IN THE SUPREME COURT OF FLORIDA

JILL BRIXIUS AND
ROBERT A. BRIXIUS, her spouse,

Petitioners,

vs. Case No. 75,026

ALLSTATE INSURANCE COMPANY,
a foreign corporation,

Respondent.

_____/

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

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PREFIX

In this Brief, the Petitioners, JILL BRIXIUS and ROBERT A. BRIXIUS, her spouse, the Appellants in the lower court, will be referred to as the "Plaintiffs." The Respondent, ALLSTATE INSURANCE COMPANY, will be referred to as the "Defendant" or "Allstate." The symbol "R" will be used to refer to the record on appeal.

STATEMENT OF THE FACTS AND CASE

The relevant facts upon which this case depends are not complex. The Complaint alleges Plaintiff, JILL BRIXIUS, was injured while riding as a passenger in a truck she owned and that the injuries resulted from the negligence of Plaintiff's friend, who was operating the truck. Plaintiff's friend did not have insurance coverage of his own. Consequently, Plaintiff sought insurance coverage from the insurer of the truck, Defendant, ALLSTATE.

Allstate's policy contains two provisions material to facts of this case. First, the liability coverage portion of the policy provides that liability coverage "does not apply to liability for bodily injury to you or any resident of your household related to you by blood, marriage or adoption." (R 67 and 75). This clause, and similar language in the policies referred to in the other cases cited herein, will be referred to as "family exclusions." Second, the Uninsured Motorist section of Allstate's policy states "an uninsured auto is not a vehicle defined as an insured auto under the liability portion of this policy." (R 78). This language, and similar clauses in other cases cited herein, will be referred to as "uninsured vehicle definitions." [1]

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[1] The Plaintiffs' Statement of the Case and Facts incorrectly cites an exclusion in an Allstate endorsement as the provision in Allstate's policy which led Allstate to deny Uninsured Motorist benefits. This endorsement was not part of the Plaintiff's Allstate policy at the time of the March 10, 1985 accident. The amended coverage declaration sheet of January 20, 1985 (R 53-55 and R 64) refers to endorsement AU1102-6, (R 75-81) which contains the insured vehicle definition (R 78) cited above. Plaintiffs' counsel did not contest that AU1102-6 was part of Allstate's contract during proceedings in the trial court or in the Second District Court of Appeal.

The family exclusion in the liability section of the policy prevented Plaintiff from collecting liability benefits from Allstate for the negligence of her permissive driver/friend. Therefore, the Complaint did not name the friend as a defendant and stated the friend had no liability insurance to pay the Plaintiffs' damages. (R 1-6). The Complaint did seek Uninsured Motorist benefits, however, under the same policy. The Plaintiffs admit in the Complaint, as Plaintiffs' counsel admitted at the hearing on the Motion for Summary Judgment, that the truck involved in the accident was an insured auto under Allstate's policy. Nevertheless, the Plaintiff's also claim the vehicle was an uninsured vehicle. (R 1-6 and 91-111).

A Motion for Summary Judgment was filed on behalf of Allstate on the grounds that the Plaintiffs were not entitled to Uninsured Motorist benefits. Allstate's counsel argued the uninsured definition in Allstate's policy was not contrary to Florida public policy and was enforcable based upon this Court's opinion in Reid v. State Farm Fire & Casualty Co., 352 So.2d 1172 (Fla. 1977). Plaintiffs' counsel responded that Jernigan v. Progressive Automobile Insurance Co., 501 So.2d 748 (Fla. 5th DCA), rev. denied, 513 So.2d 1062 (Fla. 1987) required that the trial court hold invalid the uninsured vehicle definition in Allstate's policy and extend Uninsured Motorist benefits to the insured. The trial court granted Allstate's Motion for Summary Judgment, determining the family exclusion clause prevented the payment of liability benefits, and stating that the truck could not be both an insured vehicle and an uninsured vehicle under the same policy. (R 86 and 87).

The Second District issued its decision affirming the Summary Judgment in an opinion authored by Judge Lehan. Brixius v. Allstate Insurance Co., 549 So.2d 1191 (Fla. 2d DCA 1989). Judge Lehan determined Reid controlled the outcome of this case. Further, Judge Lehan perceived a conflict between the Second District's opinion and Jernigan. This Court accepted jurisdiction.

SUMMARY OF ARGUMENT

The Second District was correct in affirming the trial court's entry of Summary Judgment for Allstate based on this Court's opinion in Reid v. State Farm Fire & Casualty Co., 352 So.2d 1172 (Fla. 1977). Reid held Florida public policy does not require Uninsured Motorist benefits under a given policy be provided to an insured when liability benefits are unavailable to the insured because of a valid liability exclusion in the same policy. Extending Uninsured Motorist benefits in such situations would nullify family exclusions. To the extent Jernigan v. Progressive Automobile Insurance Co., 501 So.2d 748 (Fla. 5th DCA) applies to the instant case, it should be overruled. Further, sound public policy considerations dictate an affirmance of the Second District Court's decision. If the holding in Reid is to be overturned, the legislature, not the judiciary, should do so.

