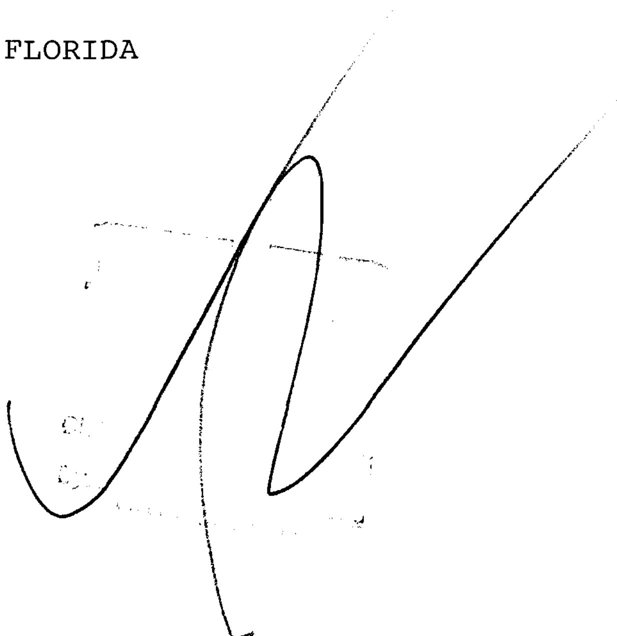
IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,226



SOUTHEASTERN FIDELITY INSURANCE COMPANY,

Petitioner,

v.

MARK COLE and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Respondents.

____/

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

* * * * * * * * * * * * * * * *

BRIEF OF PETITIONER ON MERITS

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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 consisting of: a conformed copy of the decision of the Third District Court of Appeal (A.1-4); the SOUTHEASTERN automobile liability insurance policy issued to Interamerican Car Rental, Inc. (A.5-21); the State Farm standard automobile policy insuring MARK COLE (A.22-30); the rental agreement entered into by Holiday Rent-A-Car and MARK COLE (A.31-33). The symbol "R" followed by a page number will constitute a page reference to the Record-On-Appeal. All emphasis supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

On September 8, 1980, petitioner's insured, Inter-american Car Rental, Inc., d/b/a Holiday Rent-A-Car, leased a car to MARK COLE, a Canadian citizen, who was insured by a standard STATE FARM automobile policy issued in Ontario. While driving the leased vehicle, MR. COLE was involved in an accident. (R.92-126).

The insurance policy issued by petitioner, SOUTHEASTERN, provided $300,000 of liability insurance coverage for the car rental company and, as additional insureds, the individual operators of its vehicles. (A.8,10).

However, the rental agreement entered into between Holiday Rent-A-Car and Mark Cole stated that Cole would be provided insurance coverage under SOUTHEASTERN'S policy equal to the liability limits required to satisfy Florida's financial responsibility motor vehicle laws "only if no other valid and collectable insurance, whether primary, excess or contingent is available to Renter." (A.32).

Petitioner sued respondents for a declaratory judgment that STATE FARM should provide primary liability coverage for the accident. (R.1-26). Since, however, the SOUTHEASTERN policy 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 for the first $10,000 of liability insurance. (R.309).

Moreover, by the same 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, ruled that although SOUTHEASTERN must provide the first $10,000 as required by statute, 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. (R.309).

Respondents filed an appeal in the District Court of Appeal, Third District (R.307), 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.

In 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 policy provides primary coverage to the extent of its liability limits. (A.1-4). Cole v. Southeastern Fidelity Insurance Company, 469 So.2d 925 (Fla. 3d DCA 1985). 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 and STATE FARM'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 Judgement below."
>
> (A.4).

Petitioner invoked the discretionary jurisdiction of this Court to review the decision of the Third District Court of Appeal on the ground that the decision expressly and directly conflicts with decisions of this Court and other District Courts of Appeal on the same question of law.

On October 30, 1985, this Court accepted jurisdiction. This brief of petitioner on the merits of this cause follows.

SUMMARY OF THE ARGUMENT

Petitioner, SOUTHEASTERN FIDELITY INSURANCE COMPANY, insures the owner/lessor of a rental vehicle. Respondent, STATE FARM MUTUAL INSURANCE COMPANY, insures the lessee, respondent MARK COLE. The lessee was involved in an accident while operating the rented vehicle. He is the actively negligent tortfeasor and the lessor is only vicariously liable.

