IN THE SUPREME COURT
STATE OF FLORIDA

ALLSTATE INSURANCE COMPANY

Defendant/Petitioner,

vs.

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

Plaintiffs/Respondents.

CASE # 64,838

RESPONDENT'S ANSWER BRIEF ON JURISDICTION ON CERTIORARI FROM THE FIFTH DISTRICT COURT OF APPEAL IN AND FOR THE STATE OF FLORIDA

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

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES.	ii
STATEMENT OF THE CASE AND FACTS	1
ARGUMENT ON JURISDICTION.	4
CONCLUSION.	8
CERTIFICATE OF SERVICE.	9
INDEX TO APPENDIX	10
APPENDIX.	A-1

TABLE OF AUTHORITIES

CASES	PAGE
BICKLEY vs. COSTELLO 346 So.2d 625	2, 6
CENTENNIAL INSURANCE COMPANY vs. WALLACE 330 So.2d 815 (Fla. 3rd DCA 1976)	6, 7
FORD MOTOR CO. vs. KIKIS 401 So.2d 1341 (Fla. 1981)	5
JENKINS vs. STATE 385 So.2d 1356 (Fla. 1980)	4
REID vs. ALLSTATE INSURANCE COMPANY 344 So.2d 877 (Fla. 4th DCA 1976)	7
REID vs. STATE FARM FIRE AND CASUALTY CO. 352 So.2d 1172 (Fla. 1977)	7
SALAS vs. LIBERTY MUTUAL FIRE INSURANCE CO. 272 So.2d 1 (Fla. 1972)	5, 6
WILLIAMS vs. DUGGAN 153 So.2d 726 (Fla. 1963)	4

STATUTES	
Fla.R.App.P. 9.030(a)(2)(A)(iv)	4
F.S. 440.11	2, 6

STATEMENT OF THE CASE AND FACTS

The Respondents, RICHARD B. BOYNTON and LINDA O. BOYNTON, contend that the Petitioner, ALLSTATE INSURANCE COMPANY's, version of the Statement of the Case and Facts is not entirely complete and accurate and the Respondents offer the following version of the Statement of the Case and Facts which they feel is more to the point.

On January 4, 1979, Respondent, RICHARD BOYNTON, was injured while on the job at Sears Roebuck & Company, when his leg was crushed between two cars when a fellow employee, one James Luke, caused one of the vehicles to strike BOYNTON.

At the time of the accident, the Defendant driver, Luke, had a liability insurance policy with ALLSTATE INSURANCE COMPANY. However, that liability policy had an exclusion within the policy that excluded coverage when the accident was involved during a business pursuit. Since Luke was in a business pursuit, (on the job at the time), liability coverage was denied to the defendant driver, Luke, by his liability insurance carrier, ALLSTATE INSURANCE COMPANY. The driver, Luke, who was negligent, was thus uninsured at the time of the accident.

The driver, Luke's, employer, Sears Roebuck & Company, would of course normally be responsible for a liability claim for their employee's negligence if he were in the scope and course of his employment at the time of the accident. However, even though the driver, Luke, was in the scope and

course of his employment at the time of the accident, BOYNTON, was precluded from bringing a liability claim against Sears Roebuck & Company because Respondent, BOYNTON, was on the job also at the time of the accident and thus precluded by F.S. 440.11, Workman's Compensation Tort Immunity Statute, from bringing a claim against his employer, Sears Roebuck & Company. Thus the employer, Sears Roebuck & Company, of the negligent driver, Luke, was immune from a liability claim by the Respondent, BOYNTON.

The car Luke drove into the Respondent, BOYNTON, was owned by GELCO Corporation which leased the car to Xerox Corporation. Xerox Corporation had brought the car into Sears Roebuck & Company for maintenance and repairs.

Of course, normally an injured person may sue an owner of a motor vehicle for its negligent operation by the driver of the vehicle, as long as the driver had the permission and consent of the owner to drive the car at the time of the accident in question. Here, Luke had the permission of Xerox to drive the car at the time of this accident, but because the car was in for repairs and maintenance, the owner was held to be immune from liability under the theories of law espoused in Bickley vs. Costello, 346 So.2d 625. Therefore, the Respondent, BOYNTON, could make no recovery against the owner of the vehicle which hit him. In fact the Circuit Court had earlier entered a summary judgment in favor of the owner on the basis of the Bickley case, supra.

In short, the Respondent was left with the dilemma of having no insurance coverage for the Defendant driver, and being able to make no recovery against the driver's employer, and the owner of the car driven by the negligent driver.

There was thus no insurance available to the Respondent, BOYNTON.

Accordingly, the Respondent, BOYNTON, brought a claim for uninsured motorists coverage from his own insurance company, which also happens to be ALLSTATE INSURANCE COMPANY, which is the Petitioner herein. (Luke's liability coverage was also with ALLSTATE INSURANCE COMPANY). The Petitioner, ALLSTATE INSURANCE COMPANY, denied BOYNTON's uninsured motorist claim. A summary judgment on uninsured motorist coverage was granted in favor of ALLSTATE INSURANCE COMPANY at the trial level from which BOYNTON appealed. The Fifth District Court of Appeal reversed this lower court ruling and found in favor of the Respondent, BOYNTON, and said he should have the uninsured motorist coverage for which he paid a premium. The Petitioner, ALLSTATE INSURANCE COMPANY, seeks by certiorari, to have the Fifth District Court of Appeal's decision reversed by the Supreme Court to which the Respondent, BOYNTON, is now responding to the Petitioner's brief on jurisdiction.

