IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,226

SOUTHEASTERN FIDELITY INSURANCE COMPANY

Petitioner

vs.

MARK COLE and STATE FARM MUTUAL INSURANCE COMPANY

Respondent

* *

ON PETITION FOR DISCRETIONARY REVIEW TO THE
DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

* *

BRIEF OF PETITIONER ON JURISDICTION

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PRELIMINARY STATEMENT

Petitioner, SOUTHEASTERN FIDELITY INSURANCE COMPANY, was Plaintiff in the trial court and Appellee on appeal. Respondents, MARK COLE and STATE FARM MUTUAL INSURANCE COMPANY, were Defendants in the trial court and Appellants on appeal. Parties will be referred to in this brief as they appear before this Court. The symbol "A" followed by a number will constitute a page reference to the appendix being filed with this brief, said appendix being a conformed copy of the decision of the Third District Court of Appeal.

STATEMENT OF THE CASE AND FACTS

On September 8, 1980, Petitioner's insured, Interamerican Car Rental, Inc., d/b/a Holiday Rent-A-Car, leased a car to MARK COLE, a Canadian citizen, who was insured by a STATE FARM automobile policy issued in Ontario.

While driving the leased vehicle, Mr. COLE was involved in an accident. The insurance policies issued by Petitioner, SOUTHEASTERN, provided $300,000 of liability insurance coverage for the rental company and, as additional insureds, the individual operators of its vehicles. The policies stated that excess coverage was provided for the use of non-owned vehicles.

Petitioner sued Respondents for a declaratory judgment that STATE FARM should provide primary liability coverage for the accident. Since, however, the SOUTHEASTERN policies and the rental agreement did not sufficiently comply with the requirements of Section 627.7263, Florida Statutes (1979), the trial court summarily held, and Petitioner conceded, that SOUTHEASTERN is required to provide primary coverage

under Section 627.7263(1) for the first $10,000 of liability coverage as mandated by Section 627.736, Florida Statutes.

By Order dated May 17, 1984, granting summary judgment in favor of Petitioner, the Honorable Richard S. Hickey, Judge of the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, determined that Petitioner must provide the first $10,000 as required by statute, and that State Farm must provide any and all excess or secondary insurance coverage which may be required over and above the $10,000 coverage provided by Southeastern.

Respondents filed an appeal in the District Court of Appeal, Third District, contending that Southeastern should be responsible for providing primary insurance coverage up to the limits of its liability policy, and State Farm should be obligated only to provide excess coverage thereafter.

Petitioner answered that Southeastern is obligated only to the extent required by Section 627.7263, Florida Statutes, and that the parties had contracted to shift coverage in excess of the statutory limits to the lessee's carrier, State Farm.

By a two to one decision rendered May 28, 1985, the Third District Court of Appeal agreed with State Farm's contention, finding that the Southeastern policies provide primary coverage to the extent of their liability limits. The majority opinion is authored by Chief Judge Alan Schwartz, Judge Wilkie Ferguson concurring. Judge James Jorgenson dissented, and would affirm the lower court's judgment.

The Third District held that Southeastern's policies "state that they are excess policies only as to non-owned vehicles with the result that the vehicle owner's policy provides primary and the driver's only excess or secondary coverage"... and "[s]ince there is no

statutory or contractual reason for confining the application of this principle to the $10,000 statutory requirement, or to any limits other than those stated in the owner's policy, we direct that, on remand, Southeastern's coverage be declared to be primary to the full extent of its liability limits." (A.3)

In his dissent, Judge Jorgenson states:

> I would agree with the court but for the clear language of section 627.7263(1), Florida Statutes (1983), which states "[s]uch insurance shall be primary for the limits of liability and personal injury protection coverage as required by ss. 324.021(7) and 627.736" (emphasis added). See Reliance Insurance Co. v. Maryland Casualty Co., 453 So. 2d 854 (Fla. 4th DCA 1984).
>
> I would affirm the Judgment below.
>
> (A.4)

Petitioner invokes the discretionary jurisdiction of this Court to review the decision of the Third District Court of Appeal on the grounds that the decision does expressly and directly conflict with decisions of this Court and other district courts of appeal on the same question of law.

QUESTION PRESENTED

WHETHER THE DECISION IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THE SUPREME COURT AND OTHER DISTRICT COURTS OF APPEAL WHICH HOLD THAT THE LESSOR OF A FLORIDA RENTAL VEHICLE IS OBLIGATED TO PROVIDE PRIMARY COVERAGE ONLY TO THE EXTENT OF THE STATUTORY LIMIT OF $10,000, AS REQUIRED BY THE FLORIDA FINANCIAL RESPONSIBILITY LAWS?

