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IN THE SUPREME COURT OF
THE STATE OF FLORIDA

CASE NO.: 64838

FILED
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ALLSTATE INSURANCE COMPANY,

Defendant/Petitioner,

vs.

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

Plaintiffs/Respondents.
______________________________/

REPLY 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.

The amicus curae which filed a brief in this case supporting RESPONDENT'S position, namely, the Academy of Florida Trial Lawyers, will hereinafter be referred to as the ACADEMY.

References to the Record on Appeal shall be designated as "(R. .)".

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ARGUMENT

I. PETITIONER'S GENERAL REPLY TO BRIEFS OF BOTH RESPONDENT AND AMICUS CURIAE:

A. IT WAS NOT THE LEGISLATURE'S INTENT THAT THE U.M. STATUTE BE INTERPRETED TO ALLOW A U.M. RECOVERY IN THIS CASE.

1. THE LEGISLATURE DID NOT INTEND FOR A VEHICLE TO BE CONSIDERED UNINSURED WHEN THERE WAS FULL INSURANCE PROVIDED BY THE VEHICLE'S LESSEE.

The arguments propounded by Respondent and the ACADEMY require this Court to examine closely the intent of the Florida Legislature when it passed §627.727, Fla. Stat. (Supp. 1978), the U.M. statute. This Court has stated that there are certain rules controlling how courts of this state should interpret legislative provisions:

> If the intent is clear from the content of the statute, our function is to interpret the act so as to effectuate that intent if we can do so by the application of accepted rules of statutory construction.
>
> Courts are, of course, extremely reluctant to add words to a statute as inacted by the Legislature. They should be extremely cautious in doing so.
>
> ***
>
> The courts cannot and should not undertake to supply words purposely omitted. When there is doubt as to the legislative intent or where speculation is necessary, then the doubts should be resolved against the power of the courts to supply missing words.

Armstrong v. City of Edgewater, 157 So.2d 422 (Fla. 1963).

Petitioner previously argued in its Initial Brief various

points relating to the manner in which the language of the insurance contract in this case should be interpreted. Because that language tracks the language of the U.M. statute, Petitioner will avoid repeating those arguments by simply stating that this Court should give the same meaning to the statutory language which provided the basis for the language in the insurance contract. Therefore, as previously argued, the clear and unambiguous meaning of the language of the statute should be given effect, rather than some strained interpretation of same.

In particular, in regard to the word, "uninsured," the prefix at the beginning of the word has special significance. Webster's New World Dictionary defines the prefix, "un-," as: "not, lack of, the opposite of ... ." WEBSTER'S NEW WORLD DICTIONARY 810 (2d "Concise Edition" 1979). The clear import of this definition is that the word, "uninsured," as it appears in §627.727, is that one making a claim against his U.M. carrier must first show that there was not any insurance, i.e., that there was a lack of any insurance, which covered the injury-causing vehicle. He must prove the opposite of the contention that there was any insurance.

As previously mentioned, BOYNTON cannot argue this, because the lessee of the vehicle in this case, Xerox Corporation, which, for the purposes of examining the issues herein was tantamount to the vehicle's owner, did have in full force and effect a policy of insurance providing comprehensive general liability coverage for the auto. (R. 291 - 293.) This Court should not allow BOYNTON or the ACADEMY to persuade it to graft onto the statute

additional meanings or language which would defeat the clear intention of the Legislature in using the word, "uninsured."

2. THE LEGISLATURE DID NOT INTEND "LEGALLY ENTITLED TO RECOVER" MERELY TO MEAN, "ENTITLED TO RECOVER."

Justice Upchurch, who dissented from the majority of the appellate court below, aptly noted that the words, "legally entitled," mean something more than simply, "entitled." Boynton v. Allstate Insurance Co., 443 So.2d 427, 432 (Fla. 5th DCA 1984). It appeared that this Court agreed in Salas v. Liberty Mutual Fire Insurance Co., 272 So.2d 1 (Fla. 1972), in which it stated that an uninsured motorist coverage claimant must be able to prove that he "would have been able to recover" against the at-fault motorist if that motorist had maintained a policy of liability insurance. Salas at 3.

