

IN THE SUPREME COURT OF FLORIDA

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CLERK SUPREME COURT

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JILL BRIXIUS and
ROBERT A. BRIXIUS, her spouse,

Petitioners,

v.

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 PETITIONERS

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STATEMENT OF THE CASE AND FACTS

In this Brief, the Petitioners, JILL BRIXIUS and ROBERT A. 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 Defendant in the Circuit Court of Pinellas County, and Appellee in the Second District Court of Appeal, will be referred to as the "Respondent". References to the Petitioners' Appendix will be noted by the symbol "A".

This appeal arises from a summary judgment denying Petitioners' claim for uninsured motorist coverage. The Second District court of Appeal affirmed the lower court's summary judgment in favor of Respondent.

The Plaintiff, JILL BRIXIUS, was injured while a passenger in her own motor vehicle, which was insured by Appellee, ALLSTATE INSURANCE COMPANY. The vehicle was driven by an uninsured friend at the time of the accident. The policy of insurance excluded liability coverage for injuries sustained by a named insured, making the Plaintiff uninsured under the policy. The Plaintiff, as a result claimed entitlement under the uninsured motorist coverage under the same policy. (A 2)

The trial court denied uninsured motorist coverage, finding that the motor vehicle involved in the accident cannot be both an insured vehicle on the policy as well as an uninsured motor vehicle. (A 4)

The Second District Court of Appeal affirmed the lower court's summary judgment in favor of Respondent on the basis that the vehicle could not be both insured and uninsured under the same policy of insurance. In its decision, the Second District Court of Appeal acknowledged conflict with Jernigan v. Progressive American Ins. Co. 501 So.2d 748 (Fla. 5th DCA 1987), (A 2).

The Petitioners timely filed their notice of appeal on November 13, 1989.

SUMMARY OF PETITIONERS' ARGUMENT

The Petitioners, JILL BRIXIUS and ROBERT A. BRIXIUS, her spouse, are invoking discretionary jurisdiction of this Court, pursuant to Article V, Section 3(b)(3), Fla. Const. and Rule 9.030(a)(2)(A)(IV), Fla. R.App.P. In its opinion below, the Second District Court of Appeal held that a motor vehicle cannot be insured and uninsured under the same policy of insurance. As expressly recognized by the Second District Court of Appeal, the lower court's decision conflicts with the Fifth District Court of Appeal in Jernigan v. Progressive American Ins. Co., 501 So.2d 748 (Fla. 5th DCA 1987) on the same rule of law.

The Supreme Court should accept jurisdiction to resolve this important conflict between the Second and Fifth District Courts of Appeal. There being express and direct conflict, jurisdiction exists under Rule 9.030(a)(2)(A)(IV), Fla. R.App.P. The Supreme Court should exercise its jurisdiction to resolve the conflict between Jernigan v. Progressive American Ins. Co., 501 So.2d 748 (Fla. 5th DCA 1987), and the decision sub judice because the public policy behind Section 627.727, Fla. Stat. is of great public importance.

ARGUMENT

I

THE DECISION OF THE SECOND DISTRICT COURT
OF APPEAL DIRECTLY AND EXPRESSLY CONFLICTS
WITH JERNIGAN V. PROGRESSIVE AMERICAN INSURANCE
COMPANY, 501 SO.2d 748 (FLA. 5TH DCA 1987)

The basis for invoking this Court's jurisdiction, Rule 9.030(a)(2)(A)(IV), Fla. R.App.P., requires an express and direct conflict with a decision of another district court of appeal or the Supreme Court on the same question of law. The Second District Court of Appeal decision expressly and directly conflicts with the Fifth District Court of Appeal decision in Jernigan v. Progressive American Ins. Co. 501 So.2d 748 (Fla. 5th DCA 1987). The Second District Court of Appeal's decision acknowledges conflict with the Fifth District Court of Appeal's decision in Jernigan v. Progressive American Ins. Co., 501 So.2d 748 (Fla. 5th DCA 1987):

As the parties appear to agree, Jernigan v. Progressive American Ins. Co., 501 So.2d 748 (Fla. 5th DCA 1987), would require a reversal in the case at hand. However, we decline to follow Jernigan and acknowledge our conflict with that case. (A 2)

In its opinion below, the Second District Court of Appeal agreed with the lower court's decision that a motor vehicle cannot be both insured and uninsured under the same policy. As recognized by the Second District Court of Appeal, the lower court's opinion conflicts with the Fifth District Court of Appeal in Jernigan v. Progressive American Insurance Company, 501 So.2d 748 (Fla. 5th DCA 1987).

