IN THE SUPREME COURT OF FLORIDA

CASE NO. 75,026

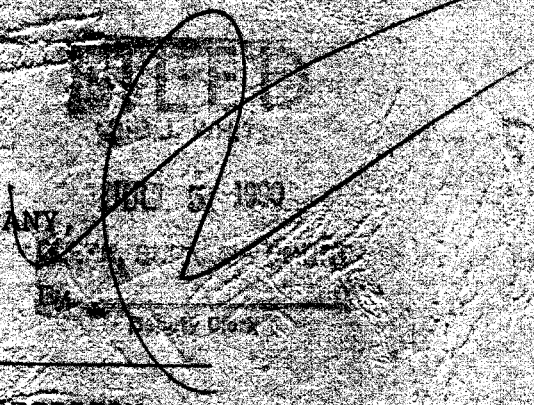
JILL BRIXIUS and
ROBERT A. BRIXIUS,
her spouse,

Petitioners,

vs.

ALLSTATE INSURANCE COMPANY,

Respondent



ON PETITION TO REVIEW THE DECISION
OF FLORIDA SECOND DISTRICT
COURT OF APPEAL

AMICUS CURIAE ANSWER BRIEF OF NATIONAL ASSOCIATION OF INDEPENDENT INSURERS

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STATEMENT OF THE CASE AND FACTS

Amicus curiae, the National Association of Independent Insurers (the "NAII"), adopts the statements of the case and facts submitted by the parties. However, the NAII wishes to emphasize that this case does not merely deal with uninsured motorist coverage. The only reason the uninsured motorist coverage issue was reached was because plaintiff-petitioner, Jill Brixius ("plaintiff" or "petitioner"), was not entitled to liability coverage under the same automobile insurance policy issued to her by defendant-respondent, Allstate Insurance Company ("Allstate"). See Brixius v. Allstate Insurance Co., 549 So. 2d 1191, 1192 (Fla. 2d DCA 1989).

The liability coverage under plaintiff's Allstate policy is inapplicable because of an exclusion for "bodily injury to **you** or any **resident** of **your** household related to **you** by blood, marriage or adoption." Plaintiff here has not challenged the validity of that liability exclusion. What she has done, however, is attempted to recover uninsured motorist benefits under the same policy.

SUMMARY OF ARGUMENT

The asserted "conflict" between Jernigan v. Progressive Automobile Insurance Co., 501 So. 2d 748 (Fla. 5th DCA), rev. denied, 513 So. 2d 1062 (Fla. 1987), and the two cases currently pending before this Court, Sharon v. State Farm Fire & Casualty Co., 15 F.L.W. 191 (Fla. 2d DCA January 19, 1990), and this case, is in fact non-existent. In both Sharon and this case, a valid household exclusion precluded liability insurance coverage. Consequently, in accordance with every prior relevant Florida precedent, including Jernigan, no coverage, liability or uninsured motorist, was available to petitioners. Jernigan, by its own terms, did not involve a situation where a valid household exclusion barred liability insurance coverage under the policy at issue. In fact, Jernigan explicitly distinguished its situation from other cases involving household exclusions which precluded liability insurance coverage.

In any event, to the extent Jernigan can be construed as applicable to the instant situation, it is hopelessly in conflict with this Court's prior decisions, and is simply wrong in its public policy assumptions. Accordingly, this Court should affirm in all respects the Second District Court of Appeal's decisions in this case and its companion Sharon case.

ARGUMENT

I. BECAUSE A VALID LIABILITY INSURANCE HOUSEHOLD EXCLUSION PRECLUDED COVERAGE TO PLAINTIFF, SHE CANNOT SUBVERT THAT EXCLUSION BY OBTAINING UNINSURED MOTORIST COVERAGE UNDER THE SAME ALLSTATE POLICY.

One of the hallmarks of insurance law in Florida, as in other jurisdictions, is that if the terms of insurance policies are clear and unambiguous, they must be enforced as written; courts cannot rewrite clear insurance policies to grant coverage not meant to be provided by the insurer. See, e.g., Gulf Insurance Co. v. Dolan, Fertig & Curtis, 433 So. 2d 512, 515-16 (Fla. 1983); Lee v. National Union Fire Insurance Co., 469 So. 2d 849, 851 (Fla. 3d DCA), rev. denied, 480 So. 2d 1295 (Fla. 1985); State Farm Fire & Casualty Co. v. Oliveras, 441 So. 2d 175, 178 (Fla. 4th DCA 1983), rev. denied, 451 So. 2d 849 (Fla. 1984). In the instant case, the subject Allstate policy plainly precludes both liability and uninsured motorist coverage for plaintiff's injuries. Accordingly, this Court should enforce that policy as written -- to completely exclude liability and uninsured motorist coverage.

