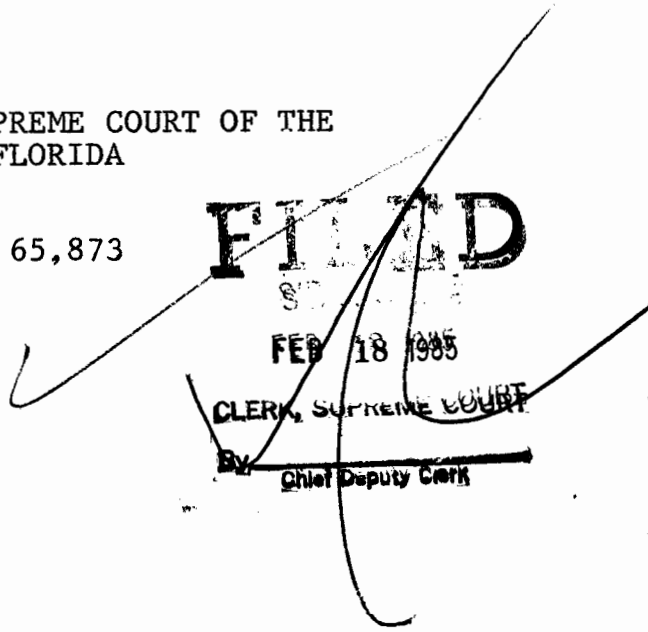
IN THE SUPREME COURT OF THE
STATE OF FLORIDA

CASE NO: 65,873




MARYLAND CASUALTY COMPANY,
B.A.T. PIPELINE, INC., and
SEAN FRANKLIN KINGMAN,

Petitioners,

vs.

RELIANCE INSURANCE COMPANY
and BOB SALMON, INC.,

Respondents.

_____/

# PETITIONERS' INITIAL BRIEF ON THE MERITS

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By Rosemary Cooney
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## PREFACE

Petitioners and Respondents were Co-Defendants in the trial court. Petitioners were the Appellees, and Respondents were the Appellants in the Fourth District Court of Appeal. The parties will be referred to as Petitioners or Respondents or by their respective proper names.

The following symbol will be used:

App. Ex. - Appendix Exhibit

## TABLE OF CITATIONS

STATUTES

## STATEMENT OF THE FACTS AND OF THE CASE

There is no dispute as to the facts. (See Stipulation and Order, App. Ex. 1 and Order, App. Ex. 2, which were provided in lieu of a Record, pursuant to Fla. R. App. P. 9.200(b)).

On October 23, 1979, Filomena Ricucci suffered personal injuries as a result of an automobile accident with a vehicle owned by Respondent, BOB SALMON, INC., (hereinafter "SALMON"), and insured by Respondent, RELIANCE INSURANCE COMPANY, (hereinafter "RELIANCE"), and leased to B.A.T. PIPELINE, INC. (hereinafter "B.A.T."), under an oral agreement for consideration. At the time of the accident, B.A.T.'s employee, SEAN FRANKLIN KINGMAN (hereinafter "KINGMAN"), was operating the vehicle within the course and scope of his employment and with the permission, knowledge and consent of his employer. At all times material, B.A.T. and KINGMAN were covered by a policy of insurance issued by Petitioner, MARYLAND CASUALTY COMPANY (hereinafter "MARYLAND").

Filomena Ricucci brought an action against Petitioners and Respondents for damages for her personal injuries. KINGMAN, B.A.T. and MARYLAND crossclaimed against SALMON and RELIANCE for indemnity, asserting that RELIANCE'S coverage was primary and that RELIANCE had a duty to provide coverage and a defense to Petitioners. SALMON and RELIANCE crossclaimed against Petitioners for indemnity, asserting that MARYLAND'S coverage was primary.