ARGUMENT

I. THIS COURT'S DECISION IN REID V. STATE FARM FIRE & CASUALTY CO., 352 So.2d 1172 (Fla. 1977) APPLIES TO THE INSTANT CASE AND REQUIRES AN AFFIRMATION OF THE SECOND DISTRICT COURT OF APPEAL'S DECISION.

In Reid, the plaintiff was injured while riding in a car owned by her father and driven by her sister. Liability coverage was held to be unavailable to the plaintiff because she was a relative of the named insured, and hence excluded from coverage on the basis of a family exclusion. Uninsured Motorist coverage was also determined to be unavailable based upon an uninsured vehicle definition similar to that at issue here.

The plaintiff in Reid argued that she was entitled to Uninsured Motorist coverage under her policy, as there was no liability insurance available by virtue of the family exclusion. This Court rejected the argument, holding that the vehicle insured under the liability portion of a policy "does not become uninsured because liability coverage may not be available to a particular individual." Reid, 352 So.2d at 1173. The plaintiff in Reid further argued that the uninsured vehicle definition in the Uninsured Motorist coverage was an invalid attempt to limit Uninsured Motorist coverage. In rejecting the Plaintiffs' second argument, Justice Hatchett recognized that failing to enforce the uninsured vehicle definition and allow the recovery of Uninsured Motorist benefits would nullify the family exclusion in the liability portion of the policy.

The material and relevant facts in Reid are identical to those in the instant case. The family exclusion prevents the

payment of liability benefits to the Plaintiffs, and the Plaintiffs are seeking Uninsured Motorist benefits under the same policy. However, the Uninsured Motorist section of the policy contains an uninsured vehicle definition which precludes payment of Uninsured Motorist benefits. As in Reid, Allstate's policy in the instant case includes an uninsured vehicle definition which provides: "an uninsured auto is not a vehicle defined as an insured auto under the liability portion of this policy." (R 78). Therefore, the application of Reid to the instant case is appropriate and supports this Court's affirmation of the lower court's decision.

II. TO THE EXTENT JERNIGAN V. PROGRESSIVE AUTOMOBILE INSURANCE CO., 501 So.2d 748 (Fla. 5th DCA), REV. DENIED, 513 So.2d 1062 (Fla. 1987) APPLIES TO THE INSTANT CASE, JERNIGAN SHOULD BE OVERRULED.

As in the instant case, the Plaintiff in Jernigan was injured while riding as a passenger in his own motor vehicle while it was being operated by a friend with his consent. The Plaintiff sought Uninsured Motorist benefits from his own carrier, Progressive. Progressive denied coverage on the basis of an insured vehicle definition in the Uninsured Motorist portion of the policy. Judge Orfinger's opinion clearly states the Progressive policy did not contain a "family exclusion clause or other bar to recovery" in the liability portion of the policy. Jernigan, 501 So.2d at 751. Therefore, Judge Orfinger reasoned, determining the uninsured vehicle definition in the Uninsured

Motorist portion of the policy to be invalid "did not defeat any valid liability exclusion." Jernigan, 501 So.2d at 751.[2]

If the Jernigan case is found applicable to the instant case, Jernigan should be overruled for the following reasons:

A. The result of the court's ruling in Jernigan is illogical.

In Jernigan, the Fifth District held Progressive must pay Uninsured Motorist benefits to its insured because the liability portion of the policy failed to contain a valid liability exclusion. Since there was no liability exclusion, the insured would have been able to sue the permissive driver and obtain the liability benefits. Thus, liability coverage, not Uninsured Motorist coverage, should have been available.

The Plaintiffs and AFTL make the same error in reasoning as that committed by the Fifth District Court of Appeal. Plaintiffs and AFTL argue that Allstate should provide Uninsured Motorist coverage to the plaintiff because family exclusions in liability policies are unenforceable to named insureds. However, as explained above, if a family exclusion is unenforceable against a claim for injuries, an insured is entitled to liability benefits - not Uninsured Motorist benefits.

Further, the underlying argument that family exclusion clauses when present in a policy cannot prevent insureds from recovering liability benefits is incorrect as Florida courts have universally upheld family exclusion clauses whether applied to a

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[2] Unlike Progressive's policy, Allstate's policy in the instant case contains a valid family exclusion clause for liability coverage.

family member or an insured. Three Florida district courts have determined that family exclusion clauses can properly exclude recovery of liability benefits by insureds. Newman v. National Indemnity Co., 245 So.2d 118 (Fla. 3d DCA 1971); Gibson v. State Farm Mutual Automobile Insurance Co., 378 So.2d 875 (Fla. 2d DCA 1979); and Pierson v. National Insurance Association, 557 So.2d 227 (Fla. 3d DCA 1990). In Gibson, the Second District reasoned that the application of family exclusion clauses to insureds was allowed, as otherwise, a liability carrier would be required "to pay damages for injuries suffered by the very person it agreed to insure against claims by others." Gibson, 378 So.2d at 876.

