IN THE SUPREME COURT OF FLORIDA

Case No: 75,026

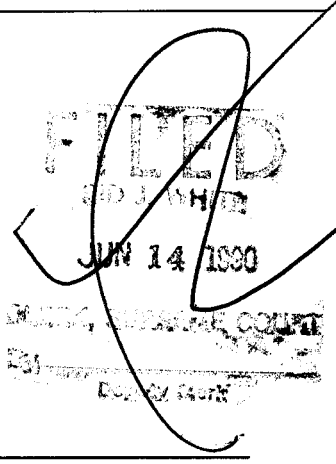
JILL BRIXIUS and
ROBERT A. BRIXIUS,
her spouse,

Petitioners,

v.

ALLSTATE INSURANCE COMPANY,

Respondent.



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

PETITIONER'S REPLY BRIEF ON THE MERITS

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PREFIX

References to the Record on Appeal will be given by "R" followed by the page of the record as listed on the index.

STATEMENT OF THE CASE AND FACTS

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

Petitioners adopt the Statement of the Case and Facts contained in their initial brief on the merits, with the following addition:

The uninsured motorist section of ALLSTATE'S policy defines uninsured motor vehicle as "an uninsured auto is not a vehicle defined as an insured auto under the liability portion of this policy". (R 78)

SUMMARY OF REPLY ARGUMENT

The trial court below and the Second District Court of Appeal were incorrect in granting and affirming summary judgment for Defendant when Reid v. State Farm Fire and Casualty Co., 352 So.2d 1172 (Fla. 1977) is factually distinguishable and when Jernigan v. Progressive American Ins. Co., 501 So.2d 748 (Fla. 5th DCA 1987) is directly on point.

The Fifth District Court of Appeal in Jernigan held a vehicle can be insured and uninsured under the same insurance policy for purposes of uninsured motorist coverage when an insured is injured and there are no available liability benefits.

The Jernigan court recognized the purpose behind Sec. 627.727, Fla. Stats. (1985) is to protect persons who are injured by other motorists who are not insured. Any insurer who offers liability insurance for motor vehicles in Florida is required to offer uninsured motorist coverage, pursuant to Sec. 627.727 Fla. Stats. (1985). Such definitions as contained in both the policy in Jernigan and Respondent's policy which work to deny uninsured motorist coverage will be declared invalid and contrary to public policy.

Finally, the Fifth District Court of Appeal's holding in Jernigan tracks the intent of the legislature by ensuring that injured persons are made whole by the negligence of uninsured operators of motor vehicles by allowing recovery of uninsured motorist benefits.

REPLY ARGUMENT

I. THE LOWER COURT ERRED IN RULING AS A MATTER OF LAW THAT PLAINTIFF WAS NOT ENTITLED TO UNINSURED MOTORIST COVERAGE WHERE SHE WAS INJURED BY THE NEGLIGENCE OF AN UNRELATED UNINSURED MOTORIST AND NO LIABILITY INSURANCE WAS AVAILABLE TO HER.

Contrary to Respondent's point I, the facts in Reid v. State Farm Fire & Casualty Co. 352 So.2d 1172 (Fla. 1977), and the case sub judice, are not identical. The plaintiff in Reid was injured while a passenger in a vehicle insured under a policy of insurance obtained by her father. The plaintiff's sister was driving the vehicle and, due to her sister's negligence, the plaintiff was injured. This court noted in Reid that failure to enforce the uninsured vehicle definition under her father's policy would nullify the family exclusion in the liability portion of the policy and allow the injured plaintiff to recover for the negligence of her sister.

Reid is distinguishable from the case at bar where JILL BRIXIUS could have legally recovered from the negligent operator of the motor vehicle had Mr. Stewart carried insurance coverage for his acts of negligence. The plaintiff in Reid, however, was unable to recover from her sister by virtue of the family exclusion provision and inter-family immunity from tort suits. The definition of uninsured vehicle in both Reid and the case at bar are similar, but it is the application of the definition to the facts that are distinguishable.

In Allstate Insurance Co. v. Boynton, 486 So.2d 552 (Fla. 1986), this court held that under all uninsured motorist policies the insured is entitled to uninsured motorist benefits where he has been injured by an uninsured motor vehicle, and he is legally entitled to recover from the operator of the uninsured motor vehicle. It is the definition of uninsured motor vehicle under Allstate's policy in the case at bar that is limiting and restrictive and, thus, void against public policy. The definition of uninsured motor vehicle in Allstate's policy is contrary to the Boynton test. In this case, there are no common law or statutory immunities that would prevent plaintiff's recovery from the driver. James Monroe Stewart was an uninsured operator under the true sense of the word. In addition, the plaintiff's bar to recovery is the unavailability of liability insurance coverage by virtue of a named insured exclusion. Under Sec. 627.727, Fla. Stat. (1985), and the public policy behind that statute, the defendant's policy is required to provide uninsured motorist benefits to the plaintiff.

