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
SID J. WHITE
JUL 2 1984
CLERK, SUPREME COURT
By_____
Chief Deputy Clerk

INITIAL BRIEF OF DEFENDANT/PETITIONER,
ALLSTATE INSURANCE COMPANY

APPEAL FROM THE DISTRICT COURT OF APPEAL OF
THE STATE OF FLORIDA, FIFTH DISTRICT

CASE NO.: 82-1002

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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" for the transcript of the hearing and rehearing on ALLSTATE's Motion for Summary Judgement held on March 8, 1982 and on June 21, 1982, respectively.

"P" for references to pages in the Record on Appeal or any appendix used in the appellate proceedings to date.

"L" for lines of text in the Record on Appeal or any appendix used in the appellate proceedings to date.

"R" for the Record on Appeal.

"A" for any appendix used in any appellate proceedings to date.

TABLE OF CITATIONS

STATEMENT OF FACTS

On or about January 4, 1979, the Plaintiff below, Respondent herein, RICHARD B. BOYNTON, was employed as a mechanic by Sears, Roebuck & Company, and worked in the Sears department store garage on State Road 50 in Orlando, Orange County, Florida. (R. 250 -286.) At the said time and place, Defendant, JAMES LUKE, was also employed as a mechanic by Sears, Roebuck & Company, and allegedly due to his negligence, a car upon which he was working moved forward and struck BOYNTON, which caused him injuries. Id.

The car which struck BOYNTON was owned by Gelco Corporation, which at the time mentioned above, was leasing the car to Xerox Corporation. (R. 291 - 293, 295, 296.)

Defendant, LUKE, had a policy of liability insurance with co-defendant below, Petitioner herein, ALLSTATE, at the time of the accident. However, liability coverage under that policy was not available, because of a provision which excluded coverage for non-owned automobiles under LUKE's physical control while he was in the course of his employment.

At the time of the accident, Employers Insurance of Wausau had in full force and effect a policy of insurance providing comprehensive general liability coverage for the automobile owned by Gelco Corporation and leased to Xerox Corporation. (R. 291 - 293.)

STATEMENT OF THE CASE

The initial Complaint was filed against Xerox and its insurer, Wausau, along with Sears, Roebuck & Company, and its insurer, ALLSTATE. (R. 11 - 13 and 20.) Sears answered the Complaint and alleged immunity under §440.11, Fla. Stat. (Supp. 1978). BOYNTON filed a Voluntary Dismissal without Prejudice in favor of Sears on April 15, 1981. (R. 132.)

Xerox answered the Complaint and moved for summary judgment. (R. 26 - 27 and 57 - 58.) The motion for summary judgment was granted by Orders entered April 20, 1981, on the basis that Xerox was not liable to BOYNTON. (R. 133 and 136.)

BOYNTON filed an Amended Complaint against ALLSTATE and LUKE , with the action against ALLSTATE in this instance being for recovery of U.M. benefits. (R. 137 - 138.) Summary judgment was entered on behalf of ALLSTATE on the theories that the involved vehicle was not "uninsured" and that BOYNTON was not "legally entitled to recover" against the owner or operator of same. (R. 314 - 315.) BOYNTON served his Motion for Rehearing in regard to the summary judgment entered for ALLSTATE on March 23, 1982. (R. 317.) This Motion was denied by Order entered June 21, 1982. (R. 331.) A transcript was made of the hearing on the Motion for Rehearing. (R. 1 - 10.)

BOYNTON served his Notice of Appeal July 19, 1982, in regard to the Order Granting Allstate Motion for Summary Judgment and Order Denying Plaintiff's Motion for Rehearing, as entered by Judge Frank N. Kaney of the Circuit Court, Ninth Judicial

Circuit, of Orange County, Florida. (R. 333.) Following oral argument, the District Court of Appeal of Florida, Fifth District, reversed the judgment of the trial court and ALLSTATE petitioned this Court for certiorari. Jurisdictional briefs were submitted and this Court accepted jurisdiction by Order rendered June 8, 1984.