Petitioners asserted that Respondents were primary to the extent of the limits of RELIANCE'S liability policy. In addition, Petitioners demanded that Respondents reimburse them for $2,017.28 which Respondents paid for property damage to the Ricucci vehicle before determining the existence of the RELIANCE policy.

Petitioners filed a Motion for Summary Judgment on both crossclaims. The Motion for Summary Judgment was granted. The Final Summary Judgment in favor of Petitioners and against Respondents, is the subject matter of this appeal. (App. Ex. 3)

In addition, Respondents appealed from a judgment for attorney's fees in the amount of $8,931.50 in favor of Petitioners. The attorney's fees were awarded pursuant to the previously entered Summary Judgment in favor of Petitioners. (App. Ex. 4). The Summary Judgment had ordered Respondents to take over the defense of Petitioners pursuant to a finding that RELIANCE'S policy was primary.

The Fourth District Court of Appeal filed an Opinion on July 11, 1984, reversing the Final Judgment and the Judgment for Attorneys' Fees (App. Ex 5) which was rendered pursuant to the denial of the Petitioners' Motion for Rehearing and/or Motion for Clarification on August 9, 1984. (App. Ex.6,7) Petitioners filed a Notice to Invoke Discretionary Jurisdiction of the Supreme Court on September 7, 1984 (App. Ex.8). The

Supreme Court accepted jurisdiction and dispensed with oral argument by Order dated January 25, 1985. (App. Ex. 9)

## ISSUES ON APPEAL

I. WHETHER THE INSURANCE COVERAGE OF THE LESSOR OF A MOTOR VEHICLE, IN THE ABSENCE OF A WRITTEN LEASE, IS PRIMARY FOR THE LIMITS OF LIABILITY AFFORDED THE LESSOR OR IS PRIMARY FOR THE LIMITS OF LIABILITY REQUIRED BY THE FINANCIAL RESPONSIBILITY LAW.

II. WHETHER AN AWARD OF ATTORNEY'S FEES IS PROPER TO A LESSEE FROM A LESSOR IN AN ACTION WHERE THE LESSOR OF A MOTOR VEHICLE IS FOUND TO BE PRIMARILY RESPONSIBLE FOR INSURANCE COVERAGE ONLY UP TO THE MINIMUM FINANCIAL RESPONSIBILITY REQUIREMENTS OF FLORIDA STATUTE §627.7263.

## SUMMARY OF ARGUMENT

I. WHETHER THE INSURANCE COVERAGE OF THE LESSOR OF A MOTOR VEHICLE, IN THE ABSENCE OF A WRITTEN LEASE, IS PRIMARY FOR THE LIMITS OF LIABILITY AFFORDED THE LESSOR OR IS PRIMARY FOR THE LIMITS OF LIABILITY REQUIRED BY THE FINANCIAL RESPONSIBILITY LAW.

The insurance coverage of the Lessor of a motor vehicle, in the absence of a written lease, is primary for the limits of liability afforded the Lessor and not only for the limits of liability required by the Financial Responsibility Law. While the Lessor is only required to provide liability coverage which complies with the minimal requirements of the Financial Responsiblity Law, the Lessor may choose higher coverage. In the instant case, since the Lessor and the Lessee did not contract between themselves so as to shift the burden of loss, the Lessor necessarily agreed to be primary. Since the parties did not contract between themselves so as to allow for the right of indemnification beyond the minimum statutory requirements, the Lessor is not entitled to common law indemnity.

## SUMMARY OF ARGUMENT

II. WHETHER AN AWARD OF ATTORNEY'S FEES IS PROPER TO A LESSEE FROM A LESSOR IN AN ACTION WHERE THE LESSOR OF A MOTOR VEHICLE IS FOUND TO BE PRIMARILY RESPONSIBLE FOR INSURANCE COVERAGE ONLY UP TO THE MINIMUM FINANCIAL RESPONSIBILITY REQUIREMENTS OF FLORIDA STATUTE §627.7263.

