IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO.: 64,938

ALLSTATE INSURANCE COMPANY,

Defendant/Petitioner,

vs.

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

Plaintiffs/Respondents.
/

FILED
SID J. WHITE
FEB 9 1984
CLERK, SUPREME COURT
By Chief Deputy Clerk

# BRIEF OF PETITIONER ON JURISDICTION

## FROM THE FIFTH DISTRICT COURT OF APPEALS

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# CITATION OF AUTHORITY


| CASES: | PAGE: |
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| CENTENNIAL INSURANCE COMPANY v. WALLACE<br>330 So.2d 815 (Fla. 3rd DCA 1976)<br>cert. denied 341 So.2d 1087 (Fla. 1976) | 3,4,5,6,7,9 |
| REID v. ALLSTATE INSURANCE COMPANY<br>344 So.2d 877 (Fla. 4th DCA 1977) | 5 |
| REID v. STATE FARM FIRE AND CASUALTY COMPANY<br>352 So.2d 1172 (Fla. 1977) | 5 |
| SALAS v. LIBERTY MUTUAL FIRE INSURANCE COMPANY<br>272 So.2d 1 (Fla. 1972) | 3,4,7,8,9 |
| **STATUTES:** | |
| §440.11, Florida Statutes | 2,5 |

## STATEMENT OF THE CASE AND OF THE FACTS

Defendant/Petitioner, ALLSTATE INSURANCE COMPANY, seeks to have reviewed a decision of the District Court of Appeal, Fifth District, dated and filed on January 5, 1984, in Case Number 82-1002.

The Petitioner, ALLSTATE INSURANCE COMPANY, will herein after be referred to as either Petitioner or ALLSTATE. The Respondents, RICHARD B. BOYNTON and LINDA O. BOYNTON, his wife, will hereinafter be referred to as either Respondents or BOYNTON.

The Petitioner was an original Defendant below and an Appellee before the District Court of Appeal. The Respondents were the original Plaintiffs in the trial forum and Appellants before the District Court of Appeal. This was an appeal by Respondents from a Summary Judgment entered by the Circuit Court in and for Orange County, Florida, pursuant to a Motion for Summary Judgment filed by the Petitioner, ALLSTATE. The District Court of Appeal, Fifth District, reversed the Summary Judgment in favor of ALLSTATE and remanded this action to the trial Court. Allstate now seeks review of that decision.

The essential facts to be relied upon are that on January 4, 1979, a vehicle owned by Gelco Corporation and leased to Xerox Corporation had been delivered to Sears Roebuck and Company to be serviced or repaired. While in

the possession of Sears, an employee of Sears named James Luke operated the vehicle in such a manner as to cause it to strike RICHARD BOYNTON, a fellow employee, resulting in injuries to BOYNTON. At the time of the incident, the vehicle involved was insured by Employers Insurance of Wausau.

On October 16, 1980, BOYNTON brought an action against Xerox Corporation, Wausau Insurance Company as the insurer of Xerox, Sears Roebuck and Company, and Allstate Insurance Company as the insurer of Sears. Xerox denied liability based upon Castillo v. Bickley, 363 So.2d 792 (Fla. 1978). An Order granting Summary Final Judgment for Xerox was entered April 20, 1981. Sears answered the Complaint alleging immunity under §440.11, Fla. Stat. BOYNTON filed a Voluntary Dismissal without Prejudice against Sears on April 13, 1981. BOYNTON thereafter filed an Amended Complaint against ALLSTATE and Luke. The Amended Complaint against ALLSTATE was for uninsured motorists benefits under a policy of insurance issued to BOYNTON on motor vehicles owned by him. The claim against Luke was negligent operation of the motor vehicle. ALLSTATE answered the Amended Complaint alleging that BOYNTON was not entitled to benefits under the policy because he was not legally entitled to recover damages from the owner or operator of an uninsured motor vehicle. Luke, as a fellow employee of BOYNTON, answered the Amended Complaint alleging immunity pursuant to §440.11, Fla. Stat.

BOYNTON voluntarily dismissed his Amended Complaint against Luke on September 17, 1982.

ALLSTATE moved the trial Court for Summary Judgment based upon the premise that BOYNTON was not entitled to uninsured motorists benefits under the subject policy. The trial Court entered Summary Judgment in favor of ALLSTATE on March 18, 1982.