A. A Valid Household Exclusion Was Applicable Here.

Initially, even though the vehicle in which she was riding at the time of her accident was an insured vehicle, because of a

plain exclusion from liability coverage, plaintiff was not entitled to recover liability insurance benefits under her Allstate policy. That exclusion provides that the policy does not cover "bodily injury to **you** or any **resident** of **your** household related to **you** by blood, marriage or adoption." (R. 75). Accordingly, because bodily injury was suffered by "you" (i.e., plaintiff), this household exclusion plainly precluded liability insurance coverage to plaintiff.

Try as she might to avoid it, plaintiff in this case (and the petitioner in Sharon) cannot get around the fact that the only reason uninsured motorist coverage ever became an issue was because of the existence and applicability of this valid household exclusion. Of course, Florida courts have repeatedly upheld the validity of the household exclusion in the liability insurance coverage context. See, e.g., Reid v. State Farm Fire & Casualty Co., 352 So. 2d 1172, 1172-73 (Fla. 1977); Florida Farm Bureau Insurance Co. v. Government Employees Insurance Co., 387 So. 2d 932, 934 (Fla. 1980); Simon v. Allstate Insurance Co., 496 So. 2d 878, 879 (Fla. 4th DCA 1986); Newman v. National Indemnity Co., 245 So. 2d 118, 118-19 (Fla. 3d DCA 1971).

This exclusion does not become any less a household exclusion simply because the insured herself, as opposed to a resident family member in her household, suffered the relevant bodily injury. In fact, Florida courts have explicitly upheld

this exclusion whether it applies to family members or to the insured.

For example, in Newman, the liability coverage exclusion applied to both family members and "the named insured." 245 So. 2d at 119. Thus, the appellate court upheld the denial of liability coverage to both the husband (as named insured) and wife (as resident spouse) when they suffered injuries while riding as passengers in a vehicle driven by a family friend.

Similarly, in Gibson v. State Farm Mutual Automobile Insurance Co., 378 So. 2d 875 (Fla. 2d DCA 1979), a liability exclusion barred coverage for "bodily injury to any insured or any member of the family of an insured residing in the same household as the insured." Id. at 876. Based on this exclusion, the court held that the named insured could not obtain coverage for injuries he suffered while riding as a passenger in his vehicle, which was being driven by an unrelated permissive user. Id. at 876-77. In so holding, the court noted that the failure to apply the household exclusion to named insureds would unjustifiably require the insurer "to pay damages for injuries suffered by the very person it agreed to insure against claims by others." Id. at 876. See also Pierson v. National Insurance Ass'n, 557 So. 2d 227, 227-28 & n. 1 (Fla. 3d DCA 1990) (excluding liability coverage, based on a household exclusion, to owner of vehicle riding as a passenger therein while vehicle was being driven by an unrelated permissive user).

Moreover, as demonstrated above, Florida courts have held that the household exclusion is valid in the liability context even where, as here, an unrelated permissive user, rather than the insured, was driving the vehicle in question. See, e.g., Newman, 245 So. 2d at 118-20; Gibson, 378 So. 2d at 876-77; Pierson, 557 So. 2d at 227-28 & n. 1. See also Curtin v. State Farm Mutual Automobile Insurance Co., 449 So. 2d 293, 293-94 (Fla. 5th DCA 1984), rev. dism'd, 496 So. 2d 815 (Fla. 1986) (same principle); Porr v. State Farm Mutual Automobile Insurance Co., 452 So. 2d 93, 93-94 (Fla. 1st DCA 1984), rev. dism'd, 496 So. 2d 816 (1986) (same principle). Accordingly, it is undisputed that a household exclusion from liability coverage was involved here, and that this exclusion was valid. Viewed in this light, resolution of the uninsured motorist coverage issue becomes simple.

B. Because A Valid Household Exclusion Was Applicable Here, No Uninsured Motorist Coverage Was Available Under The Same Policy.