The Fifth District Court of Appeal in Jernigan held a vehicle can be insured and uninsured for purposes of uninsured motorist coverage when an insured is injured and there are no available liability benefits. 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 liability coverage because of a named insured exclusion in this policy. The Fifth District Court of Appeal ruled that Jernigan could recover uninsured motorist benefits under the same policy by following this Court's pronouncement of the law in Allstate Insurance Company v. Boynton, 486 So.2d 552 (Fla. 1986). This court in Boynton 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."

The Second District Court of Appeal in the case sub judice stated; "We do not necessarily disagree with the reasoning set forth in Jernigan which supports the position that Boynton should have overruled Reid in these circumstances (A 2)."

The facts in the case at bar are identical to Jernigan. Therefore, the decision in Jernigan that a motor vehicle can be insured and uninsured under the same policy conflicts with the Second District Court of Appeal's decision in this case. The Fifth District Court of Appeal in Jernigan allowed the injured insured entitlement to uninsured motorist benefits, whereas the

Petitioner, under the identical facts, is precluded from recovering uninsured motorist benefits. Therefore, the Supreme Court should accept jurisdiction to resolve this important direct and express conflict between the Second District Court of Appeal and the Fifth District Courts of Appeal.

II

THE SUPREME COURT SHOULD EXERCISE ITS JURISDICTION TO RESOLVE THE CONFLICT BETWEEN JERNIGAN v. PROGRESSIVE AMERICAN INSURANCE COMPANY, 501 So.2d 748 (FLA. 5TH DCA 1987), AND THE DECISION SUB JUDICE BECAUSE THE PUBLIC POLICY OF SECTION 627.727, FLA. STAT. IS OF GREAT PUBLIC IMPORTANCE.


The acknowledged conflict between Jernigan and the case sub judice creates widespread uncertainty under Section 627.727, Fla. Stat., as to an insured's right to uninsured motorist coverage. The public policy considerations expressed in Jernigan, 501 So.2d at 750, although recognized by the Second District Court of Appeal, are ignored in the court's ultimate ruling. The clear legislative intent of Section 627.727, Fla. Stat., is undermined by the Second District Court of Appeal's opinion. For the purpose of clarifying the availability of uninsured coverage under 627.727, Fla. Stat., and resolving this matter of public policy and importance, this court should exercise its jurisdiction to resolve the clear inter-district conflict.

The decision of the Second District Court of Appeal expressly and directly conflicts with the decision of the Fifth District Court of Appeal in Jernigan, as required under Article 5, Section 3(b)(3) of the Florida Constitution. There being express and direct conflict, jurisdiction exists under Rule 9.030(a)(2)(A)(IV), Fla. R.App.P.

CONCLUSION

The Second District Court of Appeal's decision in this case expressly and directly conflicts the rule of law set forth by the Fifth District Court of Appeal in Jernigan v. Progressive American Insurance Company, 501 So.2d 748 (Fla. 5th DCA 1987) as acknowledged by the Second District Court of Appeal's decision. There being express and direct conflict, this Court should accept discretionary jurisdiction pursuant to Article V, Section 3(b)(3), Florida Constitution, and Rule 9.030(a)(2)(A)(IV), Fla. App. P.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail BARD D. ROCKENBACH, ESQUIRE, One Fourth Street North, Suite 1000, St. Petersburg, FL 33701, by this 22nd day of November, 1989.

By: *Lisa A. Jayson*
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