O/a 10-5-84

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IN THE SUPREME COURT
OF THE STATE OF FLORIDA

CASE NO. 64838

ALLSTATE INSURANCE COMPANY,

Defendant/Petitioner,

vs.

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

Plaintiffs/Respondents.

FILED
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JUL 20 1984
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ANSWER BRIEF
OF
PLAINTIFFS/RESPONDENTS
RICHARD B. BOYNTON AND
LINDA O. BOYNTON, HIS WIFE

ON APPEAL FROM THE DISTRICT COURT OF APPEALS OF THE STATE OF FLORIDA, FIFTH DISTRICT
CASE NO: 82-1002

R. DAVID AYERS, JR., ESQUIRE
1680 Lee Road
Winter Park, Florida 32789
(305) 628-4871
Attorney for Plaintiffs/
Respondents, RICHARD B.
BOYNTON and LINDA BOYNTON,
his wife

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PREFACE

The Petitioner was the Defendant below, ALLSTATE INSURANCE COMPANY, and will hereinafter be referred to as either Defendant, Petitioner, or ALLSTATE.

The Respondents were the Plaintiffs below, RICHARD B. BOYNTON and LINDA O. BOYNTON, his wife, and will hereinafter be referred to as either Plaintiff, Respondent, or BOYNTON.

In the interest of maintaining consistency with usage in prior appellate proceedings in this case, the following symbols will be used:

"T" - As used in this brief will refer to the Transcript of the Hearing and Rehearing on Summary Judgment held on March 8, 1982 and on June 21, 1982.

"P" - As used in this brief will refer to the page.

"L" - As used in this brief will refer to the line of text.

"R" - As used in this brief will refer to the Record on Appeal.

"A" - As used in this brief will refer to the Appendix.

TABLE OF CITATIONS

STATEMENT OF FACTS

The Defendant below, Petitioner herein, ALLSTATE's, Statement of Facts in its Initial Brief is not fully accurate and is incomplete and therefore this Respondent, Plaintiff below, BOYNTON, offers these additions to the Statement of Facts.

At the time of the accident in question, BOYNTON was crushed between two vehicles due to the negligence of Defendant, JAMES LUKE, a fellow employee. The accident resulted in BOYNTON incurring a comminuted fracture of the distal tibia on the left side neecessitating several operations. He incurred in excess of $15,000.00 in medical bills and had to be off work for over one and one-half years. He still has a significant permanent injury from which he presently limps.

At the time of the accident Defendant, LUKE, had a liability insurance policy with ALLSTATE. However ALLSTATE denied coverage to Defendant, LUKE, saying there was an exclusion in his policy which excluded coverage for injury during a business pursuit. Thus the Defendant/Driver LUKE was uninsured at the time of this accident.

The Defendant/Lessee, XEROX CORP., was held by summary judgment not to be liable to Plaintiff because of the case of Bickley vs. Castillo, 346 So.2d 625. Thus it was held the lessee, XEROX, and/or owner of the Defendant vehicle, were not responsible and was not a viable Defendant against whom

a liability claim could be brought.

Therefore, there was no answerable Defendant against whom the Plaintiff could bring a liability claim, i.e., there was no available liability coverage to the Plaintiff.

BOYNTON thus presented a UM claim to his insurance company, ALLSTATE INSURANCE COMPANY, for which he had paid a premium for UM coverage. ALLSTATE INSURANCE COMPANY, as they did in Defendant, LUKE's, liability coverage, denied UM coverage to the Plaintiff. It is from that denial of UM by summary judgment from which the Plaintiff appealed to the Fifth District Court of Appeals. On January 5, 1984 the Fifth District Court of Appeals reversed the lower court and held the Plaintiff, BOYNTON, was entitled to UM coverage. The Defendant, Petitioner herein, ALLSTATE, has appealed the Fifth District Court of Appeals' opinion to which this answer brief is in response to.

STATEMENT OF THE CASE

The Plaintiff below, Respondent herein, BOYNTON, accepts the Defendant/Petitioner, ALLSTATE INSURANCE COMPANY's, version of the Statement of the Case.

