IN THE SUPREME COURT OF FLORIDA

ALLSTATE INSURANCE COMPANY,

Petitioner,

vs.

ALLEN L. FOWLER, et al.,

Respondents.

_____/

Case No. 65,986

Discretionary Review of the
District Court of Appeal,
First District

PETITIONER'S REPLY BRIEF

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VI. WHETHER THE DISTRICT COURT ERRED IN APPLYING THE METHODOLOGY SET FORTH IN ITS OPINION TO THE FACTS OF THIS CASE.

STATEMENT OF THE CASE AND OF THE FACTS

Allstate is appealing to this Court, as it did to the First District, the granting of a summary final judgment in favor of Travelers in a declaratory judgment action to determine the issue of insurance coverage vis-a-vis an injured plaintiff. [R:98, 99]. Travelers, in its brief, apparently misperceives what is before this Court, since Travelers discusses at length the separate suit between the injured plaintiff Fowler and the vehicle owner, permissive user and insurers. That litigation has just been settled by Allstate and is not before the Court. As such, it is totally incorrect for Travelers to state, at pages 1 and 2 of its Answer Brief, that "(w)hether Allstate should be reimbursed through the Travelers Excess Policy for the $62,500 it has paid is the remaining issue in the case." That is not the issue in this case. The issue in this case, as stated by Allstate and apparently concurred in by Travelers throughout this litigation up until its Answer Brief, is a determination of coverage between insurers. Specifically, the issue is whether Allstate or Travelers must provide first level excess coverage to the Travelers Business Automobile Policy, i.e., whether Travelers' excess policy which is silent on "other insurance" comes before Allstate's policy, which expressly declares it is excess over other collectible insurance. Generally, the issue is how that contractual coverage question will be answered, i.e., whether the policies in question will be analyzed to determine what they provide by way of coverage and their relation to other insurers [Allstate's position] or whether the contractual language of the policies will

be totally ignored and tort principles of liability followed instead [Travelers' position]. This coverage issue is the issue sought by Allstate to be decided by this Court.

I.

Allstate, of necessity, reiterates some of its argument in its initial brief to this Court because of the extreme obfuscation of the issue on appeal that is so apparent in Travelers' Answer Brief. That brief, barren of relevant citations of authority but full of much sound and fury, nobly argues that "the important principle is to see that the innocent third party is compensated and that disputes by insurance companies do not cause unnecessary delays in that compensation." [Answer Brief at 12]. Allstate voices no disagreement with that lofty aim. However, the procedural history of this case does not cast Travelers in such a shining role as it would have this Court to believe. It was Travelers, as issuer of two policies of liability insurance to owner and lessor, Enterprise, at least one of which insured Morrison, that refused to defend Morrison in the action filed by the injured plaintiff, Fowler. [See R: 109]. Because of that refusal to defend, in express contravention to section 627.7263, Florida Statutes (1981), Allstate had to file a declaratory judgment action in Nassau County which named Enterprise, Travelers, Morrison and Fowler as defendants. [R: 107]. Allstate had to spend divers sums for the costs of that lawsuit, including reasonable attorney's fees, to determine who had the duty to defend Morrison on the claim by Fowler. It was Travelers which necessitated this litigation between insurance carriers by its intransigence in refusing to defend

its own insured, Morrison. Travelers declined to follow well-settled law that the duty of a liability insurer to defend its insured is distinct from, and broader than, the duty to pay. State Farm Mutual Automobile Insurance Company v. Universal Atlas Cement Company, 406 So.2d 1184 (Fla. 1st DCA 1981); Florida Farm Bureau Mutual Insurance Company v. Rice, 393 So.2d 552 (Fla. 1st DCA 1980). Allstate, below, asked the trial court in the declaratory judgment action to hold Travelers to be the primary insurer in accordance with Enterprise's lease agreement with Morrison. Only after Allstate filed suit did Travelers and Enterprise concede that the Enterprise lease violated section 627.7263. Accordingly, as the primary insurer providing coverage for Enterprise and Morrison, Travelers would have the duty to provide Morrison with a defense in a suit by Fowler. Assuming a verdict in favor of Fowler, Travelers and Enterprise could be required to pay that total judgment pursuant to the dangerous instrumentality doctrine which holds an owner jointly liable in tort with a lessee/driver to an injured plaintiff. At that point, the innocent third party would be compensated and his litigation would be at an end. Public policy would be satisfied in that the injured party had its money. At that point, Travelers could then have sought indemnity against Allstate if it felt that it had been compelled to pay damages (as insurer of a vicarious owner) that ought to have been paid by the wrongdoer (to the extent that the Travelers policies did not provide coverage to the active tortfeasor). That suit would have been between insurance companies only and not have included Fowler. That suit would in nowise have violated "the important principle that