BOYNTON thereafter appealed the Summary Judgment to the Fifth District Court of Appeal. The Fifth District Court of Appeal reversed the Summary Judgment in favor of ALLSTATE and remanded the cause to the trial Court finding that even though a motor vehicle is covered by a policy of liability insurance, if a particular occurrance giving rise to injuries is excluded from coverage under the insuring policy then the vehicle causing injury is uninsured for purposes of availability of uninsured motorists coverage to the injured party from his own insurance carrier. The Court further held that the injured person need not be "legally entitled to recover" from the offending uninsured motorist in order to be entitled to uninsured motorists benefits.

Such holdings directly and expressly conflict with Centennial Insurance Company v. Wallace, 330 So.2d 815 (Fla. 3d DCA 1976) cert. denied, 341 So.2d 1087 (Fla. 1976); and Salas v. Liberty Mutual Fire Insurance Company, 272 So.2d 1 (Fla. 1972).

## QUESTION PRESENTED

WHETHER THE DECISION IN THE INSTANT CASE IS IN CONFLICT WITH THOSE CASES HOLDING THAT A VEHICLE COVERED TO THE EXTENT THAT THE LAW REQUIRES IS NOT AN UNINSURED VEHICLE BECAUSE COVERAGE MAY NOT BE AVAILABLE TO THE INJURED PARTY UNDER THE CIRCUMSTANCES, AND THAT AN INSURED IS ENTITLED TO RECOVER UNDER A POLICY OF UNINSURED MOTORISTS COVERAGE THOSE DAMAGES HE WOULD HAVE BEEN ABLE TO RECOVER AGAINST THE NEGLIGENT MOTORIST IF THAT MOTORIST HAD MAINTAINED A POLICY OF LIABILITY INSURANCE.

## ARGUMENT

THE DECISION IN THE INSTANT CASE IS IN CONFLICT WITH THOSE CASES HOLDING THAT A VEHICLE COVERED TO THE EXTENT THAT THE LAW REQUIRES IS NOT AN UNINSURED VEHICLE BECAUSE COVERAGE MAY NOT BE AVAILABLE TO THE INJURED PARTY UNDER THE CIRCUMSTANCES, AND THAT AN INSURED IS ENTITLED TO RECOVER UNDER A POLICY OF UNINSURED MOTORISTS COVERAGE THOSE DAMAGES HE WOULD HAVE BEEN ABLE TO RECOVER AGAINST THE NEGLIGENT MOTORIST IF THAT MOTORIST HAD MAINTAINED A POLICY OF LIABILITY INSURANCE.

Pursuant to Florida Rules of Appellate Procedure, 9.030(a)(2)(A)(iv) and Article V, Section 3(b)(3) of the Constitution of Florida, the Supreme Court of Florida has discretionary jurisdiction to review a decision of a District Court of Appeal that expressly and directly conflicts with a decision of another District Court of Appeal or the Supreme Court on the same point of law. The holdings of both Centennial Insurance Company v. Wallace, 330 So.2d 815 (Fla. 3d DCA 1976), cert. denied, 341 So.2d 1087 (Fla. 1976), and Salas v. Liberty Mutual Fire Insurance

Company, 272 So.2d 1 (Fla. 1972), directly and expressly conflict with the opinion filed in the present case.

Centennial Insurance Company v. Wallace, supra, (cited with approval in Reid v. Allstate Insurance Company, 344 So.2d 877 (Fla. 4th DCA 1977), and Reid v. State Farm Fire and Casualty Company, 352 So.2d 1172 (Fla. 1977)), is clearly in express and direct conflict with the holding in the present case. In Wallace, an employee of a power and light company was injured by a truck operated by a fellow employee. The truck was self insured pursuant to the requirements of the Motor Vehicle Financial Responsibility Law. The operator of the truck had a policy of automobile liability insurance on his privately owned vehicles with State Farm. State Farm refused to acknowledge liability due to an exclusion in its policy. The power company, was immune from liability by virtue of §440.11, Fla. Stat. Because the fellow employee operator of the truck had no liability insurance available to him under his personal automobile liability insurance policy and because the employer was immune from suit pursuant to the Worker's Compensation Laws, a claim was presented to the uninsured motorists carrier of the injured employee, Wallace. The Third District Court of Appeal held that the truck by being self insured within the meaning of the Motor Vehicle Financial Responsibility Law could not be an uninsured motor vehicle under the terms of Wallace's policy. The Court rejected Wallace's argument

that because the power company was immune from liability by virtue of the Worker's Compensation Laws, the truck was an uninsured vehicle. The Court stated that where a vehicle is covered to the extent required by law, it does not become an uninsured motor vehicle simply because liability coverage may not be available to an injured party under a particular set of circumstances.

