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 APPEAL FROM THE SECOND DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

JURISDICTIONAL BRIEF OF THE RESPONDENT

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STATEMENT OF THE CASE AND FACTS

In this Brief, the Petitioners, JILL BRIXIUS and ROBERT BRIXIUS, her spouse, who were Plaintiffs in the Circuit Court of Pinellas County and Appellants in the Second District Court of Appeal, will be referred to as "Petitioners." The Respondent, ALLSTATE INSURANCE COMPANY, who was the Defendant in the Circuit Court of Pinellas County and Appellee in the Second District Court of Appeal, will be referred to as "Respondent." Reference to the Petitioners' Jurisdictional Brief will be noted by the initials "PJB" followed by the appropriate page number. Reference to the Petitioners' Appendix will be noted by the symbol "A" followed by the appropriate page number.

The Respondent agrees with the Petitioners' Statement of the Case and Facts as set forth in the Jurisdictional Brief of the Petitioners other than the statement that the exclusion of liability coverage for injuries sustained by the named insured made the "Plaintiff uninsured under the policy." PJB, p. 1. The Respondent admits that the Second District Court of Appeal acknowleged conflict with Jernigan v. Progressive Ins. Co., 501 So.2d 748 (Fla. 5th DCA 1987), as stated in the Jurisdictional Brief of the Petitioners. However, the Petitioners' Statement of the Case and Facts fails to mention that the Second District found the Jernigan case to also be in conflict with the controlling decision of the Florida Supreme Court in Reid v. State Farm Fire & Casualty Co., 352 So.2d 1172 (Fla. 1977).

SUMMARY OF RESPONDENT'S ARGUMENT

The Respondent agrees that in the opinion below, the Second District Court of Appeal recognized that its decision conflicts with the Fifth District Court of Appeal's decision in Jernigan v. Progressive Ins. Co., 501 So.2d 748 (Fla. 5th DCA 1987) on the same rule of law. However, this court should refuse to exercise its discretionary jurisdiction as Jernigan conflicts with the controlling decision of the Florida Supreme Court in Reid v. State Farm Fire & Casualty Co., 352 So.2d 1172 (Fla. 1977). The conflict developed between the Fifth District Court of Appeal and the Second District Court of Appeal as a result of the Fifth District Court's previous failure in Jernigan to follow the clearly controlling precedent of the Florida Supreme Court as set forth in Reid. This court should not exercise its discretionary jurisdiction and entertain this case on the merits in order to reaffirm prior controlling precedent of this court which the Fifth District Court of Appeal clearly failed to follow in the Jernigan decision.

ARGUMENT

I

ALTHOUGH THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL DIRECTLY AND EXPRESSLY CONFLICTS WITH JERNIGAN V. PROGRESSIVE AMERICAN INS. CO., 501 So.2d 748 (Fla. 5th DCA 1987), THE FLORIDA SUPREME COURT SHOULD NOT EXERCISE ITS DISCRETION AND ENTERTAIN THIS CASE ON THE MERITS AS THE FIFTH DISTRICT COURT OF APPEAL, IN THE JERNIGAN DECISION, FAILED TO FOLLOW THE CONTROLLING DECISION OF THE FLORIDA SUPREME COURT IN REID V. STATE FARM FIRE & CASUALTY CO., 352 So.2d 1172 (Fla. 1977)

In Reid v. State Farm Fire & Casualty Co., 352 So.2d 1172 (Fla. 1977), this court held that a valid exclusion in a liability policy does not make a vehicle uninsured for uninsured motorist purposes, and that a vehicle cannot be both an insured and an uninsured vehicle under the same policy. However, in Allstate Ins. Co. v. Boynton, 486 So.2d 552 (Fla. 1986), this court stated that a valid liability exclusion in separate policies could allow a plaintiff to obtain uninsured motorist benefits if the exclusion resulted in no liability insurance being available to the injured plaintiff. However, this court in Boynton specifically distinguished, and in effect reaffirmed Reid in the following language:

> Allstate, citing Reid v. State Farm Fire & Casualty Co., 352 So.2d 1172 (Fla. 1977), asserts in its brief that a valid exclusion in a liability policy does not make a vehicle uninsured for uninsured motorist purposes. 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 applicable.

Boynton, 486 So.2d at 555, n.5.

In denying that uninsured motorist coverage was available to the Petitioners, the trial court applied a policy provision which provided that an uninsured automobile is not a vehicle defined as an insured automobile under the liability portion of the policy. (A, p.2.)