On appeal to the Fourth District Court of Appeal, it was undisputed that the trial court properly entered Final Summary Judgment in favor of Petitioners with respect to the findings that the insurance coverage afforded the Respondent/Lessor was primary, that the Respondent/Lessor's insurer, RELIANCE, had a duty to defend the Petitioners in the action brought by the Plaintiffs, and that Respondent, RELIANCE, must reimburse Petitioner, Lessee's insurer, MARYLAND, for property damage. Therefore, regardless of any issue as to the extent to which the coverage provided by RELIANCE is primary, the trial court properly awarded attorney's fees to the Lessee where the Lessor denied at the trial court level that it was primary to any extent, that it had a duty to defend and that it had to reimburse the Petitioner for property damage paid.

## ARGUMENT

### I. WHETHER THE INSURANCE COVERAGE OF THE LESSOR OF A MOTOR VEHICLE, IN THE ABSENCE OF A WRITTEN LEASE, IS PRIMARY FOR THE LIMITS OF LIABILITY AFFORDED THE LESSOR OR IS PRIMARY FOR THE LIMITS OF LIABILITY REQUIRED BY THE FINANCIAL RESPONSIBILITY LAW.

There is no dispute as to the facts for the purpose of this appeal. Petitioners assert that the insurance coverage of the Lessor of a motor vehicle is primary to the limits of liability afforded the Lessor in the absence of a written lease. Respondents' position is that the insurance coverage of the Lessor of a motor vehicle, in the absence of a written lease, is primary only to the limits of liability required by the Financial Responsibility Law. Section 627.7263(1), Florida Statutes, provides as follows:

> The valid and collectable liability insurance or personal injury protection insurance providing coverage for the lessor of a motor vehicle for rent or lease shall be primary unless otherwise stated in bold type on the face of the rental agreement. Such insurance shall be primary for the limits of liability and personal injury protection coverage as required by ss. 324.021(7) and 627.736.

Since the lease between the Lessor, SALMON, and the Lessee, B.A.T., was oral, there is no question that the insurance coverage of the Lessor, SALMON, is primary under Section 627.7263 (1), Florida Statutes. Respondents, on appeal to the Fourth District Court of Appeal, argued that the Statute requires that Lessor be primary only for the statutorily required coverage of

Ten Thousand ($10,000.00) Dollars minimum liability limits under Section 324.021(7), Florida Statutes, and Ten Thousand ($10,000.00) Dollars, minimum personal injury protection limits under Section 627.736, Florida Statutes. It is the Petitioners' position that Florida Statute §627.7263 does not state that the Lessor is only liable for the required minimum limits as Respondents contend. The Statute provides that in the absence of a written lease, the Lessor's coverage is primary and that the Lessor's insurance coverage must meet the minimum statutory requirements of §§324.021( 7) and 627. 736, Florida Statutes. Petitioners contend that the Statute is not specific as to whose coverage is applicable after personal injury protection and financial responsiblity limits are paid out.

In reversing the Final Summary Judgment in favor of Petitioners, the Court relied on Patton v. Lindos Rent-A-Car, Inc., 415 So.2d 43(Fla. 2d DCA 1982).[1] The Patton decision involved a written lease agreement. The main issue on appeal was whether the parties to a written lease are free to contract between themselves as to which of them shall be primary without complying with the Statute which makes the

1. However, the Court noted that its decision conflicted with Sunshine Dodge, Inc. v. Ketchem, 445 So.2d 395 (Fla. 5th DCA 1984) in footnote 1.

Lessor primarily liable unless he follows a specific method of shifting primary responsibility to the Lessee. In the Opinion, the Court found that the written lease did not comply with the Statute and that, therefore, the Lessor was primary. The Court stated that once the parties complied with the Statute, the parties were free to contract between themselves as to who would be responsible.