ISSUE I

Is a vehicle an uninsured vehicle when a policy of liability insurance covers it but the policy does not provide coverage for the particular occurrence? Yes.

The purpose of UM coverage is to provide protection to an insured when the tortfeasor could not respond.

Defendant, XEROX, would not respond to BOYNTON because of the restriction of Bickley vs. Castillo, 346 So.2d 625, which holds that an owner is not responsible for a driver's negligence if the date of loss occurred when the driver was a repairman or serviceman working on the vehicle. Thus, it was held that the lessee, XEROX, and/or the owner of the Defendant vehicle, were not responsible and were not viable Defendants against whom a liability claim could be brought.

As far as the Defendant/driver, LUKE, was concerned, his insurance company, which also happened to be ALLSTATE INSURANCE COMPANY, denied liability coverage to him because of an alleged exception to coverage if the accident occured while in the course of a business pursuit. Since LUKE was on the job when this accident occurred, ALLSTATE, denied liability coverage to LUKE. Thus the Defendant driver was uninsured at the time of this accident.

In short, the Defendant driver, LUKE, was uninsured at the time of the accident, and the Defendant owner and/or lessee were not responsible, viable defendants against whom a liability claim could be brought. Therefore, there was no

answerable defendant against whom the Plaintiff could bring a liability claim.

Thus the only viable Defendant, LUKE, was uninsured and BOYNTON should be entitled to present his UM claim.

Certainly the Defendant's liability insurance, if any, if unavailable to the Plaintiff, makes them uninsured as far as the Plaintiff is concerned.

XEROX, apparently had liability insurance, but it was not available to BOYNTON and thus as far as BOYNTON was concerned, XEROX's insurance was a nullity. As this Court in Brown vs. Progressive Mutual Ins. Co., 249 So.2d 429, stated:

> "In deciding whether a person is entitled to protection of uninsured motorist statutes, the question to be answered is whether the offending motorists had insurance available for protection of injured party, for whose benefit the statute was written; the test should not be simply whether or not the injured party can prove that the offending party was uninsured, which is, in many instances, impossible in hit and run cases." (Emphasis added).

Here, the Plaintiff had no available coverage from the Defendant owner-lessee, XEROX. Since the Plaintiff was barred by summary judgment from making a claim against the owner-lessee, there was certainly no insurance available to the Plaintiff from the Defendant owner-lessee.

This Court in Brown vs. Progressive, supra, went on to say:

> "The purpose of the uninsured motorist statute is to protect persons who are injured or damaged by other motorists who in turn are not insured and cannot make whole the injured party. The statute is designed for the protection of injured persons, not for the benefit of insurance companies or motorists who cause damage to others".

Similarly, in the case of American Fire & Casualty Co. vs. Boyd, 357 So. 768, the First District Court of Appeals held even though the Defendant had liability coverage, when the coverage was not available because of an exclusion, the Plaintiff was entitled to bring a UM claim. In American, supra, it is stated:

> "The sole issue is whether the Hansen vehicle was 'an uninsured vehicle' within the meaning of that term as used in F.S. 626.727. We hold that it was, and therefore affirm. Although Hansen had procured a policy of insurance, that policy afforded no coverage because of the exclusionary clause; and the mere fact that Hansen was in such a position as to cause to be invoked by his negligence the provisions of the Federal Tort Claims Act does not mean that he is thereby 'insured' within the meaning of the statute."

The crux of the matter is, as pointed out by the Fifth District Court of Appeals in its opinion herein, is that as far as BOYNTON was concerned, as to the specific date of loss, none of the potential liability Defendants had insurance coverage available for the protection of the injured BOYNTON.

If there is any doubt whether there should be uninsured motorist coverage or not in this case, it should be resolved in favor of coverage according to the case law. In the case of Allstate vs. Chastain, 354 So.2d 251, the Court said:

> "Where uninsured motorist provisions of automobile policy of owner of automobile in which omnibus insured plaintiff and her husband were riding at time that vehicle was involved in accident with automobile operated by insured driver but owned by uninsured motorist were ambiguous as to whether vehicle operated by an insured driver but owned by an uninsured motorist was an uninsured vehicle,

> ambiguities would be resolved against carrier which prepared policy and in favor of coverge in light of fact that owner of automobile in Florida is vicariously liable for actions of an operator under dangerous instrumentality doctrine."