The Second District Court of Appeal affirmed the trial court's determination specifically on the basis of the holding in Reid. The Second District Court also determined that the Fifth District Court of Appeal, in Jernigan, improperly ruled that this court overruled Reid in the Boynton case, by citing the language set forth above from the Boynton decision, which reaffirmed the holding in Reid. The primary purpose of the constitutional authorization of the supreme court to review conflicting decisions in the district courts of appeal is to avoid confusion and to maintain uniformity in the case law of this State. Hastings v. Osius, 104 So.2d 21 (Fla. 1958).

Of course, the Florida district courts of appeal are bound to follow the controlling precedent set down by the Florida Supreme Court. Hoffman v. Jones, 280 So.2d 431 (Fla. 1973). It is clear that the Fifth District Court of Appeal, in Jernigan, failed to follow this court's clear reaffirmation of the Reid decision in Boynton and incorrectly determined that Boynton overruled the Reid decision. This court should not entertain this case on the merits in light of the clear error committed by the Fifth District Court of Appeal as identified by the Second District Court of Appeal.

There are two (2) situations in which the Florida Supreme Court may exercise its jurisdiction to review decisions of the district courts of appeal because of alleged conflicts. If the district court of appeal's decision announces a rule of law which conflicts with the rule previously announced by the Florida Supreme Court, or if the district court of appeal's decision applies a rule of law, or produced a different result, in a case which involves substantially the same controlling facts as a prior case disposed of by the Florida Supreme Court, the court may exercise its discretionary jurisdiction. Nielsen v. City of Sarasota, 117 So.2d 731 (Fla. 1960). In Nielsen, this court stated that discretionary jurisdiction should be carefully applied so as to give the decisions of the courts of appeal an aspect of finality. Id. at 734. Further, in order to assert the discretionary power to set aside a decision of the district court of appeal on the conflict theory, the court must find that the decision embodies a real, live and vital conflict within the limits above announced. Id. at 735. Such "real, live and vital conflict" does not exist in the case before the court. The Second District Court of Appeal has affirmed the trial court's determination specifically on the rule of law set forth by this court in Reid. If the court entertains this case on the merits, it would undermine the proper decision of the Second District Court of Appeal which followed the supreme court's ruling in Reid. Therefore, this court should not enterain this case on the merits.

If an opinion entered by a district court of appeal conflicts with a decision of another district court of appeal, the supreme court may exercise its discretion to review the case and may then quash or modify the decision of the district court of appeal. Lake v. Lake, 103 So.2d 639 (Fla. 1958). In Lake, this court was addressing the prior provisions of the Florida Constitution dealing with certiorari jurisdiction to review a district court decision that is in conflict with another district court of appeal. Such certiorari review is similar to the discretionary review now mandated by Article V, Section 3(b)(3), Fla. Const. However, this court should not exercise discretion to entertain this case on the merits as it is not the Second District Court Appeal decision in Brixius which is the heart of the problem. Rather, it is the Fifth District Court of Appeal in Jernigan which conflicts with the rule of law set forth by the supreme court in Reid and followed by the Second District Court of Appeal in Brixius. To quash or modify the Brixius decision based on the conflict created by the Fifth District's misapplication of the law would create further confusion amongst the district courts of appeal as to the proper application of precedent.

In Ansin v. Thurston, 101 So.2d 808 (Fla. 1958), this court declined to review a decision by the Third District Court of Appeal which purportedly was in conflict with decisions of the Florida Supreme Court. In Ansin, the petitioner contended that the decision by the Third District Court of Appeal was not in

accord with the rule of the supreme court decision relied upon by the district court and that the district court's decision conflicted with two (2) subsequent decisions by the Florida Supreme Court. Ansin, 101 So.2d at 810. The court stated in Ansin that the district courts of appeal should not be treated as intermediate courts and that the revision of Florida's judicial system at the appellate level embodied that philosophy. Further, the court stated that discretionary review should be limited to cases where the issues involved are of great importance to the public as distinguished from that of the parties or where there is a real and embarassing conflict of opinion and authority. Id. at 811. Neither situation presents itself in the Brixius case. The supreme court established the rule of law in Reid and the Second District Court of Appeal followed it. Any conflict between Jernigan and Brixius exists due to the Fifth District Court of Appeal's failure to follow Reid in light of this court's decision in Boynton, which acknowledged that Reid was still good law. This court should refuse to exercise its discretion as it did in 1958 in Ansin v. Thurston, where it refused to review an appellate court decision which followed the rule of law previously set forth by this court.