IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,226

SOUTHEASTERN FIDELITY INSURANCE COMPANY,

Petitioner,

-vs-

MARK COLE and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Respondents.
_____/

BRIEF OF RESPONDENTS,
MARK COLE and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY
ON CERTIORARI JURISDICTION

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STATEMENT OF CASE AND FACTS

Introduction

This case is before the Court pursuant to a notice attempting to invoke discretionary certiorari jurisdiction. The Petitioner, SOUTHEASTERN FIDELITY INSURANCE COMPANY, was the Plaintiff, Counter-defendant in the Trial Court, the Appellee in the District Court of Appeal, and will be referred to herein as "SOUTHEASTERN". The Respondents, MARK COLE and STATE FARM MUTUAL AUTOMOBILE INSURACE COMPANY, were Defendants, Counter-plaintiffs, and Cross-plaintiffs in the Trial Court, Appellants in the District Court of Appeal, and will be referred to herein as "COLE" and "STATE FARM" respectively.

The following symbols will be utilized in this brief:

"A" -- Appendix filed simultaneously with this brief

All emphasis is supplied by counsel unless otherwise indicated.

Case and Facts

The present case involved an analysis, comparison, and determination of the operative effect of the specific terms of two

motor vehicle liability insurance policies within the parameters of existing statutory regulations concerning rented motor vehicles. A company engaged in the business of renting motor vehicles to the public procured a $300,000 liability insurance policy from SOUTHEASTERN. COLE rented a motor vehicle from such rental agency and it is important to note that COLE was specifically insured by the SOUTHEASTERN policy as an operator of the insured vehicle. It is equally important in this case that the SOUTHEASTERN policy provided primary or first level coverage for vehicles owned by the rental agency. The policy specifically provided that it operated as "excess" insurance only for vehicles which were not owned by the rental agency. Without dispute, the vehicle involved in the accident which generated the insurance coverage dispute was owned by the rental agency.

On the other hand, COLE had previously obtained insurance coverage for his personal vehicle from STATE FARM in Canada. The STATE FARM policy provided primary or first level coverage for the vehicle owned by COLE, however, it applied only as "excess" coverage for vehicles which were not owned by COLE, such as the vehicle owned by the rental agency and insured by SOUTHEASTERN. In September, 1980, COLE was involved in an accident while operating a vehicle owned by the rental agency and insured by SOUTHEASTERN.

SOUTHEASTERN initiated an action for declaratory relief seeking a determination that STATE FARM provided primary or first level coverage for the September, 1980, accident. The Record clearly demonstrated that the rental agency did not comply with the requirements of § 627.7263, Fla. Stat., to avoid responsibility for

primary liability insurance coverage for the accident. By summary final judgment, the Trial Court determined that SOUTHEASTERN was required to provide primary or first level insurance coverage under its $300,000 policy only to the extent of $10,000, and that the remainder of the $300,000 of coverage would apply only after the exhaustion of STATE FARM'S coverage.

COLE and STATE FARM successfully sought review of the summary final judgment in the District Court of Appeal, Third District. The District Court of Appeal held that the $300,000 SOUTHEASTERN policy provided primary or first level coverage to the extent of its liability limits. The legal basis for the determination was that the specific provisions of each insurance policy, along with the effect thereof, must be recognized and that SOUTHEASTERN could not relieve itself of responsibility which was specifically within its coverage as to one of its own insureds. Further, there was no statutory or contractual provision which mandated that SOUTHEASTERN provide coverage on a basis other than and contrary to the specific terms stated in its policy. The District Court of Appeal simply followed and applied the terms of the SOUTHEASTERN policy.

JURISDICTIONAL POINT ON APPEAL

WHETHER THE DECISION UNDER REVIEW IS IN EXPRESS AND DIRECT CONFLICT ON THE SAME QUESTION OF LAW WITH DECISIONS PRESENTED BY THE PETITIONER?

SUMMARY OF ARGUMENT

The obligations of an insurance company are determined based upon the specific terms of the insurance contract in question. When two insurance policies are or may be applicable, one must look to the terms of the respective policies to determine if and how each

policy applies with regard to the other. Statutory provisions, such as § 627.7263, Fla. Stat., may alter the manner in which a policy would otherwise apply, but after the statutory minimum reqirements have been satisfied the contractual terms of the respective policies are effective and controlling.

Thus, decisions which determine the manner in which certain insurance policies apply in a given situation must involve insurance policies with the same contractual terms and provisions to be considered as a decision on the same question of law. Application of totally different contractual terms presents a totally different factual predicate and requires the application of different legal concepts.

The present case determined the application of an owner's motor vehicle insurance policy which specifically provided primary or first level coverage and also covered other drivers. The decisions set forth for conflict which involve an owner's motor vehicle policy which specifically provides no coverage under the circumstances or no coverage for other drivers [escape clauses] do not conflict with the same question of law in the decision under review.

ARGUMENT

THE DECISION UNDER REVIEW IS NOT IN EXPRESS AND DIRECT CONFLICT ON THE SAME QUESTION OF LAW WITH DECISIONS PRESENTED BY THE PETITIONER.

It is certainly recognized that the Court below characterized certain Florida decisions as non-uniform in this area, but the facial appearance in the required express and direct conflict sense rapidly dissolves upon proper analysis of the factual elements

involved in each case upon SOUTHEASTERN relies. The factual elements in this case are of critical importance and particularly the terms of the respective insurance policies which were analyzed and applied. Decisions which produced different legal conclusions based upon different factual elements do not satisfy or establish the express and direct conflict jurisdictional requirements as historically discussed by this Court. See generally Ansin v. Thurston, 101 So. 2d 808 (Fla. 1958); Jenkins v. State, 385 So. 2d 1356 (Fla. 1980).