Petitioner concedes that it must provide the first $10,000 of liability coverage pursuant to Section 627.7263, Florida Statutes. Petitioner contends, however, that its policy is primary only up to that $10,000 amount, and that respondent, STATE FARM, must provide the secondary coverage.

Petitioner is entitled to follow STATE FARM in coverage (after the $10,000 statutory amount has been satisfied by petitioner) because petitioner is only vicariously liable and entitled to indemnity, and respondent, STATE FARM, is the insurer of the actively negligent party.

Petitioner is entitled to indemnity because the rental agreement between lessor and lessee specifically incorporates the SOUTHEASTERN insurance policy and, most significantly, contains an escape clause relieving SOUTHEASTERN from insurance coverage of the lessee. The rental agreement also contains an indemnification agreement which shifts responsibility for loss to the lessee.

ISSUE PRESENTED FOR REVIEW

WHETHER THE TRIAL COURT ERRED IN AWARDING SUMMARY JUDGMENT IN FAVOR OF PETITIONER, SOUTHEASTERN FIDELITY INSURANCE COMPANY, AND ORDERING THAT PETITIONER PROVIDE PRIMARY INSURANCE COVERAGE ONLY UP TO THE $10,000 MINIMUM AMOUNT REQUIRED BY THE FLORIDA FINANCIAL RESPONSIBILITY LAW, AND THAT RESPONDENT, STATE FARM MUTUAL INSURANCE COMPANY, PROVIDE ALL SECONDARY INSURANCE COVERAGE, WHERE PETITIONER'S INSURED, THE OWNER/LESSOR, IS ONLY VICARIOUSLY LIABLE AND THEREFORE ENTITLED TO FOLLOW STATE FARM, THE INSURER OF RESPONDENT, MARK COLE, THE ACTIVELY NEGLIGENT PARTY?

ARGUMENT

THE TRIAL COURT DID NOT ERR IN AWARDING SUMMARY JUDGMENT IN FAVOR OF PETITIONER, SOUTHEASTERN FIDELITY INSURANCE COMPANY, AND ORDERING THAT PETITIONER PROVIDE PRIMARY INSURANCE COVERAGE ONLY UP TO THE $10,000 MINIMUM AMOUNT REQUIRED BY THE FLORIDA FINANCIAL RESPONSIBILITY LAW, AND THAT RESPONDENT, STATE FARM MUTUAL INSURANCE COMPANY, PROVIDE ALL SECONDARY INSURANCE COVERAGE, WHERE PETITIONER'S INSURED, THE OWNER/LESSOR, IS ONLY VICARIOUSLY LIABLE AND THEREFORE ENTITLED TO FOLLOW STATE FARM, THE INSURER OF RESPONDENT, MARK COLE, THE ACTIVELY NEGLIGENT PARTY.

In Maryland Casualty, Co. v. Reliance Insurance Co., 10 F.L.W. 612 (Fla. Nov. 27, 1985), this Court decided that the plain meaning of Section 627.7263(1), Florida Statutes, in conjunction with the requirements of Sections 324.021(7) and 627.736, Florida Statutes, mandates a finding that in those situations where the lessor of a motor vehicle has failed to shift the burden of primary insurance coverage to the lessee, the lessor's insurance policy only provides primary insurance coverage for the first $10,000, regardless of the amount of the policy issued by the lessor's carrier.

In the case sub judice, it is submitted that petitioner, SOUTHEASTERN FIDELITY INSURANCE COMPANY (hereinafter SOUTHEASTERN), is responsible only for the first $10,000 of coverage and that lessee's carrier, respondent STATE FARM MUTUAL INSURANCE COMPANY (hereinafter STATE FARM), is responsible for coverage in excess of that amount.

In Allstate Insurance Co. v. Fowler, 10 F.L.W. 610 (Fla. Nov. 27, 1985), this Court explained that once the statutorily required minimum amount of $10,000 has been satisfied, the insurer of the party who is only vicariously liable and entitled to indemnity is entitled to follow the insurer of the actively negligent party, as a matter of law. Accord, Maryland Casualty Co. v. Reliance Insurance Co., supra; Metropolitan Property and Life Insurance Co. v. Chicago Insurance Co., 10 F.L.W. 614 (Fla. Nov. 27, 1985). The right to indemnity does not exist if the insurer of the vicariously liable party insures the actively negligent party as an additional insured. Fowler, supra; Reliance, supra; Chicago, supra.

