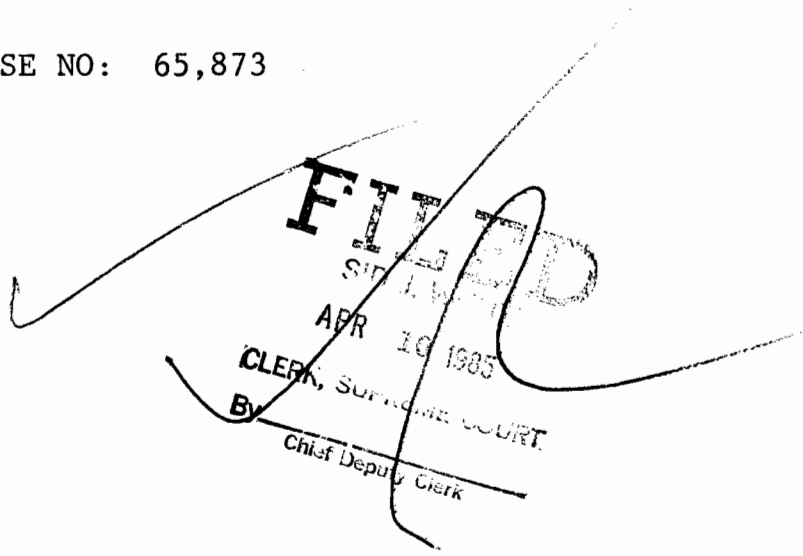
IN THE SUPREME COURT OF THE
STATE OF FLORIDA

CASE NO: 65,873




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

Petitioners,

vs.

RELIANCE INSURANCE COMPANY
and BOB SALMON, INC.,

Respondents.

_____/

PETITIONERS' REPLY BRIEF ON THE MERITS

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## TABLE OF CONTENTS

TABLE OF CITATIONS

## ISSUE 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 GROUNDS OR OBJECTIONS CONCERNING AN AWARD OF ATTORNEY FEES NOT TIMELY RAISED AND RULED UPON BY THE TRIAL COURT MAY BE RAISED FOR THE FIRST TIME IN THE APPELLATE COURT.

## 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.

Florida common law recognizes that a motor vehicle owner who has primary responsibility for damages caused as a result of the negligent use of the vehicle and who is only vicariously liabile for injuries, is entitled to indemnification from the negligent operator. However, Section 627.7263, Florida Statutes, modified the common law and requires that the insurance coverage of the lessor of a motor vehicle, in the absence of a written lease, be primary. While the lessor is only required to provide liability coverage which complies with the minimal requirements of the Florida financial responsibility laws, the lessor may choose higher coverage. In the case at bar, the lessor did not contract in writing or put the lessee on notice so as to shift the burden of loss from the lessor or so as to allow for the right of indemnification. Moreover, the lessee is a permissive user and an insured under the lessor's policy. Thus, under the facts of this case, the lessor is primary for the limits of liability selected by the lessor, in the absence of compliance with the statutory method of shifting the loss. Therefore,

contrary to Respondents' argument, Section 627.7263 does not provide that in the absence of a written lease, the lessor is not required to provide primary protection for a lessee beyond the minimum statutory requirements when the lessee has applicable insurance coverage.

## SUMMARY OF ARGUMENT

II. WHETHER GROUNDS OR OBJECTIONS CONCERNING AN AWARD OR ATTORNEY FEES NOT TIMELY RAISED AND RULED UPON BY THE TRIAL COURT MAY BE RAISED FOR THE FIRST TIME IN THE APPELLATE COURT.

On appeal to the Supreme Court, the Respondents argue, for the first time, that an insurance company which has a contractual duty to provide a legal defense for its named insured is not entitled to reimbursement for attorney's fees from a separate insurance company which has a separate obligation to provide a legal defense. Respondents did not timely raise this ground or objection to the award of attorney's fees so that it could be ruled upon by the trial court. Under Florida law, errors raised for the first time on appeal are deemed to be waived, and when argued in briefs, may be stricken. Therefore, the merits of Respondents' argument against the propriety of the award of attorney's fees in that regard should not be considered by this Court.

It is undisputed that the trial court properly entered Final Summary Judgment in favor of Petitioners with respect to the findings that the insurance coverage afforded Respondent/Lessor was primary, that the Respondent/Lessor's insurer had a duty to defend Petitioners and that Respondent insurer must reimburse Petitioner/Lessee's insurer for property damages. Since it was necessary for Petitioners to litigate against

Respondents to obtain the Final Summary Judgment pursuant to Section 627.7263, and since there was no justiciable issue as to the above findings, Petitioners are entitled to an award of attorneys' fees.