the innocent third party is compensated and that disputes by insurance companies do not cause unnecessary delays in that compensation."

It has only been Travelers (and presumably its insured, Enterprise) that has sought to inject a dispute between insurance companies into the primary action by the injured plaintiff [Fowler] which sought recovery for his damages. In this regard, it is noteworthy that while this action has been pending before this Court, it was Allstate which settled the suit instituted by plaintiff Fowler by payment to Fowler of his total damages in excess of the required $10,000 mandated by the Travelers' Business Automobile Policy. It was Allstate's full settlement with Fowler, (in a case where Allstate should not have even been a major participant if Travelers had performed both its contractual and statutory duty to provide a defense to its insured Morrison), that allowed the injured plaintiff to receive his compensation. If Travelers did indeed practice what it so piously preaches in appellate briefs, Travelers would have settled with the injured plaintiff long ago, allowed that innocent party to be compensated, and then sought indemnity against Allstate. However, Travelers remained silent on settlement with the injured plaintiff and therefore it was Allstate that stepped in to ensure the fulfillment of "the important principle . . . that the innocent third party is compensated and that disputes by insurance companies do not cause unnecessary delays in that compensation."

Lastly, an opinion of the Fourth District published just two days after service of Travelers' Answer Brief portrays in bold relief the shortcomings and error of the First District's opinion which is

the subject of appeal in this case. Chicago Insurance Company v. Soucy, 9 F.L.W. 2485 (Fla. 4th DCA Nov. 28, 1984) [Appendix A], shows the extent to which a court, following the "rule" set forth in Hartford Accident and Indemnity Co. v. Kellman, 375 So.2d 26 (Fla. 3d DCA 1979), (that the order of responsibility for coverage is determined through the principle that a driver is responsible first and not determined through an examination of insurance policy provisions), can become mired in extraneous formalisms and misapply the appropriate rule of law.

In Soucy, LaCavalla owned a motor vehicle that was insured through a policy of primary liability insurance with Travelers. Chicago insured LaCavalla through an excess insurance policy. Metropolitan insured the permissive user, Trueman. At the trial level, Travelers conceded that its coverage was primary to the other two policies. The trial court then relied upon the Kellman rule that all insurance policies applying coverage in the same "class of responsibility" had to be exhausted before the coverages provided by policies in another "class of responsibility" were reached. It held that since the owner's primary carrier, Travelers, had the first responsibility to pay, then Chicago, as the owner's excess carrier, being in the same class as Travelers as an insurer of the class of owners, was thus responsible for the next level of coverage. Lastly, Metropolitan, the insurer of the driver, a member of a different class of responsibility than the owner, had the last level of coverage.

The Fourth District disagreed and reversed. It cited its disagreement with the Kellman rule and explicitly acknowledged its conflict with the Kellman decision. It noted that the Kellman court did not define what "in the same class" meant but that presumably this was a reference to owners or drivers considered as separate classes of insureds. It then cited the instant case on appeal before this Court as providing the rule that if the owner is only vicariously liable because of the dangerous instrumentality doctrine, then his insurer should be entitled to be subequent in coverage to the insurer of the negligent driver. Applying that to the case before it, the Fourth District held that Travelers had the first level of coverage, Metropolitan the second level, and Chicago the third level.