The present decision expressly and directly conflicts with Wallace in that the Fifth District Court of Appeal stated that it could not agree with the holding in Wallace and that a motor vehicle is an uninsured motor vehicle if the offending motorist has no insurance coverage available for protection of the injured party. The Court further stated that a policy which provides for an exclusion of a particular loss is the same as having no insurance with respect to that loss. Wallace states that if a vehicle is covered to the extent required by law it is not an uninsured vehicle because of an exclusion, whereas the present case states that if an exclusion is applicable to a loss then the vehicle becomes uninsured.

In the present case, the vehicle was insured pursuant to the Financial Responsibility Law by a policy of insurance issued by Employers Insurance Company of Wausau to Xerox Corporation. The policy, however, was not available to BOYNTON, not because of any policy exclusion, but because of the absence of liability on the part of Xerox Corporation,

the insured under the Wausau policy. Also, as in the Wallace decision, the fellow employee, Luke, and the employer, Sears, were immune from liability based upon the Worker's Compensation Statutes. Thus, because BOYNTON could not impose liability on the owner and thus recover from the owner's insurance carrier because of the principles announced in Castillo, and because the operator of the vehicle was not liable pursuant to the Worker's Compensation Laws, BOYNTON presented a claim for uninsured motorists benefits to his own personal automobile liability insurance carrier, ALLSTATE.

The fact situations are virtually identical. However, the result reached in the present case directly and expressly conflicts with the result reached in Wallace.

With respect to the issue of "legally entitled to recover", the holding in the present case equates the phrase to the simple showing of liability on the part of an uninsured motorist and resulting damages. This construction and interpretation of that policy provision directly and expressly conflicts with the decision of this Court in Salas v. Liberty Mutual Fire Insurance Company, 272 So.2d 1 (Fla. 1972). Salas requires more than the mere showing of liability and resulting damages. The measure of damages to which an insured is entitled under a policy of uninsured motorists coverage is that amount to which the insured would be entitled to recover against a negligent motorist if that

motorist had maintained a policy of automobile liability insurance.

In Salas, the daughter of the named insured on the Liberty Mutual policy, while a relative residing in the named insured's household, was injured in an accident while riding as a passenger in an uninsured vehicle owned and operated by her brother, also a relative resident of the named insured's household. This Court held that the public policy of the State of Florida was that every insured as defined in a policy would be entitled to recover under the policy for damages he would have been able to recover against a negligent motorist had that negligent motorist maintained a policy of liability insurance. The prerequisite that the injured party would have been able to recover against the negligent motorist, but for the absence of a policy of liability insurance, differs from the mere showing of liability and damages. It contemplates the legal right to recover against the tort feasor.

This same point of law was involved in the present case and it was ruled that legally entitled to recover meant only the showing of liability and resultant damages, as opposed to the ruling in Salas which interpreted the legal right to recover as meaning "would have been able to recover against the negligent motorist if that motorist had maintained a policy of liability insurance". Salas, supra, p. 3.

The ruling in the present case concerning the construction of the word "legally entitled to recover as damages" directly and expressly conflicts with that construction and interpretation reached in Salas, supra.

## CONCLUSION

The decision of the District Court of Appeal, Fifth District, is in express and direct conflict with Centennial and with Salas. It is respectfully submitted that this Court should invoke its certiorari jurisdiction and enter its Order quashing the decision and Order hereby sought to be reviewed, approving the conflicting decisions as correct, and granting such other and further relief as shall seem right and proper to the Court.

Respectfully submitted

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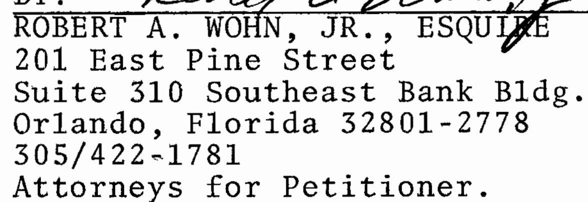
I HEREBY CERTIFY that a true copy of the foregoing has been, by mail, this 7th day of February, 1984, furnished to: R. David Ayers, Esquire, 1680 Lee Road, Winter Park, Florida 32789.

ANDERSON AND HURT, P.A.

BY: 

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