ARGUMENT

I. WHETHER THE FIFTH DISTRICT COURT OF APPEAL ERRED IN RULING THAT A MOTOR VEHICLE IS AN "UNINSURED" VEHICLE WHEN THE DRIVER'S POLICY DID NOT PROVIDE COVERAGE FOR THE PARTICULAR OCCURRENCE RESULTING IN INJURY, BUT THE OWNER'S POLICY DID PROVIDE SUCH COVERAGE.

For the sake of logical comparison, Defendant, ALLSTATE, has organized its arguments herein in similar fashion to the manner in which the Fifth District Court of Appeal's opinion herein was organized. ALLSTATE, however, has included in its statement of the first issue considered by that court one very important fact which apparently was ignored in that court's decision. This fact was that the lessee of the involved motor vehicle, Xerox Corporation, actually did have insurance which would have provided coverage for BOYNTON's damages if BOYNTON had had a legal right of action against Xerox. Therefore, the vehicle which caused injury to BOYNTON was not uninsured such that ALLSTATE's uninsured motorist (U.M.) coverage was exposed under the circumstances of this case.

The Fifth District Court of Appeal mistakenly stated that Xerox' insurance carrier, Employers Insurance of Wausau, had "denied coverage" for this accident because Xerox was not responsible for it. Boynton v. Allstate Insurance Co., 443 So.2d 427, 429 (Fla. 5th DCA 1984). In fact, Wausau never denied coverage at all, but merely denied liability on behalf of its insured and ultimately prevailed by obtaining a summary judgment in that regard. The vehicle involved may not be considered "uninsured" simply because BOYNTON could not recover from Xerox.

In the comparable case of Centennial Insurance Co. v. Wallace, 330 So.2d 815 (Fla. 3d DCA 1976) cert. den., 341 So.2d 1087 (Fla. 1976), an employee of Florida Power and Light Company (FPL) was fatally injured when a part of a winch truck owned by FPL came into contact with a power line. Wallace at 816. A claim could not be made against FPL by Wallace's estate, because at the time of the incident, Wallace was an employee of that company and was therefore limited to his worker's compensation benefits by virtue of the exclusive remedy provision contained in §440.11, Fla. Stat. (Supp. 1978). Instead, a claim was presented to the U.M. coverage carrier based on the argument that because liability coverage on the FPL vehicle was not available, the truck was an uninsured vehicle such that Wallace's estate was entitled to benefits under the coverage. The Wallace court disagreed and stated:

> We must also reject appellee's argument that because FPL is immune from liability by virtue of workmen's compensation laws (§440.11), the winch truck is an uninsured vehicle. 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.

Wallace at 817. Cf. Hartford Accident and Indemnity Co. v. Fonck, 344 So.2d 595 (Fla. 2d DCA 1977) (where liability and U.M. coverage were disallowed because of fellow-employee exclusion in employer's policy).

The Wallace court cited with approval Taylor v. Safeco Insurance Co., 298 So.2d 202 (Fla. 1st DCA 1974). In that case, William Taylor's employer, Robert L. Henry, lent him an automobile, which William then allowed his brother, Earl Taylor, to

drive. Taylor at 202. Due to Earl's negligence, an accident occurred in which William, who was a passenger, was killed. Id. Neither William nor Earl had insurance. Id. There was no cause of action available against the owner of the vehicle, because the Dangerous Instrumentality Doctrine was not applicable under the facts of the accident. Id. Therefore, even though the vehicle was covered by liability insurance of the owner, that insurance was not available to William's estate. Id.

In regard to the question of whether William Taylor's estate could make a claim against the owner's uninsured motorist insurance coverage on the basis that the Henry vehicle was "uninsured," the Taylor court stated:

> We cannot say that Henry's vehicle, which was covered by liability and uninsured motor vehicle insurance to the full extent required by law, was an uninsured vehicle simply because the owner, Henry, is not liable to his bailee for the negligence of the bailee's driver. Appellant's argument ignores the clear wording of the [uninsured motorist] statute. The statute only requires protection of persons insured who are legally entitled to recover damages from owners or operators of "uninsured motor vehicles." Although appellant [William's estate] may be legally entitled to recover damages from the operator, Earl, the vehicle was not an uninsured motor vehicle. Thus, the protection required by the uninsured motor vehicle statute does not extend to appellant's decedent as he is not a person legally entitled to recover damages from the owner or operator of an uninsured motor vehicle.