The Soucy opinion is quite instructive to the present case on appeal. The reasoning engaged in by the Soucy trial court in its application of Kellman[1] highlights how erroneous Kellman is. The trial court looked at no provision of any of the three policies to determine the relationship of each of the policies to the others on the question of coverage vis-a-vis the injured plaintiff. Rather than analyzing the policies to see if they contained language that determined priorities of coverage, the trial court apparently ignored all language within the policies that described how they related each to the other and instead blindly followed Kellman. It held that since it had been conceded that the owner's primary policy was first

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[1]Which case, as Allstate has argued in its Initial Brief to this Court, fails to follow the clear rule of law laid down by the Supreme Court in Insurance Company of North America v. Avis Rent-A-Car System, Inc., 348 So.2d 1149 (Fla. 1977).

in coverage, all other owner's policies (being of the same class) would be exhausted before any policy insuring any other class of responsibility (i.e., a driver) would come into play. Allstate certainly disagrees with this reasoning of the Soucy trial court as it completely ignores coverage-determining policy language for which insureds have paid a premium and on the basis of which liability insurers have set their rates based upon potential exposure to loss.

However, while the Fourth District reversed these actions of the Soucy trial court as error, that appellate court itself erred by doing what the First District below did -- it ignored coverage-determining policy language and confused indemnity between insurers with coverage vis-a-vis a plaintiff. The issue before the Soucy trial court was the order of coverage vis-a-vis the injured plaintiff. From the facts reported in the Soucy opinion, it is seen that Chicago was appealing the entry of a summary final judgment on the issue as to order of coverage. There is no mention in the Soucy opinion that that action was one sounding in indemnity. Yet, the Fourth District, as the First District did below in the instant appeal, injected the issue of indemnity in a coverage dispute and held that notwithstanding any language in any of the policies that showed how the policies answered the coverage question at issue, a negligent tortfeasor's insurer had to indemnify a vicariously-liable tortfeasor's insurer. While Allstate does not dispute that an active tortfeasor has a duty to indemnify one who is only vicariously liable, that apparently was not the issue in Soucy and clearly was not the issue in the proceedings in the instant case below.

Soucy becomes most meaningful in its discussion of Metropolitan's argument that since Chicago's policy incorporates all of the terms of the underlying Travelers' policy, then Chicago's claim of indemnity should be barred because the tortfeasor would therefore be an insured of Chicago. The Fourth District disagreed with Metropolitan's argument but it did so only after analyzing the terms of each of the insurance policies! It found that Chicago's policy expressly provided that its coverage would be excess to that of any other policy of insurance and therefore its coverage would be last in line.[2] Without belaboring the point, this analysis is exactly what Allstate has argued for throughout this case, from the trial court up to the Supreme Court. Allstate has requested simply that as to issues of priority of coverage, a court should follow the rule set forth in Insurance Company of North America that contracts of insurance be analyzed to see how they mesh together in providing for coverage vis-a-vis an injured plaintiff (not indemnity between insurance companies). If the Soucy trial and appellate courts had done this, the issues of "classes of responsibility" and remands to plead and prove vicarious liability would be rendered unnecessary, as truly they are. "Clever wordsmith" arguments notwithstanding, it is indeed the policies of insurance to which a court must look in order to determine the extent of coverage for which an insured paid

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[2]It is on this point that Soucy is factually dissimilar to the instant case on appeal. In the case sub judice, the Travelers' excess policy, unlike the Chicago excess policy in Soucy, is wholly silent as to whether it is excess to any other policy. Allstate's policy, on the other hand, specifically provides that it is excess to all other collectible insurance.

a premium to an insurer. Quite simply, what Allstate is arguing is that coverage questions vis-a-vis an injured plaintiff are a matter of insurance law, while later (if any) indemnity questions between insurers themselves, after the plaintiff has received his compensation, are a matter of tort law. Only then, after the plaintiff has received his compensation, would issues of indemnity or contribution become important.