The Second District Court of Appeal in Patton specifically limited the application of its opinion to the agreement before the Court as indicated by the following quote from their decision:

> Accordingly, under the agreement in this case, the lessor's insurance company is only primarily liable to the requirements of the Financial Responsibility Law (at page 45, emphasis supplied).

The Court limited the application of its opinion after noting that the Lessor's insurance policy contained an "escape clause". The Patton decision is inapplicable to the instant case where the parties had an oral lease. Moreover, unlike the Patton case, in the case at bar, the Lessee's policy contains an escape clause.

In carefully reviewing the Patton decision, it is clear that the Second District found that the Lessor's insurer was primarily liable only to the minimum requirements of the Financial Responsibility Law because of the Lessor's escape clause. After the Lessor's insurer complied with the minimum

statutory requirements, the Lessor's insurance policy mandated that any further coverage would be excess over any other collectable insurance. Thus, in light of the factual differences between the Patton case and the case at bar, the Patton decision is inapplicable.

In reversing the Final Summary Judgment in reliance on the Patton decision, the Fourth District Court of Appeal noted that its decision conflicted with Sunshine Dodge, Inc. v. Ketchem, 445 So.2d 395 (Fla. 5th DCA 1984). Here the Fifth District Court of Appeal held that the Lessor's coverage is primary for the limits of liability afforded the Lessor and not only for the limits of liability required by the Financial Liability Law, in the absence of a written agreement otherwise. In addition, the Court held that the Lessor is obligated to defend an action on behalf of the driver Lessee and Lessor and Lessee's insurer and indemnify them to the limits of liability insurance afforded the Lessor. In reaching its decision, the Fifth District Court of Appeal relied on Insurance Company of North America v. Avis Rent a Car System, Inc., 348 So.2d 1149 (Fla. 1977); Racecon, Inc., v. Mead, 388 So.2d 266 (Fla. 5th DCA 1980) and Ray v. Earl, 277 So.2d 73 (Fla. 2d DCA) cert. den. 280 So.2d 685 (Fla. 1973).

In support of their position, Respondents cited to the Fourth District Court of Appeal, the case of Guemes v. Biscayne Auto Rentals, Inc., 414 So.2d 216 (Fla. 3rd DCA 1982)

which is also distinguishable on its facts from the instant case. In Guemes, the written agreement between the Lessor and the Lessee did not sufficiently comply with §627.7263, Florida Statutes to shift primary statutory responsibility from the Lessor to the Lessee. The Court noted:

> In order to satisfy the requirements of §627.7263...we find that the lessee must be clearly informed that his insurance carrier will be responsible for any claim against the lessee during the use and operation of the vehicle. (at Page 218).

As to the Lessor's right to indemnity, the Court held:

> Although the dangerous instrumentality doctrine places the primary responsibility upon the owner for damages caused as a result of negligence in the use of the instrementality, he is ordinarily entitled to indemnity from his permittee. However, the right of indemnity is subject to the exception that if the owner leases the vehicle to another and the owner provides in that lease that he will furnish insurance, then the lessor will be denied indemnity. (Truck Discount Corporation v. Serrano, 362 So.2d 340 (Fla. 1st DCA 1978); Morse Auto Rentals, Inc. v. Lewis, 161 So. 2d 235 (Fla. 3d DCA 1964). As a result of the defective compliance with §627.7263, supra., the lessee necessarily contracted with Biscayne to provide liability insurance coverage as part of the rental agreement. (at 218)

Therefore, the Court held that the Lessor is primarily liable and was not entitled to an indemnity and that the Lessee's policy provided excess coverage.

Contrary to Respondents' assertion, the Guemes decision does not limit the extent of the Lessor's primary responsibility to the minimum requirements of the Financial Responsibility Law. The Guemes decision clearly holds that where a Lessor is primarily responsible for insurance coverage, the Lessee's coverage is excess and the Lessor is not entitled to indemnity. In the instant case, the Lessor, by not entering into a written lease agreement, did not attempt to change its statutory responsibility. Therefore, the Lessor agreed to provide liability insurance coverage as part of the rental agreement and is not entitled to indemnity.