A long line of Florida precedent has explicitly held that where, as here, a valid household exclusion precludes liability insurance coverage, uninsured motorist coverage is not available under the same policy. Plaintiff and the AFTL do not challenge this result, and in fact agree that it represents the law of Florida. As explained by this Court in the seminal case of Reid v. State Farm Fire & Casualty Co., 352 So. 2d 1172, 1173-74 (Fla.

1977), the reason for this rule of law is that, otherwise, a valid household exclusion in the liability insurance coverage context would be subverted through reliance on the same policy's uninsured motorist coverage provisions. Accord Allstate Insurance Co. v. Baker, 543 So. 2d 847, 850 (Fla. 4th DCA), rev. denied, 554 So. 2d 1167 (Fla. 1989).

The bases for this "same policy" analysis are clear. If separate policies are involved, the liability insurance coverage exclusion in one of those policies will not be eviscerated through provision of uninsured motorist coverage by the other policy. However, if the same policy is involved, provision of uninsured motorist coverage would plainly nullify the valid liability insurance coverage exclusion also present in that policy.

Here, as in Reid and Baker, the relevant policy language is clear and unambiguous. Plaintiff's Allstate policy plainly defines an uninsured automobile as "a **motor vehicle** which has no bodily injury liability bond or insurance policy in effect at the time of the accident." (R. 77). Of course, that definition is not applicable here, because plaintiff's motor vehicle did have an "insurance policy" in effect at the time of the accident.[1/]

1/ Additionally, Plaintiff's Allstate policy clearly states (at R. 78):

An uninsured auto is not:

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Thus, the relevant Allstate policy's clear language, as upheld by Reid, compels the conclusion that no uninsured motorist coverage is available to plaintiff.[2/]

This case is nearly identical to Baker. There too, the insured party was injured while riding as a passenger in a vehicle driven by a family friend. Moreover, in that case, as here, the Allstate household exclusion quoted above[3/] precluded

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> A vehicle defined as an insured auto under the liability portion of this policy.

Based on that portion too, Plaintiff's vehicle, which was one of the "insured autos" under the subject policy's liablity coverage, could not have been uninsured.

2/ The uninsured motorist coverage exclusion repeatedly cited by plaintiff, barring coverage for "any person injured while in, on, getting into or out of or when struck by an uninsured motor vehicle which is owned by **you** or a **resident** relative" (see Plaintiff's Appendix, p. 15), has no application to this case. That policy provision is clearly inapposite because the motor vehicle in question was not "uninsured." On the contrary, that vehicle was covered by a valid insurance policy, although that policy was inapplicable because of the aforementioned household exclusion. Moreover, Plaintiff's citation to this exclusion appears to be inaccurate, because it is taken from a document entitled Endorsement AU 1002-5, even though the relevant policy's declarations page indicates that the applicable Endorsement is AU 1102-6, which does not contain such a provision. (See R. 64, 78).

3/ When citing the household exclusion, the Baker court cited an older exclusion relating only to family members -- not to the named insured. 543 So.2d at 848. However, a review of the Record in Baker indicates that the household exclusion at issue there, like that here, by Endorsement excluded coverage for

Footnote continued on next page.

liability insurance coverage. In light of the applicability of the household exclusion to preclude liability insurance coverage, Judge Downey concluded that, under this Court's controlling Reid decision, uninsured motorist coverage was not available under the same policy.

In the course of his decision, Judge Downey explicitly considered Jernigan, which, of course, the insured in Baker heavily relied upon, as does the plaintiff here. However, as pointed out by plaintiff here in her brief, Judge Downey recognized that Jernigan was inapposite because it did not involve a household exclusion. Baker, 543 So. 2d at 849-50. That simple fact resolves any supposed conflict between Jernigan on the one hand and this case and Sharon on the other.

Here (and in Sharon), a valid household exclusion precluded any liability insurance coverage. Jernigan, by contrast, according to that court's own statement (501 So. 2d at 757), did not deal with a household exclusion. Indeed, in the course of its holding, the Jernigan court opined that its decision was actually consistent with this Court's Reid holding. Id. Thus, far from opining that Reid should be overruled, Jernigan, by its own terms, was wholly consistent with Reid.

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"bodily injury to **you** or any **resident** relative related to **you** by blood, marriage or adoption." (See page 25 of the Record on Appeal in Baker, a certified copy of the relevant portion of which is attached in the Appendix hereto.)

Any doubt as to the import of Jernigan is resolved by the fact that Jernigan expressly cited with approval the Fifth District's prior opinion in Curtin. Jernigan, 501 So. 2d at 750, 751. In Curtin, the situation was almost exactly the same as that in the instant case. The resident son of the insured was injured while riding as a passenger in a car owned by his father, which was being negligently driven by a family friend. Curtin, 449 So. 2d at 293-94.