Accordingly, by Allstate's reasoning, it is seen that the Soucy appellate court came up with the right result but for the wrong reason. On the issue of coverage vis-a-vis the injured plaintiff, had the court examined the appropriate policy provisions as per the holding of Insurance Company of North America, it would have found that the owner's primary policy provided first level coverage; and, of the remaining two policies, that only one provided that it would be excess to all other policies of insurance. The policy which contained the excess clause, Chicago's, would then be the last policy in line of coverage, following that of the policy silent as to its relationship to other insurance. The injured plaintiff would then know which insurer would owe him recovery and in what order, and his litigation would be simplified. The insurers would know which order each came vis-a-vis the plaintiff, and none would be responsible for any more coverage than what each accepted a premium for from its insured. Similarly, had the First District followed Insurance Company of North America in the case sub judice, it would have likewise found that the owner's primary policy [the Travelers Business Automobile Policy] provided first level coverage;

and, of the remaining two policies [the Travelers Excess Liability Policy and the Allstate Automobile Policy], that only one [the Allstate Automobile Policy] provided that it would be excess to all other policies of insurance. That one, Allstate's, would then be the last policy in line of coverage. The injured plaintiff, Fowler, would know which insurers -- insuring the joint and severally liable owner Enterprise and driver Morrison -- would owe him recovery and in what order, and his litigation would be simplified. The insurers would know which order each came vis-a-vis the plaintiff, and none would be responsible for any more coverage than for which each had accepted a premium from its insured.

II.

Allstate has but two brief responses to Travelers' comments on this issue. First, Allstate again draws attention to the fact that Travelers, as did the trial court and the First DCA, incorrectly interchanges "coverage" with "indemnity." The action below was one to determine a coverage question. As such, it was a matter of insurance and contract law, and one on which a court could rule as a matter of law. There was no issue plead by any party as to the recovery by one insurer of any sums that it may have to pay to the injured plaintiff by virtue of insurance coverage on the owner of a leased vehicle. As correctly noted by the First District, "Enterprise's [and Travelers] complaint did not plead its right to indemnity." Allstate Insurance Company v. Fowler, 9 F.L.W. 1772, 1773 (Fla. 1st DCA Aug. 15, 1984). For Travelers now to argue before this Court, at this late date, that it is entitled to

indemnity because Enterprise is only vicariously liable, is to ignore that Travelers never sought indemnity below (as correctly noted by the First District). All parties below were interested in the coverage question vis-a-vis the plaintiff Fowler. Only after that issue was settled, and the plaintiff out of the suit with his recovery, would the insurance parties litigate among themselves questions of indemnity or contribution.

Second, the cases cited by Travelers in its Answer Brief at pages 15-18 (the same cases cited in the Fowler opinion below), are all distinguishable precisely because they are all indemnity cases. Allstate has no argument with those cases nor with the proposition that one only vicariously liable is ultimately entitled to indemnity from one actively liable. What Allstate does take issue with, though, is the applicability of indemnity cases to an initial coverage case. [See footnote 5 of Allstate's Initial Brief, pp. 29-30].

III.

Allstate responds to the eighteen lines devoted to Sentry in Travelers' Answer Brief as follows:

It is simply incorrect for Travelers to claim that "[t]he issue in Sentry involved liability of an employer's insurer not liability of an owner's insurer as in the instant case." [Answer Brief at 19] (emphasis in original). Even a cursory reading of Sentry discloses that it was precisely because Kirby Gould had an owner's policy, through which his daughter, Rebecca, the active tortfeasor, could have been an additional insured, that prompted the Second District to vacate a summary judgment in favor of the insurer of the vehicle's owner.

Notwithstanding this attempt at distinguishing Sentry, Travelers has failed to respond to the arguments offered by the Second District in Sentry as to the preferrment of the rule of law mandated by the Supreme Court in Insurance Company of North America over that of the Third District in Kellman. Apparently, Travelers concedes the applicability of the holding in Sentry.

IV.