The Respondents also cited the case of Insurance Company of North America v. Avis Rent a Car, 348 So.2d 1149, (Fla. 1977) which can also be distinguished on its facts from the case at bar. In I.N.A. v. Avis, the Lessor and Lessee's written rental agreement provided that the Lessor's liability coverage would be $500,000.00 per person and $ 1 million per accident and that Lessee's would be $100,000.00 per person and $300,000.00 per accident. Under this set of facts, the Court held that the Lessor could seek indemnity from the Lessee for any amounts paid over $100,000.00 per person and $300,000.00 per accident, but less than $500,000.00 per person and $1 million per accident. The Court specifically noted that the Avis case is an exception to Roth v. Old Republic

Insurance Co., 269 So.2d 3 (Fla. 1972), where the general rule of barring indemnity was applied. In Avis, the parties had specifically contracted between themselves as to the allocation of risk between the Lessor and the Lessee in excess of the minimum coverage required by Statute. In essence, the parties had specifically contracted between themselves as to the right to indemnity. Therefore, the Supreme Court held that "the parties were free to contract between themselves to shift the burden of loss" once they had met the statutory minimum requirements.

A recent decision of the Fifth District Court of Appeal addresses the issue as to whether the Lessor or the Lessee's insurance coverage is responsible once the minimum requirements of the Financial Responsibility Law are met, based upon a written rental agreement. In Allstate Insurance Company of Canada v. Value Rent-A-Car of Florida, Inc., 10 F.L.W. 117 (Fla. 5th DCA 1985), Opinion filed January 3, 1985, the Court agreed with Petitioner's argument that the Second District Court of Appeal in Patton, relying on I.N.A. v. Avis, supra., found that the "hold harmless" or "escape clause", in the rental agreement was controlling. Relying on Racecon, supra., and Patton, which had similar facts to that case, the Court held that the Lessor was primarily responsible only up to the financial responsibility limits and that the Lessee is primarily responsible thereafter up to the limits of its policy, because of the Lessor's "escape clause".

Both the Fifth District Courtof Appeal in Allstate and the Fourth District Court of Appeal in the instant case overlook that Section 627.7263, Florida Statutes, does not provide that once the Lessor has met the minimum Financial Responsibility requirements, the responsibility for excess coverage shifts to the Lessee and its insurer. In Sentry Indemnity Co. v. Hartford Accident and Insurance Co., 425 So 2d 652 (Fla. 5th DCA 1983), the Court noted:

> The legislature intended to protect unwary lessees of motor vehicles from responsibility of providing insurance unless their liability was conspicuously designated in 'bold type' under the requirements of the present §627.7263.

The Statute permits the Lessor to shift its primary coverage responsibility, but at the same time upholds the public policy of the state that Lessees, in the absence of "bold type" warnings in a written lease agreement, would not be responsible for providing insurance. Public policy would dictate that where a Lessor undertook to provide primary coverage, the Lessor's coverage would be primary not only to the minimum requirements of the Financial Responsibility Law, but to the full limits of liability insurance afforded the Lessor since the Lessee was not placed on notice of any responsibility for providing insurance. As the First District Court of Appeal held in State Farm Mutual Automobile Insurance Company v.

Universal Underwriters Insurance Co., 365 So.2d 778 (Fla. 1st DCA 1978), where there is double or overlapping insurance coverage by an insurer of an automobile driver and an insurer of an automobile owner, the insurer of the driver of the automobile should be liable for damages awarded to injured third persons by the driver's negligence only when the coverage of the owner's policy has been exhausted.

Under Florida law, it is well settled that in insurer cannot seek indemnification from its insured. Marina Del Americana, Inc., v. Miller, 330 So.2d 164 (Fla. 4th DCA 1976); Ray v. Earl, supra. In Ray, the Court held that where the driver was using the vehicle with the owner's permission, knowledge and consent and was insured under the policy defining insured as a person using the automobile with the insured's consent, the insurer of the owner was barred from seeking indemnity from the permissive user and his insurer.

