, Florida Statutes.

The Boyd case also refutes the argument made by ALLSTATE here that MR. BOYNTON'S receipt of worker's compensation benefits somehow affects the question of whether he is entitled to uninsured motorist benefits. In Boyd, the UM insurer raised a similar argument based on the fact that the injured party in that case had received a monetary settlement from the United States under the Federal Tort Claims Act. The court correctly observed that any monies so received would be taken into account in fixing the amount of the uninsured motorist insurer's liability, and indeed such would be the case here under Section 627.727, Florida Statutes. The Boyd court found no basis for eliminating the injured party's entitlement to any uninsured motorist benefits on that ground, nor has ALLSTATE cited any authority to that effect here.

The cases relied upon by ALLSTATE to seek conflict jurisdiction on this issue[1] are distinguishable on their facts and should not control on this very important question. The Reid decision is

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[1] Centennial Insurance Company v. Wallace, 330 So.2d 815 (Fla. 3d DCA 1976), cert. den'd. 341 So.2d 1087 (Fla. 1976) and Reid v. State Farm Fire and Casualty Company, 352 So.2d 1172 (Fla. 1977).

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distinguishable upon its facts for the crucial reason that in that case, unlike the present case, only one insurance policy was involved. This Court made it quite clear in Reid that this is a very important difference. There, the question was whether the vehicle which was insured under a liability policy could also be "uninsured" under that same policy, so as to entitle a third party to uninsured motorist benefits.

That same distinction was observed in Taylor v. Safeco Insurance Company, 298 So.2d 202 (Fla. 1st DCA 1974). In Taylor, the court noted:

> It is under this very policy which insured the vehicle that Appellant claims Decedent's estate is entitled to the uninsured motor vehicle coverage contained therein through Appellant's theory that it was an uninsured motor vehicle.

Taylor, supra at 203 (emphasis in original). The court went on to conclude its opinion by distinguishing the result from that reached in Boulnois v. State Farm Mutual Automobile Insurance Company, 286 So.2d 264 (Fla. 4th DCA 1973) on the ground that there were two separate policies involved in that case.

This Court in Reid made the distinction crystal clear. In the opinion adopted by this Court, the following appears:

> We recognize, as a general rule, that an insurer may not limit the applicability of uninsured motorist protection.... 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.

Reid, supra at 1173-1174 (Citations Omitted).

This distinction has also been made by the Second District Court

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of Appeal in Hartford Accident and Indemnity Company v. Fonck, 344 So.2d 595 (Fla. 2d DCA 1977), in discussing its earlier opinion in Lee v. State Farm Mutual Automobile Insurance Company, 339 So.2d 670 (Fla. 2d DCA 1976). In Lee, a passenger was injured by the negligence of the driver, his brother. The driver's policy contained the standard family exclusion clause which resulted in a denial of liability coverage. The passenger sought uninsured motorist benefits under a separate policy owned by his father, under which he was an insured. The Second District held that since there was no liability coverage available to the injured party, he was entitled to uninsured motorist benefits under his own policy, for which a separate premium had been paid.

In Fonck, the same court found no uninsured motorist coverage in a situation where the injured party had not purchased any uninsured motorist coverage, but was simply an employee seeking to recover under the uninsured motorist provisions of his employer's policy. That same policy, although it afforded liability insurance for the vehicle in which he was injured, contained a fellow employee exclusion in the liability section of the policy. In distinguishing its result from that reached earlier in Lee, the court made it clear that in Lee it was dealing with two separate policies, and that since in Lee the injured party's father had purchased uninsured motorist protection for himself and his family, he must be afforded that protection.

The policy reason cited in Lee is particularly applicable here:

> Absent an express statement to the contrary an insured would expect that his uninsured motorist protection would focus on whether he was covered by the negligent

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> party's liability insurance. The insured paid an additional premium for uninsured motorist coverage and is entitled to its benefits.

Lee, supra at 672.

