IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Petitioner,

vs. CASE NO. 66,342

TERRI GANT, a minor, etc., and
JACK L. GANT and DONNA GANT,
individually and as personal
representatives of the Estate of
Lisa S. Gant, deceased,

Resondents.

ON CERTIFIED CONFLICT FROM THE SECOND DISTRICT COURT OF APPEAL,
LAKELAND, FLORIDA

PETITIONER'S REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

REPLY ARGUMENT

SECTION 627.4132, FLORIDA STATUTES (1980), AS A STATUTORY AMENDMENT ENACTED SUBSEQUENT TO THE EXECUTION OF THIS INSURANCE CONTRACT, DOES NOT CREATE NEW RIGHTS AND OBLIGATIONS UNDER THE PRE-EXISTING INSURANCE CONTRACT.

A. Without An Express And Unequivocal Statement By The Legislature That This Statutory Amendment Should Apply To Pre-Existing Contracts, It Cannot Alter Pre-Existing Contracts.

The Plaintiff's Brief avoids a substantive discussion of many of the arguments and the case law cited in this subsection of the Brief. Instead, the Plaintiff argues that this Court should prematurely apply a constitutional analysis because the statutory analysis was not well-presented to the Second District. This argument is incorrect for a number of reasons.

First, the basic issue which has been argued by both State Farm and the Plaintiffs in the circuit court, in the district court, and now in this Court is whether a statutory amendment on October 1, 1980 can create new contractual rights under a pre-existing insurance contract. The arguments concerning this issue, by both the Plaintiffs and State Farm, have altered from court to court. For example, the Plaintiffs have made an extensive argument in this Court and in the Second District suggesting that the statute can be retroactively applied to this insurance contract because State Farm did not increase its rates for UM coverage in the fall of 1980. Although the Plaintiffs filed an appendix in the Second District to support this argument, the appendix contained only new documents which

had not been presented to the circuit court. Thus, the specific arguments of the parties may have been modified, but the basic issue remains unchanged.

The undersigned attorney admits that his former associate was confused on the legal effect of a statutory enactment which states: "This act shall take effect October 1, 1980." He clearly assumed that such a legal provision implies a retroactive application. This Court, however, in Fleeman v. Case, 342 So.2d 815 (Fla. 1976) squarely held that the legislature cannot imply retroactivity and must make that intention an express provision within the statute. As pointed out in State Farm's initial brief, several cases have refused to allow a retroactive application of a statute when the enactment clause was identical to the format used in the 1980 amendment to the anti-stacking statute. Dade County School Board v. Miami Herald Publishing Co., 443 So.2d 268 (Fla. 3d DCA 1983); Carter v. GEICO, 377 So.2d 242 (Fla. 1st DCA 1979), cert. den., 389 So.2d 1108 (Fla. 1980); Lumbermen's Mutual Casualty Company v. Ceballos, 440 So.2d 612 (Fla. 3d DCA 1983).

The Fleeman case and the other preceding cases are dispositive of this case. The Fleeman case, as an opinion of this Court, is legal authority which is controlling in this jurisdiction. Even if the undersigned attorney had not brought the Fleeman case to the attention of this Court, the Plaintiff's attorney would have had a legal obligation to disclose this case

to the Court if he were aware of this legal authority. DR7-106(B)(1), Code of Professional Responsibility. Thus, the undersigned attorney can hardly be faulted for bringing these cases to this Court's attention.

The Second District, of course, was well aware of this Court's decision in Dewberry v. Auto-Owners Insurance Co., 363 So.2d 1077 (Fla. 1978). In Dewberry, this Court discusses the statutory construction of new statutes in relationship to pre-existing contracts. This Court relied upon its earlier decision in Walker & LaBerge, Inc. v. Halligan, 344 So.2d 239 (Fla. 1977) for the proposition that "a law is presumed to operate prospectively in the absence of clear legislative expression to the contrary." By footnote, this Court indicated that the enactment provision for Chapter 76-266, Laws of Florida was an express attempt at retroactivity. That enactment clause is substantially different from the standard clause involved in this case. Thus, the case law cited to the Second District points out this portion of the analysis.

Moreover, in State Farm's motion for rehearing, it pointed out that the Second District had considered these identical issues in Devito v. Government Employees Insurance Company, 427 So.2d 198 (Fla. 2d DCA 1982). In that case, the Second District per curiam affirmed a lower court which had refused to apply the new anti-stacking amendment retroactively. State Farm asked this Court to examine the briefs which had been filed in Devito. That briefing contained this statutory

argument.[1] It may be significant to note that Judge Schoonover participated both in this case and in the Devito case.