## 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.

Respondents argue that the decision of the Second District Court of Appeal in Patton v. Lindo's Rent-A-Car, Inc., 415 So.2d 43 (Fla. 2d DCA 1982), is controlling as to the extent to which a lessor's insurance coverage is primary in the absence of a written lease. However, Respondents fail to point out that the Patton decision involved a written lease which failed to comply with the requirements of Section 627.7263, Florida Statutes as to the method of shifting primary responsibility from the lessor to the lessee.

Moreover, Respondents fail to address the fact that the lessor's insurance policy in Patton contained an "escape clause", while in the case at bar, the lessor's and/or lessee's respective insurance policies contain mutually repugnant "escape clauses" or other insurance clauses. The reason the Second District Court of Appeal ruled that the lessor's insurer was primarily liable only to the minimum requirements of the state's financial responsibility laws was because of the lessor's "escape clause". In that way, the Court forced the lessor to comply with the minimum statutory requirements and still gave

force and effect to the escape clause and the remaining provisions of the lessor's insurance policy. In the case at bar, since there is no written lease, to give force and effect to the provisions of the parties' respective insurance policies, the insurance coverage afforded the lessor should be primary to the limits of liability afforded the lessor. This is precisely the position asserted by the Fifth District Court of Appeal in Sunshine Dodge, Inc. v. Ketchem, 445 So.2d 395 (Fla. 5th DCA 1984).

In addition, Respondents cite 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, as authoritative. However, in this case, the Fifth District Court of Appeal, citing Patton, simply gave effect to the lessor's "escape clause" or "hold harmless" clause in the rental agreement in limiting the lessor's primary liability to the minimum requirements of the financial responsibility laws. Therefore, like Sunshine Dodge and Patton, the Allstate decision is an attempt to reconcile the language of the insurance policies and the written lease agreements with the statute.

Respondents assert that the lessor did not specifically contract to provide insurance coverage for the operation of the leased motor vehicle. Of course, this is true; there was no written agreement between the lessor and

lessee. Petitioners assert that it is the absence of a written agreement and the existence of the lessor's and lessee's mutually repugnant escape clauses which mandate that the lessor be primary to the limits of its liability coverage and the Respondents are not entitled to indemnity above the limits required by the financial responsibility laws. Moreover, since the lessee's employee, KINGMAN, was a permissive user of the vehicle, and thus an insured under the lessor's policy, Respondents may not seek indemnity from the Petitioners. See Marina Del Americana, Inc. v. Miller, 330 So.2d 164 (Fla. 4th DCA 1976), Ray v. Earl, 277 So.2d 73 (Fla. 2d DCA 1973).

Respondents cite Allstate Insurance Co. v. Fowler, 455 So.2d 506 (Fla. 1st DCA 1984), Hartford Accident & Indemnity Co. v. Kellman, 375 So.2d 26 (Fla. 3d DCA 1979), Cert. den., 385 So.2d 755 (Fla. 1980) and Sentry Ins. Co. v. Aetna Ins. Co., 450 So.2d 1233 (Fla. 2d DCA 1984). None of these cases are relevant to the issue on appeal. In the Allstate decision, the First District Court of Appeal reversed a summary judgment where a genuine issue of material fact existed as to the lessor's vicarious liability. The Hartford decision is inapplicable to the case at bar. There six insurance policies were construed, none of which contained "escape clauses". Moreover, no mention is made of the applicability of Section 627.7263, Florida Statutes or insurance policy clauses in either the

Allstate or Hartford cases. The Sentry decision simply holds that where there are multiple insurance policies involved, the insurance contracts should be reviewed to determine priorities among insurers. However, the decision provides no insight as to the resolution of the issue addressing this Court.

Thus, the lessor of a motor vehicle is required to provide primary insurance coverage for a lessee, in the absence of a written agreement, to the limits of liability afforded the lessor under the facts of this case. Moreover, public policy mandates that a lessee be provided written notice and be clearly informed that he will be responsible for insurance coverage during his use and operation of the vehicle.