Additional compelling evidence of legislative intent in regard to the "legally entitled to recover" language of the U.M. statute is manifest in the obvious contemplation by the Legislature that U.M. recoveries create subrogation rights in the U.M. carrier. §§627.727 (5) and (6), Fla. Stat. (Supp. 1978). Such a right has also been recognized in Florida case law. See, Indiana Insurance Co. v. Collins, 359 So.2d 916 (Fla. 3rd DCA 1978); Quinones v. Florida Farm Bureau Mutual Insurance Co., 366 So.2d 854 (Fla. 3rd DCA 1979). It therefore seems totally illogical for BOYNTON to contend that he should be entitled to recover against ALLSTATE, who will then, under the circumstances of this case, have absolutely no right of subrogation against the driver or owner of the at-fault vehicle.

The Florida Legislature, in considering that a U.M. carrier

would have such subrogation rights, obviously envisioned that the U.M. carrier, which is placed in the shoes of its insured during subrogation proceedings, would be "legally entitled to recover" against the owner or operator of the at-fault vehicle. If this Court rules in favor of BOYNTON, it will not only extend the scope of exposure of U.M. carriers in cases such as this one, it also will effectively destroy the subrogation rights of U.M. carriers in similar cases, which clearly was not a situation contemplated by the Legislature, nor one previously recognized by Florida courts.

II. PETITIONER'S REPLY TO RESPONDENT'S BRIEF

It is interesting to note at the outset of this section that BOYNTON's contention that there was "no answerable Defendant" is just another way of stating ALLSTATE's position that BOYNTON was not "legally entitled to recover" against the putative owner (the lessee, Xerox) or the operator of the at-fault vehicle, and therefore is not entitled to a recovery against the U.M. benefits in ALLSTATE's policy. Furthermore, BOYNTON's claim that the driver of the at-fault vehicle, LUKE, was the only "viable" Defendant, and that the only bar to effective recovery against him was the fact that his liability insurance coverage had been denied by his insurer, is totally inaccurate, because LUKE was no more of a "viable" Defendant than the lessee or owner of the vehicle. This is because LUKE was protected by the exclusive remedy/fellow-employee immunity provided under §440.11, Fla. Stat. (Supp. 1978).

BOYNTON relies upon Allstate Insurance Co. v. Chastain, 251 So.2d 354 (Fla. 3rd DCA 1971) for the proposition that where ambiguities in the uninsured motorist provisions of an automobile insurance policy create a doubt as to whether there is uninsured motorist coverage, those ambiguities should be resolved in favor of coverage. PETITIONER has no difficulty with this statement, except that it is totally inapplicable to the instant case, because this case does not involve ambiguous policy provisions. In fact, following the Chastain case, the same District Court of Appeal addressed a similar situation to that in Chastain. Hayston v. Allstate Insurance Co., 290 So.2d 67 (Fla. 3rd DCA 1974). Whereas

Chastain involved a U.M. recovery being sought by passengers in an automobile operated by an insured driver, but owned by an uninsured motorist, Hayston involved the opposite situation, where the operator of the auto was uninsured, but the owner was insured. The Chastain court specifically ruled that the policy in that case was ambiguous. Chastain at 356. On the other hand, the same court, in Hayston, ruled that a policy having language which, in its pertinent provisions, was practically identical to the language in the policy herein, was definitely not ambiguous.

Note that the pertinent policy language in Hayston read as follows:

> "'[U]ninsured automobile' means an automobile:
>
> "1. With respect to the ownership, maintenance or use of which there is no bodily injury liability insurance applicable at the time of the accident... ."

Hayston at 68.

The pertinent policy language in this case provides that an "uninsured" automobile is:

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

(R. 156 - 180.) Therefore, it seems almost impossible, in light of Hayston, that anyone could argue that the policy involved in this case is ambiguous in any way.

BOYNTON repeatedly refers to fairness as a consideration in this Court's decision. ALLSTATE agrees that fairness is a consideration, but it is compelled to point out that an insurance corporation should be treated just as fairly as any individual.

See *Smetal Corp. v. West Lake Investment Co.*, 172 So.58 (Fla. 1936). BOYNTON contends that it is only fair that he "have the UM coverage he paid for (sic)." ALLSTATE agrees. BOYNTON, however did *not* pay for the broad U.M. coverage which he seeks in this instance. In fact, it is clear from the U.M. statute itself that the Legislature intended for U.M. coverage to have certain limits specified by the U.M. insurance contract.

The U.M. statute provides:

> For the purpose of this coverage, the term "uninsured motor vehicle" shall, *subject to the terms and conditions of such coverage*, be deemed to include an insured motor vehicle when the liability insurer thereof ... [certain conditions specified].