Respondent incorrectly states in its argument II (A) that Plaintiffs contend that family exclusions in liability policies are unenforceable to named insureds. However, the Petitioners argue that the uninsured motorist definition in ALLSTATE'S policy is too restrictive and void against public policy in that the uninsured motorist definition works to deny coverage to the injured insured and is therefore unenforceable.

Contrary to the lower court's ruling and its reliance on Reid, the Fifth District Court of Appeal in Jernigan v. Progressive American Ins. Co., 501 So.2d 748 (Fla. 5th DCA 1987), held that a vehicle can be insured and uninsured under the same policy and that policy provisions which would deny an insured protection for injuries caused by an uninsured motorist are invalid as contrary to public policy.

The facts in Jernigan are identical to the case sub judice. Jernigan was riding as a passenger in a vehicle owned by him but driven by an uninsured friend. As a result of the driver's negligence, Jernigan was seriously injured. He filed a claim for uninsured motorist benefits under his own policy. The insured was denied coverage because of a named insured exclusion in his policy and by the policy's definition of uninsured motor vehicle. The Fifth District Court of Appeal held that when such definitions and exclusions operate to deny an injured plaintiff uninsured motorist benefits and no other insurance is available, such definitions and exclusions are contrary to the public policy established by the legislature in 627.727(1), Fla. Stat. (1985). The Fifth District Court of Appeal in Jernigan stated:

> Although the vehicle causing the plaintiff's injury in this case was insured for liability, that insurance was not available to Jernigan because he could not recover from himself on his own liability policy. It is agreed that the driver of the vehicle was not insured. Thus, as to the plaintiff in this particular circumstances, there was no liability insurance available to him. Finally, there is no question that the plaintiff would have been legally entitled to recover from the negligent driver who caused his injury. There was no statutory or common law bar to recovery. Thus, because the plaintiff was injured by the operator of an uninnsured motor vehicle against whom he was legally entitled to recover, Progressive was required to make available uninsured motorist benefits. Jernigan at 750.

Similarly, in the case at bar, JILL BRIXIUS could not recover from herself on her own liability policy and the negligent driver, James Monroe Stewart, had no insurance.

The definition in ALLSTATE's policy of an uninsured motor vehicle which operates to deny JILL BRIXIUS uninsured motorist benefits is too restrictive. In light of the purpose behind the uninsured motorist statute and the reasoning of the Fifth District Court of Appeal in Jernigan, the definition in ALLSTATE's policy which effectively denies Plaintiffs any protection is invalid.

Contrary to Respondent's argument in II (B), this court held that Allstate must extend uninsured motorist benefits in Boynton because no liability coverage was available to the injured plaintiff. The Fifth District Court of Appeal in Jernigan reached the same conclusion and, moreover, did away with the multiple policy distinction, holding that a motor vehicle can be an insured and uninsured under the same policy.

Finally, the Fifth District Court of Appeal's holding in Jernigan tracks the intent of the legislature by ensuring injured persons are made whole from the negligence of uninsured operators of a motor vehicle by allowing recovery of uninsured motorist benefits; when Progressive attempted to deny coverage under circumstances where the legislature has mandated uninsured motorist coverage. By allowing the lower court's summary judgment in favor of ALLSTATE to stand, ALLSTATE, in the case sub judice, will succeed in denying coverage to Petitioners in such a circumstance where the legislature has mandated uninsured motorist coverage.

The Second District Court of Appeal in the case at bar tacitly agreed that Petitioners should be able to collect uninsured motorist benefits but felt constrained by this Court's decision in Reid and Boynton to deny coverage. To carry out the intent of Sec. 627.727, Fla. Stats., this court should reverse.

CONCLUSION

For the foregoing reasons, the Petitioners respectfully request this Court to reverse the decision of the Second District Court of Appeal and direct that the summary judgment in favor of ALLSTATE be set aside.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been mailed this 12th day of June, 1990 to DAVID J. ABBEY, ESQ. and ELIZABETH G. REPAAL, ESQ., One 4th St. N., Suite 1000, St. Petersburg, FL 33701; TIMOTHY C. McHUGH, ESQ., 5401 W. Kennedy Blvd., Suite 560, Tampa, FL 33609; NORMAN A. COLL, ESQ., and MICHAEL J. HIGER, ESQ., 3200 Miami Center, 201 S. Biscayne Blvd. Miami, FL 33131; and BONITA L. KNEELAND, ESQ., P.O. Box 1438, Tampa, FL 33601-1438.

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