In the absence of written notice as specified in Section 627.7263, Florida Statutes, the lessor's coverage should be primary to the full limits of liability which the lessor selected. In this way, the legislature will be affording the lessee who lacks written notice the full benefit of the lessor's knowledgeable selection of insurance coverage for the vehicle involved. It should be irrelevant whether the lessee has maintained applicable liability insurance. It should also be irrelevant whether the lessor selected the minimum insurance coverage required by the financial responsibility laws or opted for higher insurance coverage where the lessee has not received

statutory written notice of protection.

## ARGUMENT

### II. WHETHER GROUNDS OR OBJECTIONS CONCERNING AN AWARD OF ATTORNEY FEES NOT TIMELY RAISED AND RULED UPON BY THE TRIAL COURT MAY BE RAISED FOR THE FIRST TIME IN THE APPELLATE COURT.

Respondents argue, for the first time, that the award of attorney's fees by the trial court was improper based upon the decision of the Third District Court of Appeal in Argonaut Insurance Company v. Maryland Casualty Company, 372 So.2d 960 (Fla. 3d DCA 1979). See Respondents' Briefs to the Fourth District Court of Appeal. The case law clearly holds that questions, points, grounds or objections not timely raised and ruled upon by the trial court may not be raised for the first time on the appellate court. It is the duty of the appellate court to confine the parties to points raised in the trial court. Therefore, errors raised for the first time on appeal should be deemed to be waived and stricken when argued in briefs. Murray v. Chillemi, 396 So.2d 1222 (Fla. 4th DCA 1981); Bryant v. Schmoor, 393 So.2d 41 (Fla. 3rd DCA 1981); Jaffe v. Endure-A-Life Time Awning Sales, Inc., 98 So.2d 77 (Fla. 1957); International Association of Machinists v. St. Regis Paper Co., 125 So.2d 337 (Fla. 1st DCA 1960), 131 So.2d 29 (Fla. 1st DCA 1960), Cert.den. 138 So.2d 333 (Fla. 1961); Cowart v. West Palm Beach, 255 So.2d 673 (Fla. 1971). Where there is no showing in the briefs or in the record that the ground or objection was ever presented to the trial court, the trial court's

objection should be affirmed. Ballen v. Plaza Del Prado Condominium Assoc., 319 So.2d 90 (Fla. 3rd DCA 1975). Since Respondents failed to raise the Argonaut decision or argument at the trial court level, Respondents' argument in this regard should be stricken. A review of Respondents' briefs to the Fourth District Court of Appeal reflect that Respondents did not make this argument until the Supreme Court level.

Secondly, the Argonaut decision is inapplicable to the case at bar. Argonaut does not address the situation where the lessor and its insurer are co-defendants with the Lessee and its insurer in a lawsuit and demand has been made by the lessee and its insurer that their defense be taken over by the lessor and/or its insurer, that the lessor's liability coverage be provided on a primary basis, and that the lessor and/or its insurer reimburse the lessee's insurer for property damage paid pursuant to Sections 324.021, 627.7263 and 627.736, Florida Statutes. Respondents argued to the Fourth District Court of Appeal that the attorney's fee award would be proper if Respondents were primarily liable to the limits of liability coverage afforded the lessor. Respondents conceded, on appeal to the Fourth District, for the first time, the propriety of the remaining findings of the Final Summary Judgment in question.

Finally, under Section 57.105, Florida Statutes, Petitioners would be entitled to an award of attorney's fees. There was no justiciable issue that the insurance coverage afforded the Respondent/lessor was primary, that the Respondents had a duty to defend the Petitioners and that Respondent insurer owed Petitioner insurer reimbursement for property damage paid prior to determining the existence of lessor's insurance coverage pursuant to the above mentioned statutes.

## CONCLUSION

For the foregoing reasons and the arguments and authorities noted in Petitioners' Initial Brief on the Merits, it is respectfully submitted that the decision of the Fourth District Court of Appeal be reversed, that the trial court's Final Summary Judgment be reinstated and that the Petitioners be awarded attorney's fees on appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail this 8th day of April, 1985 to: Scott N. Richardson, Esq., Reid & Ricca, P.A., Attorneys for Defendants, RELIANCE/SALMON, P. O. Drawer 2926, West Palm Beach, FL 33402; Richard J. Meehan, Esq., Meehan and Foley, Attorneys for Plaintiffs, Suite 503, 4440 PGA Boulevard, Palm Beach Gardens, FL 33410; and R. Fred Lewis, Magill & Lewis, P.A., 25 S.E. Second Avenue, Suite 730, Ingraham Building, Miami, Fl. 33131.

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