In the present case, of course, we have the same situation that existed in Lee and in Boyd, where the injured party is seeking to recover under the terms of his own uninsured motorist policy, for which he has paid a premium. In the cases relied upon by ALLSTATE, i.e. Taylor v. Safeco, Reid v. State Farm, and Hartford v. Fonck, the injured party was attempting to recover uninsured motorist benefits under the very policy which was intended to provide liability insurance for the "uninsured" vehicle. As this Court pointed out in Reid, this is indeed a distinction with a difference, and the distinction controls here.

The Centennial case, also relied upon by ALLSTATE, is similarly distinguishable, and is inapplicable for two reasons. First, in that case the policy in question specifically excluded from the definition of an uninsured vehicle "an automobile which is owned by a self-insurer within the meaning of any motor vehicle financial responsibility law...." The court pointed out that all parties conceded in that case that the truck was self-insured by its owner; thus, the conclusion was inescapable that it was not an uninsured vehicle under the terms of the policy. Centennial at 817. Centennial should not be controlling here for the further reason that the Third District simply followed Taylor, supra, in reaching its conclusion that "where a vehicle is covered to the extent of the law, it is not an uninsured vehicle simply because coverage may not be available to the injured party under the circumstances."

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Centennial at 817. Taylor is of course distinguishable upon its facts for the reasons set forth above.

Subsequent to the Fifth District Court of Appeal's decision in the present case, both it and the First District Court of Appeal have reached similar conclusions in other cases. See Curtin v. State Farm Mutual Automobile Insurance Company, ___So.2d___, 9 FLW 218 (Fla. 5th DCA, Case No. 82-599, opinion filed Jan. 19, 1984); Porr v. State Farm Mutual Automobile Insurance Company, ___So.2d___, 9 FLW 1191 (Fla. 1st DCA, Case No. AO-289, opinion filed May 30, 1984); and Johnson v. State Farm Fire and Casualty Company, ___ So.2d___, 9 FLW 1187 (Fla. 1st DCA, Case No. AU-378, opinion filed May 31, 1984).

The ACADEMY believes that the Fifth District Court of Appeal's finding that the vehicle in question here was "uninsured" is clearly supported by the law, and is the far better result in light of the purpose of uninsured motorist protection. Where a party has purchased uninsured motorist protection for himself and his family, and is then injured through the fault of another, but has no liability coverage available to him, the injured party is entitled to receive the uninsured motorist benefits which he purchased. Any other interpretation would in effect nullify the broad uninsured motorist protection scheme envisioned by the Legislature, and would violate the public policy of this State.

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POINT II

THE FIFTH DISTRICT COURT OF APPEAL CORRECTLY RULED THAT AN INSURED IS NOT BARRED FROM UNINSURED MOTORIST COVERAGE BECAUSE OF THE FACT THAT THE AT-FAULT DRIVER ENJOYED LEGAL IMMUNITY FROM SUIT.

ALLSTATE claims that the appellate court erred because the driver under these facts was entitled to immunity from suit under the fellow-employee provisions of Section 440.11, Florida Statutes. Although the driver was clearly at fault and caused MR. BOYNTON'S injuries, ALLSTATE claims that BOYNTON was not "legally entitled to recover" and therefore barred under the policy.

In rejecting that argument, the Fifth District Court of Appeal found support in numerous cases from other jurisdictions. The ACADEMY shares the view of those courts that the term "legally entitled to recover" should have as its focus the fault of the driver, and not the question of whether a cause of action against the driver would be barred on some other legal ground.

In Watkins v. United States, 462 F.Supp. 980 (S.D. Ga. 1977), affirmed 587 F.2d 279 (5th Cir. 1979), the court had before it virtually the identical question. There, the at-fault driver, a federal government employee, was protected from suit by the provisions of a federal statute. The court found that under Georgia law

> ...recovery against an uninsured motorist carrier may be had where an insured would be "legally entitled to recover" against an uninsured motorist, but for some legal bar to recovery unrelated to the facts of the collision. The policy is clear: to allow recovery against the carrier when the tortfeasor is uninsured, whether he is known or unknown and whether he is amenable to judgment or not.