Lastly, it just is not equitable and fair that a man can be so severely injured through no fault of his own and because of the restrictive pecularity of the Bickley vs. Castillo case, infra, limiting liability of the owner, and because the driver had no insurance, be precluded from bringing an uninsured motorist claim when he has paid for that coverage. The purpose of uninsured motorist coverage was supposed to provide protection to an insured when the tortfeasor could not respond. Here, no one can respond. RICHARD BOYNTON should have the uninsured motorist coverage he paid for.

ISSUE II

Is the insured legally entitled to recover from the operator of an uninsured motor vehicle when there is a statutory bar to an action against the operator, but for which bar, recovery would lie? Yes.

BOYNTON would be legally entitled to recover against XEROX but for the Bickley vs. Castillo, supra, decision.

Whether BOYNTON is legally entitled to recover against LUKE is concerned is irrelevant because ALLSTATE denied liability insurance coverage to LUKE.

So as far as the only Defendant that had coverage (XEROX) is concerned, BOYNTON ordinarily would have entitlement to recovery but for the exclusionary language of Bickley, supra.

Without a doubt, BOYNTON, could demonstrate liability against LUKE.

BOYNTON agrees with the opinion expressed by the Fifth District Court of Appeals in deciding this case when they stated:

> "The majority of courts which have construed the words 'legally entitled to recover as damages' have construed them to mean simply that the insured must be able to establish fault on the part of the uninsured motorist which gives rise to the damages and to prove the extent of the damages. See, e.g., Winner vs. Ratzlaff, 211 Kan. 59, 505 P.2d 606 (1973), and cases cited in Anno., 73 A.L.R. 3d 632, 649. Recovery may be had under this coverage when the claimant shows conduct on the part of the tortfeasor which would entitle claimant to recover damages even though a defense available to the tortfeasor would defeat actual recovery Allstate Insurance Co. vs. Elkins, 77 Ill.2d 384, 396 N.E.2d 528 (1979)." (Emphasis

added)

It was further stated that:

> "The insured has paid a premium for insurance coverage which protects him when he is injured through the negligence of an uninsured motorist. He need not secure a recovery against such motorist as a condition to his securing uninsured motorist benefits (and in fact may not do so under the policy without the carrier's consent.) He is 'legally entitled to recover' in the context of the insurance policy if he can show liability on the part of the uninsured motorist and damages resulting therefrom."

CONCLUSION

The Defendant driver, LUKE'S, liability insurance company, ALLSTATE, denied coverage. The owner-lessee was precluded by summary judgment from responding in damage to the Plaintiff, BOYNTON. There was no available liability coverage to the Plaintiff. BOYNTON'S uninsured motorist policy should, therefore, be applicable.

Plaintiff dutifully paid ALLSTATE an insurance premium to cover him when the responsible party's insurance was unavailable to BOYNTON. This is exactly the very particular circumstance of this case. Considering all the factors it is only equitable, right and just that RICHARD BOYNTON have the UM coverage he paid for available to him, since the liability coverages were not. The public policy this Court espoused in Brown vs. Progressive, supra, in which it stated that the question to be answered is whether the offending motorist has insurance available, for protection of the injured party, for whose benefit this statute was written, is certainly applicable in the instant case. Accordingly, RICHARD BOYNTON requests that the well thought out decision of the Fifth District Court of Appeals in this case be affirmed and the case be remanded to the trial court for the issues of liability and damages to be decided.

Respectfully submitted,

R. DAVID AYERS, JR.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been provided by ~~U.S. Mail~~ hand delivery this 17th day of July, 1984 to HARRY ANDERSON, ESQUIRE, 201 East Pine Street, Suite 310, Orlando, Florida 32801.

R. DAVID AYERS, JR., ESQUIRE
1680 Lee Road
Winter Park, Florida 32789
(305) 628-4871

Attorney for Plaintiffs/
Respondents RICHARD B.
BOYNTON and LINDA O.
BOYNTON, his wife