On page 9 of their brief, the Plaintiffs suggests that this Court should not resolve the conflict between the Second District and the Fifth District on a ground which neither court discussed in their opinions. As discussed in State Farm's initial brief, this Court has repeatedly held that it will not consider a constitutional issue unnecessarily. If the issue presented in this case can best be resolved by statutory construction, there is no logical or jurisprudential reason to enter into a lengthy constitutional analysis.

Even if none of the parties to this appeal had briefed the Fleeman decision and the case law concerning statutory construction, this Court could and should have appropriately considered this legal analysis. This Court should not perpetuate an erroneous legal analysis which goes to the foundation of an issue. An error which goes to the foundation of a case and which would result in a miscarriage of justice if it is not considered by the Court is a fundamental error. 3 Fla.Jur.2d "Appellate Review" §301, p. 364 (1978) Especially when the issue is not a matter of factual dispute, but a pure question of law, it would be fundamental error to ignore the analysis under statutory construction. American Surety Co. v. Coblentz, 381 F.2d 185 (5th Cir. 1967). The precedent established by this Court should resolve issues upon the best jurisprudential analysis.

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[1] The motion for rehearing and the Devito briefing accompany this brief in a motion to supplement the record on appeal. This is necessary to order to rebut the supplement to the record submitted by the Plaintiffs.

Three brief arguments of the Plaintiffs concerning this issue deserve response. First, the Plaintiffs claim that the legislature "obviously" intended for the 1980 amendment to apply to contracts which pre-existed the date of the amendment. (Plaintiff's Brief, p. 9) They provide no legislative history or any case law which makes this proposition "obvious". In light of this Court's express statements in Fleeman v. Case, 342 So.2d 815 (Fla. 1976), the legislature simply could have no legal basis for that intent.

Secondly, the Plaintiffs argue that the legislature has demonstrated an ability to expressly state that an act is intended to be prospective. Such an intent is expressly provided concerning the effective date of Chapter 84-41, Laws of Florida which amended the uninsured motorist statutes. If one examines the various legislative enactments concerning automobile liability insurance over the last 20 years, it is apparent that the legislature has used a number of different enactment clauses in addition to the standard clause involved in this case. Nevertheless, this Court has not overruled the Fleeman decision and has not suggested to the legislature that they must only expressly describe prospective application. The law as stated by this Court still requires that a legislative enactment must expressly describe any retroactive effect. The enactment clause to Chapter 84-41, Laws of Florida does not overrule the numerous cases from this Court which are cited in State Farm's initial brief.

Finally, the Plaintiffs suggest that the rule on retroactivity does not apply to aleatory contracts, such as insurance contracts. The Plaintiffs cite no case law for this proposition. This proposition directly conflicts with the analysis in Carter v. GEICO, 377 So.2d 242 (Fla. 1st DCA 1979), cert. den., 389 So.2d 1108 (Fla. 1980) which is contained in State Farm's initial brief. (State Farm's Initial Brief, p. 10) Indeed, the escalation clause which was the subject of the dispute in Fleeman v. Case, 342 So.2d 815 (Fla. 1976) would appear to be an aleatory provision within a long-term contract.

B. Even If The Legislature Had Intended This Statutory Amendment To Alter Pre-Existing Contracts, Such An Application Of This Statutory Amendment Would Unconstitutionally Impair Existing Contractual Rights.

The Plaintiffs' brief repeatedly emphasizes that the stacking of uninsured motorist coverage is a matter of "public policy". The concept of "public policy" is rather ill-defined and its significance to this case is unclear. As pointed out in State Farm's initial brief, the "public policy" concerning the stacking of uninsured motorist coverage has changed four times -- twice by this Court and twice by the legislature. (State Farm's Initial Brief, p. 21) Such equivocation is rather weak evidence of an unwaivering public policy.

Moreover, the analysis in this case is not based upon an ill-defined sense of public policy. It must center upon Article I, Section 10 of the Florida Constitution and its application by this Court in Pomponio v. Claridge of Pompano Condominium, Inc., 378 So.2d 774 (Fla. 1979); Yamaha Parts Distributors, Inc. v. Ehrman, 316 So.2d 557 (Fla. 1975); and Dewberry v. Auto-Owners Insurance Company, 363 So.2d 1077 (Fla. 1978). The Florida Constitution is the relevant "public policy."

State Farm will rely upon its initial brief concerning the basic proposition that there is a presumption against any impairment of contract under the Florida Constitution. The analysis of the three factors described by this Court in the Pomponio decision is also sufficiently discussed in State Farm's initial brief.