Id. at 204.

Before Wallace, supra, the Third District Court of Appeal itself had addressed in Hayston v. Allstate Insurance Co., 290 So.2d 67 (Fla. 3d DCA 1974) the question of the meaning of the

term, "uninsured," where the operator of the injury-causing vehicle had no insurance, but the owner did, and the injured third party claimed U.M. benefits under his own policy. The court ruled that the injured third party had no U.M. claim, because the involved vehicle was covered by insurance:

> The policy now clearly envisions that where a bodily injury liability policy is applicable at the time of the accident, then the uninsured motorist portion of the policy is inapplicable.

Hayston at 68. See also, General Electric Accident Fire & Life Assurance Corp. v. Means, 362 So.2d 135 (Fla. 2d DCA 1978); Castaneda v. State Farm, 348 So.2d 1231 (Fla. 3d DCA 1977).

The Fifth District Court of Appeal has simply stated that it does not agree with the rationale in Wallace, supra, which apparently also puts that Court at odds with the Taylor decision and others cited above. Boynton, supra, at 429. The Fifth District Court of Appeal apparently decided to rely upon two less pertinent decisions, Brown v. Progressive Mutual Insurance Company, 249 So.2d 429 (Fla. 1971) and American Fire and Casualty Company v. Boyd, 357 So.2d 768 (Fla. 1st DCA 1978). Id.

In Brown, this Court was faced with the question of whether the "hit-and-run" clause included in the U.M. endorsement of an automobile policy was valid where it provided that the coverage would extend to "hit-and-run" automobiles only if bodily injury arose out of physical contact between the insured vehicle and the "hit-and-run" vehicle. Brown at 429 - 430. This Court recognized that the requirement in an uninsured motorist policy

provision of physical contact between vehicles involved in "hit-and-run" accidents was unfair and contrary to the public policy behind the uninsured motorist statute, expecially in light of the difficulties which the insured in such a case already would face in regard to proving that the other vehicle was uninsured. Id. Allowing the "hit-and-run" clause to stand would have left the injured party with no outside source of compensation for his injuries.

The facts of that case, however, bear no resemblance to the facts in the case sub judice, and there are no compelling public policy reasons, as in that case, to extend the scope of uninsured motorist coverage in this case. This is true especially considering the fact that Plaintiff, BOYNTON, had available to him worker's compensation coverage, under which he actually did collect benefits. (R. 326 - 327.)

To some extent, the Boyd decision, supra, is at least a bit more analogous to this case than Brown. Boyd involved claims by two passengers, who were qualified for uninsured motorist coverage on their vehicle, and who were injured in an automobile accident caused by the negligence of an uninsured motorist. Boyd at 769. Although the other motorist actually had automobile insurance, the policy had a clause excluding coverage while the other motorist was traveling on orders from a branch of the military service, which is what he was doing at the time of the accident. Id. The plaintiffs' U.M. carrier contended that notwithstanding its exclusionary clause, the other motorist's

vehicle did not qualify under the applicable statute as an "uninsured" vehicle, because the other motorist's employer, the United States Government, was liable for his negligence under the Federal Tort Claims Act.

The Boyd court ruled that the other motorist's car was an "uninsured" vehicle within the meaning of that term as used in §627.727, Fla. Stat. (Supp. 1978), despite the available recovery under the Federal Tort Claims Act. Id. The Boyd court stated:

> ...[T]he mere fact that [the other motorist] 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.

Id.

The Boyd decision still is not persuasive in the case under consideration, because it does not examine the question of whether a vehicle is "uninsured" within the meaning of the uninsured motorist statute when the lessee of the vehicle had insurance which would have provided coverage to the injured party but for the fact that the lessee was not liable to the injured party. Those are the facts of this case. The Fifth District Court of Appeal erroneously attempted to broaden Boyd by stating:

> ...[W]e hold, as in Boyd, 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. [Citing Brown, supra.]