The father had three separate liability insurance policies on three different vehicles, including the one involved in the accident, all issued by State Farm. 449 So. 2d at 294. With respect to the liability insurance policy insuring the vehicle in question, which contained a valid and enforceable household exclusion, the Curtin court held that, under Reid, no uninsured motorist coverage was available because there was a liability insurance policy on the car, albeit not available coverage. Id.[4/]

Jernigan did not purport to overrule this portion of Curtin. Indeed, the Jernigan court specifically cited Curtin with approval on this point. Jernigan, 501 So. 2d at 757. Thus, Jernigan leaves the basic holding of Curtin untouched -- a vehicle cannot be both insured and uninsured under the same

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[4/] Curtin went on to also hold that uninsured motorist coverage would be available in those circumstances under the other two State Farm policies. The Curtin court reasoned that Reid applied only to the situation where one policy was involved. Of course, in the instant case, unlike the situation in Curtin, only one policy is involved.

policy when a valid household exclusion from liability coverage is involved, even if a family friend, rather than a family member, is driving the subject vehicle. See also Porr, 452 So. 2d at 93-94 (holding that, under Curtin, where a minor son was injured in an accident while riding in a truck owned by his father, but driven by a family friend, and the father had three insurance policies, insuring three separate vehicles, including the truck involved in the accident, there was no liability or uninsured motorist coverage on the latter truck); Fidelity & Casualty Co. v. Streicher, 506 So. 2d 92, 93-94 (Fla. 2d DCA), rev. denied, 515 So. 2d 231 (Fla. 1987)(uninsured motorist coverage not available where uninsured motorist coverage section of subject policy excludes vehicles owned by the insured or a relative).

Put simply, it is clear from the authorities upon which the Jernigan court relied that it was in no way purporting to change settled Florida law with respect to the validity of household exclusions from liability coverage and the consequent validity of preclusions of uninsured motorist coverage under the same policy pursuant to which the liability coverage household exclusion applies. As the Jernigan court itself stated (501 So. 2d at 751), where, as here, to provide uninsured motorist coverage would defeat a "valid liability exclusion" under the same policy, no such coverage is available under that policy.

II. AFFORDING UNINSURED MOTORIST COVERAGE UNDER THE SAME POLICY WHICH HAS EXCLUDED LIABILITY INSURANCE COVERAGE WOULD VIOLATE CLEAR FLORIDA LAW AND BE WHOLLY ILLOGICAL.

In any event, to the extent Jernigan can be construed as holding that uninsured motorist coverage would be available in this case, the Court should take this opportunity to overrule Jernigan, because that decision would be contrary to this Court's decision in Reid. Significantly, this Court has never overruled, or even questioned, its Reid holding.

Indeed, Reid has been repeatedly upheld by this Court, and has also been followed by numerous other district courts of appeal. For example, Reid was specifically cited with approval in Florida Farm Bureau Insurance Co. v. Government Employees Insurance Co., 387 So. 2d 932, 934 (Fla. 1980).

Moreover, this Court followed the Reid holding in Allstate Insurance Co. v. Dascoli, 497 So. 2d 1 (Fla. 1986). There, the insured was injured while riding as a passenger in a van negligently driven by his wife. At the time of the accident, an Allstate liability insurance policy covered the van. The Fifth District Court of Appeals had held that, in these circumstances, because the household exclusion precluded liability coverage, the van was an uninsured motor vehicle and uninsured motorist coverage was applicable. However, this Court reversed, holding that, in accordance with Florida precedent, no uninsured

motorist coverage was available in these circumstances. Id. at 1.[5/]

Indeed, the only case to ever even potentially question Reid was Jernigan. Of course, a district court of appeal cannot overrule a decision of this Court and, in fact, as discussed above, Jernigan did not purport to do so. However, at one point in its opinion the Jernigan court suggested that the continuing vitality of Reid had been put into question by this Court's subsequent decision in Allstate Insurance Co. v. Boynton, 486 So. 2d 552 (Fla. 1986).