The Plaintiffs continue to argue that this case does not involve a retroactive application of the statute. They state that this is true because the "cause of action" accrued after the effective date of the amendment. (Plaintiff's Brief, p. 14) As explained in State Farm's initial brief, this type of analysis confuses the tort cause of action against the uninsured motorist with the contractual rights which exist under a pre-existing contract. (State Farm's Initial Brief, p.13)

The Plaintiffs state that "the real issue" is "one of impairment of existing contract rights rather than retroactive application of a statute". (Plaintiff's Brief, p. 14) Those two issues, however, are actually the same issue expressed differently. Courts determine whether a new statutory provision impairs a pre-existing contract right under Article I, Section 10 of the Florida Constitution by examining the impact of the statute's "retroactive" application to pre-existing contract rights. The concept of "retroactivity" is utilized both in the statutory analysis described in the first section of this brief and under the constitutional analysis concerning application of a new statute to a pre-existing contract. See, State, Department of Transportation v. Edward M. Chadbourne, Inc., 382 So.2d 293 (Fla. 1980); Carter v. GEICO, 377 So.2d 242 (Fla. 1st DCA 1979), cert. den., 389 So.2d 1108 (Fla. 1980)

The Plaintiffs' brief suggests that State Farm has not been harmed because it did not increase its UM premiums to these specific plaintiffs in the months following the enactment of this statutory amendment. It should be obvious, however, that

premiums are affected by many things other than statutory changes. When interest rates are rapidly increasing, as they did in the early 1980's, insurance companies can earn more money with their investments. Thus it is meaningless to compare premiums without comparing the economic conditions, competition, loss ratios, and other factors which affect those rates.

The Plaintiffs argue that the statutory changes did not "sneak up" on State Farm and, thus, State Farm could have increased its premium prior to October 1, 1980 for policies which would be in effect thereafter. This, of course, is contrary to the rule that Floridians cannot reasonably be charged with notice of the consequences of legislation prior to the effective date of the legislation. Dewberry v. Auto-Owners Insurance Co., 363 So.2d 1077 (Fla. 1978). More importantly, the most recent case law at the time of this statutory change had assured the insurance industry that statutory changes under these circumstances would not be applied to change contractual rights under pre-existing contracts. Carter v. GEICO, 377 So.2d 242 (Fla. 1st DCA 1979), cert. den., 389 So.2d 1108 (Fla. 1980).[2] A knowledgeable insurance carrier would never have anticipated this impairment of a pre-existing contract.

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[2] The Plaintiff's brief suggests that the insurance carriers could legally send out "endorsements" to insurance policies which would essentially charge a new premium mid-way through the policy in light of statutory changes. There is no statute giving the insurance carriers that authority. Frankly, such a statute itself would probably be an unconstitutional impairment of pre-existing insurance contracts.

Finally, the Plaintiffs rely upon two theories which were not discussed by the Second District. First, they argue that the statutory amendments must be added to the pre-existing insurance contract due to Section 627.418(1), Florida Statutes (1979). The Plaintiffs cite no case authority for this proposition. If one examines the statutory language in Section 627.418, Florida Statutes, it is obvious that this statutory provision requires that an insurance policy contain those provisions which are required by the insurance code at the time the policy is issued or delivered. There is nothing in Section 627.418, Florida Statutes, which would statutorily insert new amendments to the insurance code into insurance policies which had already been issued and delivered.

Secondly, the State Farm policy contains a rather standard "liberalization clause" concerning liability coverage. (A. 56) It only applies to policies which are "certified under any law as proof of future financial responsibilities". This policy is not alleged to be such a policy. Moreover, this provision only applies to liability coverage and requires the insured to repay State Farm for any extra payment it would not otherwise need to make under the terms of the policy. Thus, it obviously does not apply to first party coverage. The general conditions in the policy permit State Farm to voluntarily broaden coverage so long as it does not increase the premium. That condition does not make any such changes mandatory. The plaintiff has not cited any case law suggesting that these provisions have ever been interpreted in such a radical fashion.

CONCLUSION

For all of the reasons stated in this brief and in State Farm's initial brief, the opinion of the Second District should be reversed and this Court should rule either as a matter of statutory construction or as a matter of constitutional construction that the 1980 amendment to the anti-stacking statute, Section 627.4132, Florida Statutes, cannot be retroactively applied to pre-existing insurance contracts.

Respectfully submitted,

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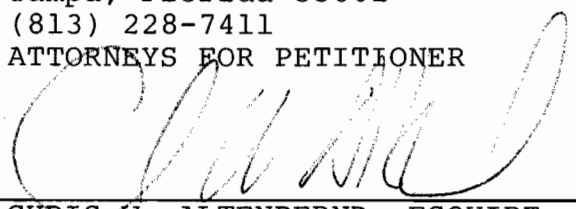
By: 

CHRIS W. ALTENBERND, ESQUIRE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 5th day of April, 1985 to Richard A. Kupfer, Esquire, Cone, Wagner, Nugent, Johnson, Hazouri & Roth, P.A., Post Office Box 3466, West Palm Beach, Florida 33402.

ATTORNEY