Boynton at 429 (emphasis added).

In fact, the lower appellate court went so far as to state that the existence of Xerox' insurance was "irrelevant," because Xerox could not be held liable as an "owner," absent proof of its own negligence, for the operation of the vehicle when it had been turned over to the Sears garage. Id. This Court probably never imagined that the Boyd decision would ever be stretched so far. This seems evident in light of this Court's denial of certiorari in Wallace, supra, at 341 So.2d 1087 (Fla. 1976), and its citing of Wallace with approval in Reid v. State Farm Fire and Casualty Company, 352 So.2d 1172 (Fla. 1977).

In Reid, a daughter was prevented from recovering under her father's U.M. coverage where she was injured in an auto accident due to the negligence of her sister, who was driving. Reid at 1177 - 1173. A family-household exclusion in the policy insuring the car was upheld by this Court as a bar to the plaintiff's recovery against her sister and the available liability coverage on the vehicle. Id. The U.M. claim was also disallowed by this Court because the barred recovery against the plaintiff's sister did not make an otherwise insured motor vehicle an "uninsured" one. Id. at 1173.

It should be pointed out that in BOYNTON's automobile insurance policy, ALLSTATE agreed:

> We will pay damages for bodily injury, sickness, disease, or death which you are legally entitled to recover from the owner or operator of an uninsured auto. Injury must be caused by accident and arise out of

the ownership, maintenance or use of an uninsured or underinsured auto.

(R. 156 - 180, emphasis added.)

BOYNTON's policy also provided that an "uninsured" auto is:

(1) A motor vehicle which has no bodily injury liability bond or insurance policy in effect at the time of the accident.

(2) A motor vehicle for which the insurer denies coverage, or the insurer becomes insolvent within twelve months from the date of the accident.

(3) A hit-and-run motor vehicle which causes bodily injury to an injured person. The identity of either the operator or owner of the vehicle must be unknown.

Id. (emphasis added).

The first quotation from the subject policy tracks the exact language of the uninsured motorist statute, §627.727, Fla. Stat. (Supp. 1978). As previously argued, it is quite clear that, with the exception of the Brown case, supra, the terms, "uninsured" or "underinsured" appearing in §627.727, Fla. Stat. (Supp. 1978) have never been interpreted by Florida courts to refer to motor vehicles that had full insurance coverage to the extent required by Florida'a financial responsibility law, as provided by some party.

In this case, the vehicle which caused injury to BOYNTON was covered with liability insurance to the extent required by law under Xerox' policy with Wausau. The Brown ruling was a special exception which was made in a situation where the equities of a "hit-and-run" accident favored a deviation from developed caselaw to provide a remedy to an injured party who otherwise

would not have had a source of recovery. BOYNTON did have a source of recovery, worker's compensation coverage, of which he availed himself. It is perhaps also noteworthy that three of the seven Justices who sat in Brown dissented from the majority opinion. Boyd at 430.

Secondly, in regard to the specific language of the policy involved in the instant case, that language should be restricted to its plain meaning according to common usage, not some strained meaning not supported by either English usage or the law. See, e.g., Johnson v. Three Bays Properties #2, Inc., 159 So.2d 924 (Fla. 3d DCA 1964). As with contracts generally, the language used in an insurance policy, unless ambiguous, is the best evidence of the intent of the parties to the contract and the limit of the responsibilities of each thereunder. Inkeepers International, Inc. v. McCoy Motels, Ltd., 324 So.2d 676 (Fla. 4th DCA 1975); Jacobs v. Petrino, 351 So.2d 1036 (Fla. 4th DCA 1976); Hurt v. Leatherby Insurance Co., 354 So.2d 918 (Fla. 4th DCA 1978), reversed on other grounds, 380 So.2d 432 (Fla. 1980). The language quoted above from the subject policy is clear, unambiguous, and not subject to any interpretation other than that which can be made from a direct reading of the policy or that which has been made by this Court and other courts of Florida in interpreting the same or similar provisions.