In the instant case, the Lessor and Lessee did not contract between themselves so as to shift the burden of loss. Therefore, the Lessor agreed to be primary. While the Lessor was only required to provide liability coverage which complied with the minimum requirements of the Financial Responsibility Law, the Lessor chose higher coverage. Since the parties did not contract between themselves so as to allow for the right of indemnity beyond the minimum statutory

requirements, the Lessor is not entitled to common law indemnity since the Lessee is an additional insured as a permissive user under the RELIANCE policy.

## ARGUMENT

II. WHETHER AN AWARD OF ATTORNEY'S FEES IS PROPER TO A LESSEE FROM A LESSOR IN AN ACTION WHERE THE LESSOR OF A MOTOR VEHICLE IS FOUND TO BE PRIMARILY RESPONSIBLE FOR INSURANCE COVERAGE ONLY UP TO THE MINIMUM FINANCIAL RESPONSIBILITY REQUIREMENTS OF FLORIDA STATUTE §627.7263.

The issue presented to the Fourth District Court of Appeal in Case No: 83-1616, was whether the insurance coverage of the Lessor of a motor vehicle, in the absence of a written lease, is primary for the limits of liability afforded the Lessor, or is it primary for the limits of liability required by the Financial Responsibility Law.

The issue presented to the Fourth District Court of Appeal in Case No: 83-2725, was whether attorney's fees should be awarded to a Lessee when the Lessor is found primarly liable for insurance coverage only up to the minimum financial responsibility requirements. By stipulation of the parties and Order of the Fourth District Court of Appeal, both appeals were consolidated. (App. Ex. 10) In the Opinion of the Fourth District Court of Appeal (App. Ex. 5), the Court makes no mention of the award of attorney's fees specifically.

On appeal to the Fourth District Court of Appeal, Respondents conceded that the trial court properly entered Final Summary Judgment in favor of Petitioners on the following points:

1. That the insurance coverage afforded Lessor, SALMON, is primary.

2. That Respondent, RELIANCE, the insurance for Lessor, had a duty to defend the Petitioners in the action brought by the Plaintiffs.

3. That Respondent, RELIANCE, must reimburse Petitioner, MARYLAND, the sum of $2,017.28 for property damage which MARYLAND paid prior to determining the existence of the RELIANCE policy.

Accordingly, Petitioners are entitled to attorney's fees regardless of any issue as to the extent to which Respondent, RELIANCE'S, coverage is primary. The Final Judgment awarding attorney's fees should be affirmed. Respondent, RELIANCE, did not concede that its coverage was primary or that it had a duty to defend or that it was responsible for the property damage until the appellate court level. Under Florida law, if RELIANCE was primarily liable, no matter to what extent, RELIANCE still would have a duty to defend the Petitioners and, therefore, the Final Judgment awarding attorney's fees should be affirmed.

## CONCLUSION

In conclusion, in the absence of a written lease, the insurance coverage of Lessor of a motor vehicle is primary for the limits of liability afforded the Lessor and not only up to the limits of the Financial Responsibility Law.

Regardless of any issue as to the extent to which the insurance coverage provided by RELIANCE is primary, the trial court properly awarded attorney's fees to the Lessee where the Lessor denied at the trial court level that it was primary to any extent, that it had a duty to defend and that it was responsible for reimbursing Lessee's insurer for property damage paid prior to determining the existence of the Lessor's policy.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail this 13th day of February, 1985 to: SCOTT N. RICHARDSON, ESQ., 2000 Palm Beach Lakes Blvd., West Palm Beach, Florida 33409, and R. FRED LEWIS, ESQ., 25 S.E. 2nd Ave., Suite 730, Miami, Florida 33131.

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