Specifically, the Jernigan court opined that Boynton disapproved Reid to the extent Reid held that a vehicle cannot be both insured and uninsured under the same policy. To the contrary, however, Boynton, which did not even deal with a household exclusion, and therefore is inapplicable in that context in any event, specifically noted that it was not disapproving Reid, but was simply distinguishing that case on its facts:

> In Reid, we held that a vehicle cannot be both an insured and uninsured vehicle under the same policy. The present case is distinguishable because it involves separate policies. Reid is inapplicable.

[5/] In addition to the above Supreme Court cases, the district courts of appeal have followed Reid in Newman, 245 So. 2d at 118-20; Gibson, 378 So. 2d at 876-77; Curtin, 449 So. 2d at 294; Porr, 452 So. 2d at 93-94; Simon, 496 So. 2d at 879; Streicher, 506 So.2d at 93-94; and Baker, 543 So.2d at 848-51; to name just a few.

Boynton, 486 So. 2d at 555 (emphasis in original).

Additionally, in Simon, the Fourth District Court of Appeal held that Boynton does not apply where, as here, only one policy is at issue. Simon, 496 So. 2d at 879. Thus, any reliance by Jernigan on Boynton for the concept that a vehicle can be both insured and uninsured under the same policy is totally misplaced. Boynton did not so hold, and in fact specifically stated the opposite.

Moreover, contrary to the suggestions by plaintiff and the AFTL, the Boynton distinction between situations involving the same policy and those involving different policies is utterly sensible. As discussed at pages 6-7, if separate policies are involved, the invocation of uninsured motorist coverage under one of those policies cannot eviscerate a valid liability insurance coverage exclusion in the other policy. The liability exclusion under the one policy takes complete effect, barring liability insurance coverage or any recovery thereunder, but, consequently, the uninsured motorist coverage of the different policy is invoked. That, of course, has no effect on the liability insurance exclusion in the first policy.

However, in the situation where only one policy is involved, a fortiori if uninsured motorist coverage is invoked the valid liability insurance exclusion is rendered nugatory. Thus, although under Boynton there is no reason to preclude uninsured motorist coverage under one policy simply because of the existence of a liability exclusion in another policy, there

is every reason to preclude uninsured motorist coverage where liability insurance coverage is excluded under the same policy. See also Baker, 543 So. 2d at 850 (uninsured motorist coverage unavailable wherever its availability would defeat a valid liability insurance exclusion in the same policy). Cf. Jernigan, 501 So. 2d at 751 (noting that its holding would not "defeat any valid liability exclusion").

Any other result would lead to the total evisceration of the household exclusion, which everyone in this and the Sharon case has agreed is valid. To be sure, petitioners here and in Sharon and the AFTL have attempted to draw a distinction between situations where family members are involved and those where it is the insured that is injured. However, as fully discussed at pages 4-5, 7-9 & n. 3, the relevant liability insurance exclusion makes no such distinction, nor does the Florida case law.

Plaintiff and the AFTL also attempt to draw a distinction between situations like that here, where a family friend is driving the subject vehicle, and those where an insured or family member is driving that vehicle. Yet, as discussed at pages 4-6, Florida case law has made no such distinction. Moreover, there is no basis for that distinction. Why should the potential for collusion be any less simply because it is a family friend that is driving the relevant vehicle instead of a family member? In either circumstance, the close relationship between the insured and the driver of the vehicle provides the

very potential for collusion that the household exclusion was designed to prevent.

To be sure, plaintiff and the AFTL suggest that the threat of a lawsuit against the driver, and the fact that the insurer will have subrogation rights, will discourage collusion in the instant situation. The NAII submits, however, that the mere fact the driver does not have insurance indicates that, in the vast majority of cases, he will be judgment-proof. Thus, any potential lawsuit or subrogation rights are meaningless, and the strong likelihood of collusion between friends exists.

CONCLUSION

For all the foregoing reasons, amicus curiae, the National Association of Independent Insurers, respectfully requests this Court to affirm the decisions of the Second District Court of Appeals in all respects, both in this case and its companion Sharon case.

Respectfully submitted,

THE NATIONAL ASSOCIATION OF INDEPENDENT INSURERS

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed this 21st day of May, 1990, to Lisa A. Jayson and Steven C. Ruth, L.D. Beltz & Associates, 300 31st Street North, Suite 400, P.O. Box 16008, St. Petersburg, FL 33733; David J. Abbey, Fox & Grove, Chartered, One Fourth Street North, Suite 1000, St. Petersburg, FL 33701; and Timothy C. McHugh, Wilkes & McHugh, 5401 W. Kennedy Blvd, Suite 560, Tampa, FL 33609.

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