The policy states that an auto is "uninsured" under several fact situations, none of which are applicable under the facts of this case. The listed fact situation which comes closest to

the circumstances in this case is where a motor vehicle "... has no bodily injury liability bond or insurance policy in effect at the time of the accident." The word, "no," is clearly intended to mean that there is not any liability insurance, that in regard to such insurance, there must be none covering the involved motor vehicle. That simply is not the situation in this case.

The Fifth District Court of Appeal attempted to bring the Plaintiffs within the ALLSTATE U.M. coverage under the fact situation listed in the policy where "... the insurer denies coverage ..." for the vehicle. As noted above, the lower appellate court stated that Xerox' insurance carrier, Wausau, "denied coverage," but that was an inaccurate observation, because Wausau merely denied liability, not coverage.

Thus, the strained interpretation made by the Fifth District Court of Appeal of the word, "uninsured," under the circumstances of this case is unwarranted, especially in view of the clear meaning of the language employed in the contract, the interpretation of same under similar circumstances by this and other courts of the State of Florida, and the fact that the vehicle in question obviously was insured under the Xerox policy to the extent required by law.

II. WHETHER THE FIFTH DISTRICT COURT OF APPEAL ERRED IN RULING THAT THE UNINSURED MOTORIST PROVISION OF AN AUTO INSURANCE POLICY, WHICH PROVIDED COVERAGE TO THE POLICYHOLDER FOR DAMAGES THAT HE WAS "LEGALLY ENTITLED TO RECOVER," PROVIDED COVERAGE WHERE THE POLICYHOLDER DID NOT HAVE A LEGAL RIGHT OF RECOVERY AGAINST EITHER THE DRIVER OR THE LESSEE OF THE INJURY-CAUSING VEHICLE.

Both the U.M. statute and BOYNTON's policy with ALLSTATE, which tracks the language of the U.M. statute, state that a person claiming U.M. coverage shall have a right of recovery against his insurer only if he is "legally entitled to recover" from the owner or operator of an "uninsured" motor vehicle. §627.727, Fla. Stat. (Supp. 1978) (emphasis added). Petitioner, ALLSTATE, has already argued that the vehicle in question was insured such that one of the two essential elements of the U.M. claim in this case, as emphasized immediately above, is not satisfied. ALLSTATE also maintains that, due to the circumstances of this case, the other element of recovery, which requires BOYNTON to be "legally entitled to recover" from the owner or operator of the involved auto, is also unsatisfied.

A review of the history of this litigation is helpful in showing why BOYNTON is not "legally entitled to recover," as required by the U.M. statute. Suit initially was filed against Xerox and its insurer, Wausau, along with Sears, Roebuck and Co., and its insurer, ALLSTATE. (R. 11 - 13 and 20.)

Sears answered the Complaint and alleged immunity under §440.11, Fla. Stat. (Supp. 1978), which provides that the exclusive remedy of an injured employee shall be against the

worker's compensation coverage of the employer, provided that such coverage exists and satisfies the requirements of the worker's compensation laws. (R. 39 - 40.) In the face of this defense, BOYNTON filed a Voluntary Dismissal without Prejudice in favor of Sears on April 15, 1981. (R. 132.)

Xerox answered the Complaint and moved for summary judgment. (R. 26 - 27 and 57 - 58.) The motion for summary judgment was based upon Castillo v. Bickley, 363 So.2d 792 (Fla. 1978), in which this Court held that the owner of a vehicle, absent negligence on his own part, is not liable for damages to an injured person caused by the operation of the vehicle by an independent contractor garage repairman. The motion for summary judgment was granted by Orders entered April 20, 1981. (R. 133 and 136.) The trial court considered Xerox, the lessee of the vehicle, to have essentially the same defense as the owner in Castillo. (It is clear that the owner, Gelco Corporation, which had leased the car to Xerox, could not be liable, either, inasmuch as any liability of Gelco would have had to flow through Xerox.)

BOYNTON thereafter filed an Amended Complaint against ALLSTATE and LUKE, with the action against ALLSTATE in this instance being for recovery of U.M. benefits. (R. 137 - 138.) Summary judgment was entered on behalf of ALLSTATE on the theories that the involved vehicle was not "uninsured" and that BOYNTON was not "legally entitled to recover" against the owner or operator of same. (R. 1 - 10 and 314 - 315.) This appeal followed.