§627.727(3), Fla. Stat. (Supp. 1978) (emphasis added). If this Court rules as Respondent requests, it will be writing into Petitioner's policy an area of coverage not contemplated when the policy was written. This is unfair to Petitioner, ALLSTATE. In turn, such a ruling clearly will result in a higher cost of U.M. insurance for all other U.M. insureds, which is unfair to them, also.

III. PETITIONER'S REPLY TO AMICUS CURIAE'S BRIEF

The ACADEMY, like the Fifth District Court of Appeal and BOYNTON, bases its arguments that the vehicle in the instant case was "uninsured" on the inaccurate premise that the insurance provided by the vehicle's lessee, Xerox Corporation, was irrelevant to the question of liability insurance coverage, because BOYNTON did not have a legal right of recovery against Xerox. The ACADEMY compounds the inaccuracy of its legal arguments with the representation that both the "owner's" and the driver's liability insurer denied coverage for this incident. This statement is true as to the liability coverage for the at-fault driver, LUKE. It is false as to the putative owner, Xerox. Xerox's insurer, Employers Insurance of Waussau, never denied coverage on the vehicle. It merely denied liability — that BOYNTON had a legal right to recover — and it prevailed on a summary judgment which is not contested by BOYNTON in this appeal.

The ACADEMY states that ALLSTATE has cited no authority for the distinction which it has drawn between the terms, "coverage" and "liability." There are certain distinctions in the law which are so obvious that there may be no appellate authority which can be cited. It is worth noting that the ACADEMY has likewise failed to cite any authority indicating that the distinction between "liability" and "coverage" should not be drawn.

Although the ACADEMY implies that ALLSTATE's policy in this

case contains ambiguous language, it never satisfactorily explains which language is ambiguous or how it is ambiguous. Furthermore, as pointed out earlier in this brief, the language of the policy which is an issue in this case is almost identical to language appearing in a similar case, where the court ruled that the language was not ambiguous. Hayston, supra.

The ACADEMY illogically contends that this Court should focus its attention on the liability insurance coverage of the driver in this case, rather than the owner's coverage, because the owner was innocent of any negligence. The ACADEMY combines this argument with an argument that BOYNTON should be given a U.M. recovery in this case, contrary to the authorities relied upon by ALLSTATE in its Initial Brief, because the cases relied upon by ALLSTATE involved situations where the U.M. claimants were seeking recoveries against policies which they had not themselves purchased. The Hayston case discussed above disposes with both of these arguments. Id.

Despite the fact that the owner in Hayston was innocent of any wrongdoing, the court in that case nevertheless did consider the fact that he had liability insurance when it ruled that the at-fault vehicle in the case was not an "uninsured" vehicle due to the existence of such insurance. Id. Additionally, Hayston did in fact involve a situation where the U.M. claimant was making a claim against a policy which he had paid for himself, yet recovery against his U.M. carrier was denied in that case. 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. 3rd DCA 1977).

The ACADEMY claims that American Fire & Casualty Co. v. Boyd, 357 So.2d 768 (Fla. 1st DCA 1978) refutes ALLSTATE's argument that BOYNTON's receipt of worker's compensation benefits relates to the question of whether he is entitled to U.M. benefits. It tries to draw an analogy between ALLSTATE's argument in this regard with the argument raised in the Boyd case by the U.M. insurer. Nothing could be less accurate. ALLSTATE referred to the worker's compensation recovery by BOYNTON merely to point out to this Court that, unlike in other cases where special equities existed to justify certain encroachments upon the strict letter of the law in the U.M. statute, no such equities exist in this case. See Boyd; Brown v. Progressive Mutual Insurance Co., 249 So.2d 429 (Fla. 1971).

Secondly, Boyd is not even on point with the facts of this case, because it did not involve an instance where there was insurance covering the involved motor vehicle, nor did it involve a situation where the U.M. claimants were completely barred from having any legal basis of recovery against the owner or operator of the involved vehicle. Finally, it should be noted that even though the U.M. insurer attempted to raise an argument based upon a monetary settlement from the United States to the U.M. claimant pursuant to the Federal Tort Claims Act, the Boyd court did not give any consideration to the settlement, because it stated that no proof of such a settlement was before the court. Boyd at 769. Such proof is before this Court in regard to the worker's compen-

sation benefits received by BOYNTON and should be considered in the context of his claims against ALLSTATE.