Watkins, supra at 991 (emphasis in original).

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The same question was presented in Allstate Insurance Company v. Elkins, 77 Ill.2d 384, 396 N.E.2d 528 (1979), where interspousal immunity would have barred the injured wife from bringing a direct action against her husband, the negligent driver. In determining whether she was thus "legally entitled to recover" against the driver for purposes of her uninsured motorist coverage, the Illinois Supreme Court held the following:

> We agree with the appellate court that the proper interpretation of the words 'legally entitled to recover' means that the claimant must be able to prove the elements of her claim necessary to entitle her to recover damages. That the tortfeasor uninsured motorist in an action brought against him might be in a position to invoke a defense of limitations or some form of statutory immunity is relevant to the question of the right to enforce payment, but does not affect the claimant's legal entitlement to recovery.

Elkins, supra at 531.

The Elkins court further distinguished one of the cases relied upon by ALLSTATE in its brief, Noland v. Farmers Insurance Exchange, 413 S.W.2d 530 (Mo. App. 1967), which reached the opposite result on similar facts. The Elkins court pointed out the reason for that holding, namely that in Noland the policy provided for payment of sums which the uninsured motorist "would be legally responsible to pay", whereas the policy in Elkins, as here, provided for payment of sums which the insured "shall be legally entitled to recover." As the Elkins court pointed out, the distinction between the two policy provisions is readily apparent, and Noland is simply not persuasive.

ALLSTATE has cited no Florida authority to support its contention that the Fifth District Court of Appeal reached an erroneous result in concluding that a party is "legally entitled to

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recover" in the context of the insurance policy if he can show liability on the part of the uninsured motorist and damages resulting therefrom. Boynton, supra at 431. That holding does not conflict with Salas v. Liberty Mutual Fire Insurance Company, 272 So.2d 1 (Fla. 1972), as ALLSTATE claims. ALLSTATE relies upon that provision of the Salas decision in which this Court held that a public policy of the State of Florida was that

> ...Every insured, as defined in the policy, is entitled to recover under the policy for damages he would have been able to recover against the negligent motorist if that motorist had maintained a policy of liability insurance.

Salas at 3 (emphasis added by ALLSTATE). That holding is in no way at variance with the District Court's conclusion here, and does not at all address the concept of "legally entitled to recover."

Indeed, it is somewhat curious that ALLSTATE would rely upon Salas, since the Court made it abundantly clear in that case that it would brook no attempt at reducing the scope of uninsured motorist coverage. Indeed, this Court observed

> ...The intention of the Legislature, as mirrored by the decisions of this Court, is plain to provide for the broad protection of the citizens of this State against uninsured motorists. 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.

Salas, supra at 5.

The ACADEMY respectfully urges this Court to adopt the reasoning of the Fifth District Court of Appeal on this point, and to hold that an insured who has been injured by the fault of an uninsured motorist is entitled to recover the benefits he paid for under his own uninsured motorist policy, whether or not the motorist may be

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entitled to some form of immunity from suit. Any other construction would, we respectfully submit, be contrary to the beneficent purposes of the uninsured motorist statute and of the long standing decisions of this Court.

CONCLUSION

For the reasons set forth above, the ACADEMY OF FLORIDA TRIAL LAWYERS respectfully urges this Court to affirm the decision of the Fifth District Court of Appeal on both issues.

Respectfully submitted,

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On Behalf of Amicus Curiae,
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By _____
Nancy Little Hoffmann

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing were served by mail this 19th day of July, 1984, upon: R. David Ayers, Jr., Esq., Attorney for Respondents, 1680 Lee Road, Winter Park, FL. 31789; and Robert A. Wohn, Jr., Esq., ANDERSON AND HURT, P.A., Attorneys for Petitioner, 201 East Pine Street, Suite 310, Southeast Bank Bldg., Orlando, FL. 32801-2778.

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