Prior to the beginning of the appeal in this case, Defendant, LUKE, amended his Answer to the Amended Complaint to include the exclusive remedy/fellow-employee immunity provided under §440.11, Fla. Stat. (Supp. 1978). (R. 297 - 298, 321, and 322.) As provided by §440.11, Fla. Stat. (Supp. 1978), LUKE, as a fellow-employee of BOYNTON, was entitled to the same immunities as the employer, Sears. After replying by denying the newly pleaded affirmative defense in LUKE's Amendment to Answer, BOYNTON apparently realized the futility of his cause of action against LUKE and voluntarily dismissed it. (This dismissal is not included as part of the Record on Appeal, because it post-dates the beginning of appellate proceedings herein.)

Castillo, supra, clearly blocked any cause of action by BOYNTON against Xerox or Gelco, the lessee and owner of the vehicle, respectively. §440.11, Fla. Stat. (Supp. 1978) precluded success against LUKE and Sears, and BOYNTON's voluntary dismissals as to those Defendants evidence this fact. Therefore, BOYNTON is not entitled to recover U.M. benefits against ALLSTATE, because at no time was he ever "legally entitled to recover from the owner or operator of an uninsured auto." (R. 156-180, emphasis added.)

In supporting its decision ruling against ALLSTATE on this issue, the Fifth District Court of Appeal relied primarily on case authority from other jurisdictions. Boynton at 430 - 431. Those cases are only persuasive authority not binding on this Court. Not one of those cases is on point with the facts of

this case.

A close reading of the cases reveals that only two of them appear to actually stand for the broad proposition that if an insured under U.M. coverage can establish automobile tort liability, he can then recover from his U.M. carrier, even if there is a substantive bar to recovery against the vehicle's owner and operator, and regardless of the type of substantive bar. Watkins v. U. S., 462 F.Supp. 980 (S.D. Ga. 1977), aff'd. 587 F.2d 279 (5th Cir. 1979); Allstate Insurance Co. v. Elkins, 396 N.E. 2d 528 (Ill. 1979).

Three of the cases cited by the appellate court below dealt with the much more specific question of whether a claimant against U.M. coverage could bring that claim within the time limits allowed under the contract statute of limitations when the suit against the uninsured motorist was already precluded by the running of the shorter tort statute of limitations. Sahloff v. Western Casualty & Surety Co., 171 N.W. 2d 914 (Wis. 1969); DeLuca v. Motor Vehicle Accident Indemnity Corp., 215 N.E. 2d 482 (N.Y. App. 1966); Transnational Insurance Co. v. Simmons, 507 P.2d 693 (Ariz. App. 1973). At least one Florida court has ruled that the contract statute of limitations is the appropriate limitation on U.M. actions. Mendlein v. United States Fidelity and Guaranty Co., 277 So.2d 538 (Fla. 3d DCA 1973). These cases should not be construed to mean that all defenses available to the uninsured motorist are not available to the U.M. carrier, but only that the specific defense of the tort statute of limitations is unavail-

able. The simple reason for this is that a U.M. suit is a suit on a contract, not a suit in tort. Id.; Sahloff; DeLuca; Simmons; Hill v. Seaboard Fire & Marine Insurance Co., 374 S.W. 2d 606 (Mo. App. 1963).

Wilkinson v. Vigilant Insurance Co., 224 S.E. 2d 167 (Ga. 1976), on remand, Wilkinson v. Craft, 226 S.E. 2d 478 (Ga. App. 1976), dealt specifically with the proposition that a discharge in bankruptcy of the tortfeasor which bars suit against him does not preclude recovery of U.M. benefits. Neither the statute of limitations cases nor this bankruptcy case went as far as Watkins and Elkins, supra, to indicate that a U.M. claimant can recover from his carrier, regardless of the nature of any bar to recovery against the uninsured motorist or owner, if he merely demonstrates automobile tort liability. Like this Court's decisions in Brown and Boyd, supra, these cases are restricted to their particular facts and depend upon special equities of the complaining parties.