Mention needs to be made of comments in Travelers' Answer Brief relating to the Market Insurance Company case. Travelers argued that Market had no legal reason or basis to defend Mrs. Morse unless its policy provided coverage to Mrs. Morse as a permissive operator of National's vehicle. "The Market and Aetna policies must have both included Mrs. Morse as an insured." [Answer Brief at 20]. Even a cursory examination of the Market Insurance Company opinion at page 558 shows otherwise. In Market Insurance Company, the court held that National, as the primary insurer [Travelers Business Automobile Policy in our case] had the duty to defend Mrs. Morse, the tortfeasor driver [Morrison] up to the limits of its liability [$10,000 in our case]. When that liability was seen to be exceeded, "then Market [Travelers], as the 'excess insurer', was obliged to take over the legal representation . . . " 296 So.2d at 558. The opinion clearly states, in addition, that Mrs. Morse [Morrison] was insured by Aetna [Allstate], and Market [Travelers] only defended Mrs. Morse "under protest." 296 So.2d at 557. Accordingly, although Market [Travelers] contended that it provided coverage only to its insured, National Car Rentals, this was deemed irrelevant in the appellant court's ruling

on the layer of coverage issue as well as the duty to defend. It is clear that the appellate court in Market Insurance Company was mindful of the joint and several liability of the lessor and lessee to the plaintiff in that case and therefore disregarded any distinction as to which insurance company insured the vehicle or driver. Travelers' bold-faced allegation that the Market policy in Market Insurance Company "must have" included Mrs. Morse as an insured, is not supported by the facts of that case and is irrelevant to the holding therein as well as the present case. Allstate reiterates that Market Insurance Company is on all fours with the facts of our case on appeal and mandates a quashing of the First District's opinion.

V. and VI.

Travelers declined to respond to Allstate's argument on these issues and apparently concedes the correctness of that argument.

SUMMARY

The altruistic position espoused by Travelers and Enterprise in their brief is that to avoid circuity of action, a court need not look at the language in any policy of insurance to see what coverage is provided therein in a lawsuit seeking to determine coverage, except in the rare situation of two policies covering the "same entities." [Answer Brief at 21-22]. By this self-serving position, Travelers and Enterprise (and the First District through its opinion) are requesting a sweeping upheaval in insurance liability rate structures that ultimately would generate a premium windfall for insurance companies which insure commercially leased vehicles (such as Travelers). Insurers have traditionally based their short and

long range rate structure on the level and type of insurance coverage being sought, vis-a-vis other carriers. In this regard, insurers have drafted their policies to determine precisely how their coverage provisions will mesh with that of other insurers, both primary and excess. This Court is well aware of pro-rata or proportionate recovery clauses, excess clauses, and no liability clauses, for example. See Sentry at 1236. By so drafting their policies, uniformity and predictability are built into the liability insurance business, an industry heavily regulated by the legislative branch of government. Furthermore, these insurers have charged their customers on the basis of the rate structure and contracted with them to provide the coverage paid for -- no more but no less. By Travelers' and Enterprise's proposal, as well as the First District's reasoning in the opinion below, there would be a change in exposure to many insureds. This would necessarily result in some insureds being overcharged and some undercharged. A revision in rates would be required. Allstate forcefully argues that if in fact Florida is going to adopt the policy that contract language in insurance policies be disregarded in disputes over coverage, this should be implemented by the legislature on a prospective basis and not in mid-stream by judicial fiat.

CONCLUSION

Allstate respectfully requests this Court to follow its own pronouncement in Insurance Company of North America and interpret, in a declaratory judgment action seeking a determination of coverage of insurance policies toward an injured plaintiff, the provisions

contained within the policies of Travelers and Allstate that define coverage. Analyzing said policies, this Court will find that Allstate's policy is, by its own express language, excess over any "collectible insurance" while the Travelers' policies either explicitly state they are primary or are silent with respect to "other insurance." This Court should then hold, as a matter of law, that Allstate's coverage is excess over that provided by both Travelers' policies. Accordingly, the opinion of the District Court should be quashed in its entirety, and summary judgment ordered entered in favor of Allstate.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail to William S. Burns, Esquire, 400 Southeast Bank Bldg., Jacksonville, Florida 32202; Henry Clay Mitchell, Esquire, P.O. Box 12308, Pensacola, Floria 32581; Albin C. Thompson, Esquire, P.O. Box 711, Fernandina Beach, Florida 32034; and S. Thompson Tygart, Jr., Esquire 609 Barnett Regency Tower, Jacksonville, Florida 32211, by U.S. Mail this 21st day of December, 1984.

Respectfully submitted,

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