ARGUMENT

THE DECISION IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THE SUPREME COURT AND OTHER DISTRICT COURTS OF APPEAL WHICH HOLD THAT THE LESSOR OF A FLORIDA RENTAL VEHICLE IS OBLIGATED TO PROVIDE PRIMARY COVERAGE ONLY TO THE EXTENT OF THE STATUTORY LIMIT OF $10,000, AS REQUIRED BY THE FLORIDA FINANCIAL RESPONSIBILITY LAWS.

In its opinion, the Third District observed that Florida decisions dealing with the rights of liability insurers of the driver-lessee and the owner-lessor of a Florida rental vehicle are "decidedly non-uniform" (A.2). Regarding the instant case, the court concluded "that Sunshine Dodge, Inc. v. Ketchem, 445 So2d 395 (Fla. 5th DCA 1984) embodies a correct analysis of the legal situation before us and therefore follow its holding." (A.2). Sunshine Dodge holds that the lessor's insurance carrier has primary coverage, and is obligated to indemnify the driver-lessee and the lessee's insurer up to the limits of the policy referred to in the lease agreement.

In the case at bar, the Third District specifically contrasts Sunshine Dodge to the contrary holdings reached in Reliance Insurance Co. v. Maryland Casualty Co., 453 So2d 854 (Fla. 4th DCA 1984) and Allstate Insurance Co. v. Value Rent-A-Car of Florida, Inc., 463 So2d 320 (Fla 5th DCA 1985), and finds those two cases to have been incorrectly decided. Inasmuch as Reliance and Value Rent-A-Car deal with the same legal issues as the instant case, they do expressly and directly conflict with the instant case. In fact, the Fourth District acknowledged in Reliance that "our decision conflicts with Sunshine

Dodge, Inc. v. Ketchem, 445 So2d 395 (Fla 5th DCA 1984)." 453 So2d 856, n.1. Moreover, the dissenting opinion of Judge Jorgenson refers to Reliance as a basis for affirmance of the lower court's judgment.

This Court has accepted jurisdiction of the Reliance case. The fact that Reliance holds the lessor obligated to provide primary coverage for only the minimum amount of liability insurance required by statute, and the instant case holds the lessor responsible for providing coverage up to the policy limits, indicates an obvious conflict between the district courts which must be resolved by this Court's accepting jurisdiction of this case as well.

As in Reliance and Value Rent-A-Car, the Second District in Patton v. Lindo's Rent-A-Car, Inc., 415 So2d 43 (Fla. 2d DCA 1982), concluded that the lessor is primarily liable only up to the financial requirements of Section 627.7263, Florida Statutes, and that once the requirements of the statute are satisfied, the parties are free to contract between themselves as to any additional responsibility. In contrast, the Third District has emphasized the binding effect of the provisions of the respective policies of the lessor and the lessee-driver.

Two Fourth District cases, Executive Car and Truck Leasing Inc. v. DeSerio, 10 FLW 1102 (Fla. 4th DCA May 1, 1985) and Chicago Insurance Co. v. Soucy, 9 FLW 2485 (Fla. 4th DCA Nov. 28, 1984), hold that the lessor's primary coverage is limited by statute to $10,000, and the active tortfeasor's carrier should provide the second layer of coverage. These holdings thus conflict with the instant case which opines there is no reason for confining the lessor's primary coverage to the $10,000 statutory minimum. In addition, the instant case ignores

the common law legal principle espoused in DeSerio and Soucey, (and Value Rent-A-Car as well) that the one who is negligent is responsible for payment, and the party who is only vicariously liable is entitled to indemnification from the active tortfeasor. This principle is enunciated in Insurance Company of North America v. Avis Rent-A-Car System, Inc., 348 So2d 1149 (Fla. 1977), thereby also establishing a conflict between this Court and the Third District on the same rule of law.

CONCLUSION

It is abundantly clear that the instant decision of the Third District Court of Appeal expressly and directly conflicts with numerous appellate decisions. Because the state of the law in this area is "decidedly non-uniform", petitioner urges this Court to accept jurisdiction of this case, and to entertain this case on its merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Petitioner on Jurisdiction was furnished by mail to R. FRED LEWIS, ESQ., Magill, Reid & Lewis, P.A., Attorneys for Cole/State Farm, Suite 730 - Ingraham Building, 25 S. E. Second Avenue, Miami, Florida 33131 on this 27th day of June, 1985.

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