The Respondent's position is that there is no express and direct conflict with another District Court of Appeal or the Supreme Court and the certiorari should be denied.

ARGUMENT ON JURISDICTION

Petitioner alleges that "conflict" jurisdiction exists in this case. That rule specifically provides:

> "Discretionary jurisdiction. The discretionary jurisdiction of the Supreme Court may be sought to review:
>
> (A) Decisions of District Courts of Appeal that:
>
> . . .
>
> (iv) expressly and directly conflict with a decision of another District Court of Appeal or of the Supreme Court on the same question of law." [Fla.R.App.P. 9.030(a)(2)(A)(iv)]. (emphasis added)

In the case at bar, is there a "conflict" which is both "express" and "direct"? We believe no such conflict exists and therefore, this Court should deny jurisdiction.

"Conflict" is said to exist when "two decisions are wholly irreconcilable," Williams vs. Duggan, 153 So.2d 726 (Fla. 1963).

The cases which construe the post-1980 Florida appellate Rules make it clear that the adding of the word "express" to the appellate rule was done with a purpose. That purpose was to limit and narrow those cases which would be heard by the Florida Supreme Court.

In Jenkins vs. State, 385 So.2d 1356 (Fla. 1980), this Court noted that the word "expressly" should be narrowly construed to effect the intent of the change in the Constitution (and in the appellate rules) to narrow this Court's jurisdiction.

Although this Court has held that an "express" conflict does not require the certification or designation by the appellate court [Ford Motor Co. vs. Kikis, 401 So.2d 1341 (Fla. 1981)], earlier decisions from this Court have made it clear that the conflict must be both genuine and irreconcilable.

Any differences which may appear between the BOYNTON decision of the Fifth District Court of Appeal below and any of the cases listed by counsel for Petitioner are readily reconcilable when the facts in the cases are examined more closely.

The Petitioner cites five cases that are allegedly conflicting with the case at hand, but on the contrary all the cases cited by Petitioner are distinguishable from the instant case and are not expressly and directly conflicting.

The Salas vs. Liberty Mutual Fire Insurance Company, 272 So.2d 1, case cited by the Petitioner is distinguishable from the instant case. In the Salas case, this court held that uninsured motorist coverage was applicable. In that case there was no dispute whatsoever that there was liability insurance available to the Plaiintiff. In fact, in Salas, the court held that "as a creature of statute rather than a matter for contemplation of the parties in creating automobile liability policies, uninsured motorists protection is not susceptible to attempts of insurers to limit or negate that protection." Salas involved a named insured's minor daughter who had been injured in an automobile accident while

riding as a passenger in an uninsured vehicle owned and operated by her brother in which the court held that an exclusion of uninsured motorist coverage by the named insured or resident relative attempted to narrow or limit uninsured motorist coverage, contrary to the purpose and intent of uninsured motorist statutes, and was void.

Salas is distinguishable in that it dealt with the meaning of a family exclusion as affording uninsured motorist coverage and not whether coverage was available from other potential defendants. Thus both the facts and question of law in Salas and in our case are materially different.

The case of Centennial Insurance Company vs. Wallace, 330 So.2d 815, is also distinguishable from the instant case. In Centennial, the Plaintiff had a course of means of recovery against the Defendant liability party, the power company. Thus uninsured motorist coverage would not be applicable because of the availability of a liability recovery against the self-insured light company.

On the other hand, in our case, BOYNTON did not have the availability of recovery against the defendant driver for liability because he was a co-employee and thus immune from suit under F.S. 440.11, and could not be sued. The owner, Xerox, was also immune from recovery by liability under the case law of Bickley vs. Costello, supra. The employer was immune from liability under Workman's Compensation tort immunity under F.S. 440.11.

Thus, contrary to the Centennial case cited by the

Petitioner, who had a means of liability recovery, BOYNTON, in the instant case had no means of a liability recovery.

The Centennial case and the instant case are thus distinguishable by both fact and law.

The cases of Reid vs. Allstate Insurance Company, 344 So.2d 877 and Reid vs. State Farm Fire and Casualty Company, 352 So.2d 1172, cited by the Petitioner are factually different in that they deal with a different area of law. The court in Reid pointed out that generally "an insurer may not limit applicability of uninsured motorist protection," and that the holding in Reid was an "exception to the general rule", because of the public policy reason behind the family-household exclusion for allowing uninsured motorist coverage to "protect an insurer from overfriendly or collusive lawsuits between family members".

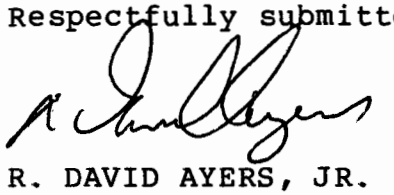
The instant case did not come under that family-household exclusion exception and thus the public policy reasons are materially different and distinguishable.

CONCLUSION

The instant case is materially different on its facts from any of the cases cited above, and unique in the fact that there is no means of recovery against the same liability carrier ALLSTATE INSURANCE COMPANY who declined uninsured motorist coverage. There is no case which addresses the specific issue herein and therefore there is no express and direct conflict on the same issue of law.

We respectfully request this Honorable Court to decline jurisdiction.

Respectfully submitted,



R. DAVID AYERS, JR.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by mail delivery to ROBERT A. WOHN, JR., ESQUIRE, 201 East Pine Street, Suite 310, Southeast Bank Building, Orlando, Florida 32801-2778, this 24th day of February, 1984.

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

Attorney for Plaintiffs/
Respondents.