It is important to note at the outset that the mere existence of an owner/separate driver accident alone, absent analysis of contractual insurance policy provisions, produces application of legal concepts which are far different from those applicable when contractual insurance policy provisions are involved. In a similar manner, cases involving different contracts and different insurance policies call for the application of different legal concepts even though an identical underlying owner/separate driver relationship may exist.

An analysis of the decisions upon which SOUTHEASTERN relies, in chronological order, demonstrates that an owner/separate driver situation was presented in Patton v. Lindo's Rent-A-Car, Inc., 415 So. 2d 43 (Fla. 2d DCA 1982). The similarity of critical and material facts ends at that point. In Patton, the owner of the vehicle was insured by American Southern and its "policy contained what is commonly known as an escape clause". id., at 45 [unlike the present case]. The effect of an "escape" clause is well documented. Continental Cas. v. Weeks, 74 So. 2d 367 (Fla. 1954); Auto-Owners

Ins. Co. v. Palm Beach County, 157 So. 2d 820 (Fla. 2d DCA 1963). An "escape" clause simply renders coverage inapplicable if some other insurance policy exists. Thus, in Patton the owner's policy was rendered inapplicable [unlike SOUTHEASTERN'S in this case] except to the extent of the minimum requirements of § 627.7263, Fla. Stat. The Court simply applied the recognized concept that after the minimum statutory requirements are satisfied, the contractual terms and provisions become operative and are given effect. This is exactly what the District Court of Appeal, Third District, applied in the present case.

Next, although it does not appear on the face of the opinion, it is clear in the Record filed with this Court and the briefs therein, that the Court in Reliance Ins. Co. v. Maryland Cas. Co., 453 So. 2d 854 (Fla. 4th DCA 1984), was faced with the identical factor as in Patton that the owner's insurance policy contained an "escape" clause. Thus, consistent with Patton, and consistent with the opinion now under review, the Court applied the principle that after the minimum statutory requirements were satisfied the contractual terms and provisions became operative. It is clear that in both Patton and Reliance the owners' insurance carriers provided no coverage except for the minimum amount required by § 627.7263, Fla. Stat. The present case presents a totally different insurance policy in which SOUTHEASTERN provides primary or first level coverage and there is no "escape" clause to eliminate such coverage.

The factual situation in Chicago Ins. Co. v. Soucy, 9 F.L.W. 2485 (Fla. 4th DCA Nov. 28, 1984), clearly demonstrates that Travelers, the primary insurance company for the vehicle owner

which occupied the identical position as SOUTHEASTERN in this case, was determined to provide primary or first level coverage which was not disputed. The only dispute in Chicago was between an excess carrier for the owner and the insurance company for the driver. Although the Court certified an indemnification question to this Court, it appears that its determination was predicated upon the terms of the excess policy, which is totally consistent with the legal concepts in the decisions previously discussed. After the minimum statutory requirements are satisfied (presumably by Travelers), the terms of the insurance policy are operative and controlling.

In Executive Car & Truck Leasing, Inc. v. DeSerio, 10 F.L.W. 1102 (Fla. 4th DCA May 1, 1985), there is no mention of the specific terms of the respective insurance policies as to how each would apply in relationship to other policies other than the generic description of underlying and umbrella policies. Further, there is no mention or discussion that either the lessee or operator were insureds under the insurance policy issued to the owner of the vehicle. The Court did, however, specifically rely upon the Reliance and Patton decisions as being controlling and such decisions involved an insurance policy for the owner of a vehicle which contained an "escape" clause. With such predicate, the Court's discussion of the common law concepts of indemnification, absent the status of the driver/operator as an insured under the owner's policy, was consistent with prior decisions. If the Executive decision is interpreted as requiring the application of the common law concepts of indemnification without regard to the specific

terms of the respective insurance policies and without regard to the status of an operator/driver as an insured under an owner's policy, the decision is in conflict with the decision under review.

In a similar manner, in Allstate Ins. v. Value Rent-A-Car of Florida, Inc., 464 So. 2d 320 (Fla. 5th DCA 1985), the Court does not discuss whether the operator/driver was an insured under the policy issued to the owner of the motor vehicle. The Court proceeded to rely upon the Patton decision without mention that the owner's insurance policy in Patton contained an "escape" clause. The Court did, however, state that the lessor's insurance policy contained no provision intended to reduce coverage provided for an operator, and to such an extent the decision is inconsistent with the opinion under review.

Finally, the decision of this Court in Insurance Co. of North America v. Avis Rent-A-Car Sys., Inc., 348 So. 2d 1149 (Fla. 1977), is totally and completely consistent with the decision under review. In INA the operator of the vehicle was insured under the owner's policy only to the extent of $100,000. This Court held that the owner was entitled to indemnification only for amounts in excess of the terms of the policy and further relied specifically upon the terms of the two insurance policies and found that the policies meshed perfectly with regard to primary and excess coverage, as do the terms of the two insurance policies involved in the decision under review.

CONCLUSION

It is submitted that the decision of the District Court of Appeal in this case is totally consistent with Florida law concern-

ing the operative effect of the specific provisions of the insurance contract which are involved in this litigation. The decisions which do not involve the same policy provisions do not address the same question of law which was applied below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed this 19th day of July, 1985, to Susan Minor, Esq., THOMPSON AND CLARK, P.A., Attorneys for Plaintiff, Suite 516, Ingraham Building, 25 S.E. Second Avenue, Miami, FL 33131; and to Richard Baron, Esq., LAW OFFICES OF RICHARD BARON, Attorneys for INTERAMERICAN CAR RENTAL, INC., Suite 350, 1125 N.E. 125th Street, North Miami, FL 33161.

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