B. The Fifth District Court of Appeal clearly ignored the continued viability of Reid in deciding Jernigan.

In Allstate Insurance Co. v. Boynton, 486 So.2d 552 (Fla. 1986), this court dealt with a claim for Uninsured Motorist benefits against an insured's personal insurer, Allstate, after the Plaintiff was injured at work by a fellow employee who negligently operated a motor vehicle. Valid exclusions in liability policies potentially providing coverage to the owner, employer, or fellow employee prevented the extension of liability coverage. Thus, this Court held Allstate must extend Uninsured Motorist benefits as no liability coverage was available to the injured plaintiff. This Court distinguished the facts in Boynton from Reid by stating:

> 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.

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

Overlooking the language cited above, the Jernigan court held:

> "A vehicle is insured in the context of uninsured motorist coverage only where the insurance in question is available to the particular plaintiff. Boynton, 486 So.2d at 555. Clearly, under the Boynton definition of an uninsured vehicle, a vehicle can be insured and uninsured under the same policy."

Jernigan, 501 So.2d at 751 (emphasis added). This statement by the Jernigan court clearly identifies the flaw in its reasoning. By the plain statement of this Court, and contrary to the Jernigan opinion, Reid not Boynton, applies to situations involving the same policy.

III. ALLOWING THE PLAINTIFF TO RECOVER UNINSURED MOTORIST COVERAGE WOULD BE UNREASONABLE AND WOULD EFFECTIVELY DESTROY A VALID LIABILITY EXCLUSION.

As explained earlier, family exclusion clauses are valid and may properly be applied to prevent payment of liability benefits to an insured. Plaintiffs argue this Court should determine uninsured vehicle definitions in Uninsured Motorist coverages which exclude vehicles insured by the same insurance contract are invalid as being contrary to Florida public policy. Such a holding would be unreasonable. As recognized by Justice Hatchett in Reid, determining a vehicle is both an insured vehicle and an uninsured vehicle pursuant to the terms of a single policy would be inherently inconsistent.

Further, Justice Hatchett reasoned an extension of Uninsured Motorist benefits when a valid liability exclusion

prevents the recovery of liability benefits "would completely nullify the family household exclusion." Reid, 352 So.2d at 1174. The logic of Justice Hatchett's statement in Reid has not been diminished by passage of 12 years. Extending Uninsured Motorist benefits in the instant case would allow the plaintiff to directly recover first party benefits from Allstate when an indirect recovery of liability benefits is prevented by a valid family exclusion clause.

IV. IF LIABILITY OR UNINSURED MOTORIST COVERAGE IS TO BE AVAILABLE CONTRARY TO THE TERMS OF A FAMILY EXCLUSION, THE FLORIDA LEGISLATURE, NOT THE JUDICIARY, SHOULD MAKE THE CHANGE.

This Court's opinion in Reid acknowledged that "it is certainly within the power of the legislature to prohibit a family household exclusion in automobile liability insurance policies." Reid, 352 So.2d at 1173. Since Reid was published, no legislative session has taken action relative to family exclusion clauses. The legislature could easily invalidate such exclusions by amending the Florida Financial Responsibility Law. As the legislature has not acted in 12 years, this Court should not now hold family exclusions to be invalid.

Further, §627.727(3), Fla. Stat., provides a definition of the term "uninsured motor vehicle." If the legislature had determined during the last twelve years that insured vehicles were to be considered uninsured motor vehicles when a valid liability exclusion prevented an insured from recovering liability benefits, the legislature could have broadened the definition of "uninsured motor vehicle." Again, no such

legislative revision has occurred since Reid. Thus, no such change need be or should be imposed by this Court.

CONCLUSION

The Reid case properly controls the outcome of the instant case. The material, relevant facts of Reid and this case are identical. To the extent Jernigan conflicts with Reid, Jernigan should be overruled. Reid should not be overturned or modified for the reasons expressed by Justice Hatchett as justification for this Court's opinion in Reid. Any modification of the principles set forth in Reid should be accomplished by the Florida legislature. Therefore, it is respectfully submitted the decision of the Second District Court of Appeal be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail this 21 day of May, 1990, to LISA A. JAYSON, ESQUIRE, P.O. Box 16008, St. Petersburg, Florida 33733, Attorney for Plaintiffs, and TIMOTHY C. McHUGH, ESQUIRE, 5401 W. Kennedy Blvd., Suite 560, Tampa, Florida 33609, Attorney for The Academy of Florida Trial Lawyers.

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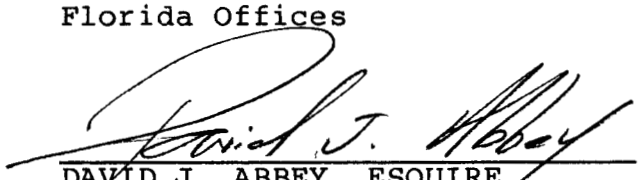

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