The ACADEMY, in making its arguments mentioned above to the effect that BOYNTON should be allowed to recover in this case, because the policy against which he seeks recovery is one for which he personally paid a premium, cites Reid v. State Farm Fire & Casualty Co., 352 So.2d 1172 (Fla. 1977), Taylor v. Safeco Insurance Co., 298 So.2d 202 (Fla. 1st DCA 1974), and Lee v. State Farm Mutual Automobile Insurance Co., 339 So.2d 670 (Fla. 2d DCA 1976). The ACADEMY's reliance upon those cases is misplaced, because not one of them is on point with this case, where there are legal bars to recovery by the U.M. insured against any at-fault party. In every one of those cases, the U.M. insured had a viable cause of action against at least one or the other of the owner or driver of the injury-causing vehicle, but in each instance, there was no insurance available to cover the liability of the individual against whom suit could be brought. Reid; Taylor; Lee.

The ACADEMY also implies that in the case of Hartford Accident and Indemnity Co. v. Fonck, 344 So.2d 595 (Fla. 2d DCA 1977), the court would have found U.M. coverage if the claimant in that case had not been attempting to recover U.M. benefits under the same policy which would have provided liability coverage to the at-fault driver, who was the claimant's fellow employee. It is worth noting that another basis for the decision, however, as in this case, is that the fellow employee exclusionary provision of §440.11, Fla.

Stat. (Supp. 1978) would have applied and would have constituted a legal bar to recovery by the U.M. claimant in Fonck against the at-fault driver.

Finally, the ACADEMY seems to take comfort in recent decisions following the rationale of the Fifth District Court of Appeal's decision in this case. 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 Co., ___ So.2d ___, 9 FLW 1191 (Fla. 1st DCA, Case No. AO-289, opinion filed May 30, 1984); Johnson v. State Farm Fire and Casualty Co., ___ So.2d ___, 9 FLW 1187 (Fla. 1st DCA, Case No. AU-378, opinion filed May 31, 1984). As with other cases mentioned above, these cases again can be distinguished from the case sub judice primarily on the basis that each one of them involved what BOYNTON referred to as a "viable" defendant, because each one involved an owner or operator who did not have liability coverage, but against whom the U.M. claimant did have a cause of action. Again, such is not the case herein, where BOYNTON was not "legally entitled to recover" against anyone, as required by the U.M. statute and by the subject policy providing U.M. benefits.

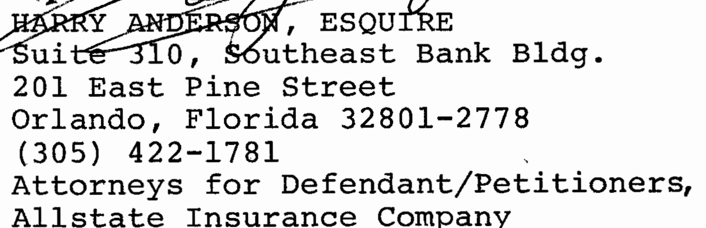
CONCLUSION

Petitioner, ALLSTATE, has pointed out to this Court why all of the authority relied upon by BOYNTON and the ACADEMY is not controlling in this case inasmuch as none of it is exactly on point with the facts of this case. ALLSTATE has demonstrated that BOYNTON has not met the requirements of the two-pronged test of the U.M. statute and the involved insurance policy, which both require that the injury-causing vehicle must be "uninsured" and that BOYNTON must be "legally entitled to recover" against the owner or driver of said vehicle.

BOYNTON is not left without a remedy in this case inasmuch as he has recovered worker's compensation benefits. Thus, there is no reason for this Court to chip away at the firmly established foundations of U.M. law in the State of Florida. This is particularly true where the language of the statute and the involved insurance contract is clear and unambiguous.

For these reasons, ALLSTATE respectfully requests that this Court reverse the decision of the Fifth District Court of Appeal in this case 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 mail, this 10th day of August, 1984, furnished to: R. David Ayers, Esquire, 1680 Lee Road, Winter Park, Florida 32780 and Nancy Little Hoffmann, Esquire, 644 Southeast Fourth Avenue, Fort Lauderdale, Florida 33301.

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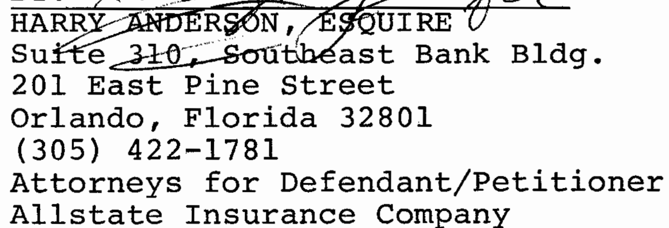

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