Two of the foreign authorities cited by the Fifth District Court of Appeal did not rule on the validity of the broad principle apparently adopted in Watkins and Elkins, but instead, merely stand for the proposition that U.M. claimants are allowed to bring direct actions against their U.M. carrier, rather than first being required to bring suit and obtain judgment against the uninsured motorist. Winner v. Ratzlaff, 505 P.2d 606 (Kan. 1973); Reese v. Preferred Risk Mutual Insurance Co., 457 S.W. 2d 205 (Mo. App. 1977). One of the reasons for this ruling given

by the courts is the need to avoid multiplicity of suits. Id. Obviously, Florida does allow such direct actions by insureds against their U.M. carriers, but this right has not always been clear in other states. Id. The fact that a state's courts allow a direct action against the U.M. carrier by the insured does not mean, however, that the insured's cause of action is not subject to defenses which would have been available to the uninsured motorist, nor is this the holding of the two cases just cited. See Id.

Other states have continued to require a two-step litigation process in which a successful suit against the uninsured motorist is a condition precedent to suit against the U.M. carrier. See, e.g., Logan v. Aetna Casualty and Surety Co., 309 F.Supp. 402 (S.D. Miss. 1970) (construing Mississippi law); O'Brien v. Government Employees Insurance Co., 372 F.2d 335 (3d Cir. 1967) (construing Virginia law). The courts of those states opted to sacrifice judicial economy to ensure the satisfaction of the requirement under their U.M. statutes of a showing that the claimant is "legally entitled to recover" from the uninsured owner or operator of the injury-causing vehicle. Such a procedure clearly allows the liability defendant to raise all defenses which are available to him, and if he prevails on any of them, the plaintiff is absolutely precluded from pursuing his U.M. claim. See Id.

It is exactly as though the U.M. carrier stands in the shoes of the uninsured motorist in regard to that individual's

available defenses. The U.M. carrier stands or falls with the liability defendant. This situation flies in the face of the Fifth District Court of Appeal's opinion that:

> 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.

Boynton at 430. Some courts have reached such a conclusion, but not a "majority." Some have merely allowed specific exceptions to the exact requirements of the "legally entitled to recover as damages" language, but only under particular circumstances where the equities required exceptions. On the other hand, a number of courts apparently do allow all of the defenses of the uninsured motorist to bar or decrease recovery against the U.M. carrier as though those defenses were the carrier's.

Even in Winner, supra, which was cited by the lower appellate court as support for the above-quoted language from this case, the court lined up with the last mentioned group of courts when it ruled:

> In resisting the claim the [U.M.] insurer would have available to it, in addition to policy defenses compatible with the statute, the substantive defenses that would have been available to the uninsured motorist such as contributory negligence, etc.

Winner at 610. The quoted language, if applicable to the instant case, means that the defenses available to LUKE, Sears, Xerox, and Gelco would also be available to ALLSTATE, which is exactly what ALLSTATE has contended all along.

In another jurisdiction which allows a direct action by the insured against his U.M. carrier, it was held that where the uninsured motorist was plaintiff's husband and interspousal immunity prevented a liability action against him, the U.M. insurer likewise was not liable. Noland v. Farmers Insurance Exchange, 413 S.W. 2d 530 (Mo. App. 1967). The Noland court also ruled that where the U.M. policy obligated the insurer to pay "... all sums ... which the owner or operator of an uninsured motor vehicle would be legally responsible to pay as damages to the insured ... ," such language was not unlawful or ambiguous. Id. at 532 - 533 (emphasis by the court).

To a considerable degree, the lower appellate court's analysis of this issue as one separate from the issue of whether the involved auto was "uninsured" begs the question in regard to several cases evaluated in the first section of this brief. In Wallace, Taylor and Reid, supra, the reviewing courts did not really examine the specific question of whether the plaintiffs in each case were "legally entitled to recover" damages from the injury-causing vehicle's operator or owner, but focused on the question of whether specified bars to recovery against those individuals made the vehicle "uninsured." Nevertheless, implicit in those court's analyses is acceptance of the proposition that where the plaintiff would have been legally entitled to recover from the vehicle's owner or operator but for substantive bars to those causes of action, and where there was sufficient liability insurance available through the legally immune owner or operator,

then the plaintiff is completely barred from any U.M. recovery in Florida. See Wallace; Taylor; Reid.

The only case in Florida which to some extent construes the language, "legally entitled to recover," directly is Salas v. Liberty Mutual Fire Insurance Co., 272 So.2d 1 (Fla. 1972). In Salas, the daughter of the named insured on a Liberty Mutual policy, while a relative residing in the named insured's household, was injured in an accident when she was riding as a passenger in an uninsured vehicle owned and operated by her brother, who was also a relative resident of the named insured's household. Salas at 2. This Court held that the public policy of the State of Florida was that:

> ...[E]very 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.

Id. at 3 (emphasis added). The prerequisite that the injured party "would have been able to recover" against the negligent motorist, but for the absence of a policy of liability insurance, differs from the mere showing of negligence and damages. It contemplates the legal right to recover against the tortfeasor. The Fifth District Court of Appeal's decision in this case is contrary to the Salas holding. Id. at 430 - 431.

In regard to this point, the words of Justice Upchurch, who dissented from the majority of the appellate court below in a well written opinion, are worth noting:

> The majority equates "legally entitled to recover" with the establishment of fault on the part of the uninsured motorist. I cannot conclude this is correct for two reasons. First, "legally entitled" means something more than simply "entitled." In the instant case, Boynton was perhaps "entitled" to recover but he was not "lawfully or legally" entitled to recover because he was barred by law from recovery. See §440.11, Fla. Stat. (Supp. 1978).

Id. at 432.

Finally, a policy consideration raised by Justice Upchurch is also worth mentioning:

> The majority opinion has created a large class of uninsured vehicles. Every automobile left with a garage for repairs is uninsured as to the employees injured by its negligent operation. While this risk may not be as great as I envision it, it is certainly not a risk contemplated by the carrier in establishing its rates.

Id. at 433.

The effect of the decision by the Fifth District Court of Appeal herein would be to alter the clear and unequivocable definition and understanding of what is meant by an uninsured vehicle and therby to expand the risk undertaken by uninsured motorist carriers beyond that which was ever contemplated prior to said decision. Additionally, said decision would illogically enlarge the right of uninsured motorist claimants beyond those given to liability claimants. Although individuals claiming benefits under liability coverage would have their claims subject to affirmative defenses, under the decision of the Fifth District Court of Appeal herein, a claimant attempting to re-

cover uninsured motorist benefits would be in a better position in that his claim would not be subject to said affirmative defenses.

CONCLUSION

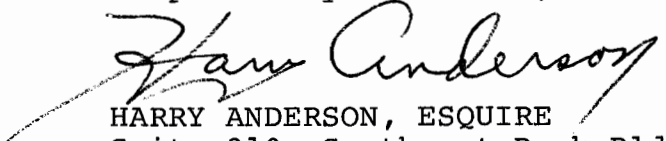
The injury-causing vehicle involved in this case was not "uninsured" within the meaning of the U.M. statute or the subject U.M. insurance policy, because liability insurance to the extent required by Florida law was carried by the vehicle's lessee.

Furthermore, Plaintiff herein was not "legally entitled to recover" damages against the owner, lessee, or operator of the subject vehicle because of legal substantive bars to recovery against them. He therefore failed to satisfy two requirements of the U.M. statute and the insurance policy in question.

Plaintiff is not without a remedy, because worker's compensation benefits were available to him, and he took advantage of them. There are no special equities favoring Plaintiff such that any exceptions to Florida's law relating to U.M. recoveries should be adopted, as was done by the appellate court below.

Fairness, public policy, and the law of this and sister states support Defendant's request that the decision of the Fifth District Court of Appeal in this case be reversed with instructions that the judgment of the trial court below be reinstated.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been, by hand, this 29th day of June, 1984, furnished to: R. DAVID AYERS, JR., ESQUIRE, 1680 Lee Road, Winter Park, Florida 32780.

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