In the instant case, SOUTHEASTERN does insure a party who is only vicariously liable because it issued a policy to the rental car company, the owner of the vehicle. Reliance, supra at 613; see also, Morse Auto Rentals, Inc. v. Lewis, 161 So.2d 235 (Fla. 3d DCA 1964). Moreover, SOUTHEASTERN is entitled to indemnity from STATE FARM, the insurer of the actively negligent tortfeasor, MARK COLE, because SOUTHEASTERN'S policy as incorporated in the rental agreement does not cover MR COLE.

Although SOUTHEASTERN'S policy does include as additional insureds those persons using the named insured's automobile, (A.8), the rental agreement entered into between the lessor, Holiday Rent-A-Car System, and the lessee, MARK COLE, which specifically incorporates the SOUTHEASTERN policy and makes it a part of the rental agreement, (A.32), provides that the

policy covers the lessee "only if no other valid and collectable [sic] insurance, whether primary, excess or contingent is avail- able to Renter." (A.32). The pertinent portion of the rental agreement reads as follows:

> "5. INSURANCE: Vehicle is covered by an automobile liability insurance policy, a copy of which is available for inspection . . . Said policy provides coverage and limits of liability at least equal to the liability coverage and limits of liability required of the operator to satisfy this state's financial responsibility motor vehicle laws, but only if no other valid and collectable insurance, whether primary, excess or contingent, is available to Renter. Renter, being an assured under said policy, agrees to comply with and to be bound by all the terms, conditions, limitations and restrictions of said policy, which are hereby incorporated by reference herein and made a part of the rental agreement as if set forth in length including those terms, conditions, limitations and restrictions of which no specific mention is made herein . . ." .
>
> (A.32).

Thus, the policy, as incorporated in the rental agreement, does contain a valid "escape clause" which relieves SOUTHEASTERN from coverage of lessee COLE, the active tort-feasor. Reliance, supra at 613. See also, Allstate Insurance Company of Canada v. Value Rent-A-Car of Florida, Inc., 463 So.2d 320 (Fla. 5th DCA 1985), wherein the district court found that although lessor's insurance policy contained no provisions intended to reduce the limits provided for the lessee's benefit,

the lessor in its rental agreement with lessee effectively shifted primary coverage to the lessee.

In addition to the escape clause, the Holiday/Cole rental agreement contains a paragraph requiring the lessee to "indemnify and hold harmless lessor from and against any and all losses, liabilities, damages, injuries, claims, demands, costs and expenses arising out of the use or possession of the vehicle . . . " (A.32).

By this indemnification provision, the parties have contracted to shift the burden of loss to the lessee, an agreement which the parties are free to undertake. Executive Car & Truck Leasing v. DeSerio, 470 So.2d 21 (Fla. 4th DCA 1985); Allstate Insurance Company of Canada v. Value Rent-A-Car of Florida, supra; Patton v. Lindo's Rent-A-Car, Inc., 415 So.2d 43 (fla. 2d DCA 1982). See also, Insurance Company of North America v. Avis Rent-A-Car System, Inc., 348 So.2d 1149 (Fla. 1977).

Therefore, SOUTHEASTERN, as insurer of the party who is only vicariously liable, and entitled to indemnity, is qualified to follow the coverage provided by STATE FARM, the insurer of the actively negligent tortfeasor. Maryland Casualty Co. v. Reliance Insurance Co., supra; Allstate Insurance Co. v. Fowler, supra; Metropolitan Property and Life Insurance Co. v. Chicago Insurance Co., supra.

CONCLUSION

Based upon the foregoing reasons and citations of authority, petitioner respectfully requests this Court to quash the decision of the Third District Court of Appeal and to reinstate the judgment of the trial court.

Respectfully submitted,

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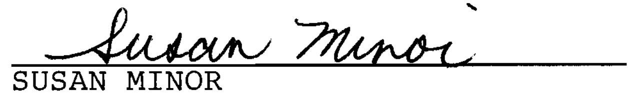
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief of Petitioner on Merits was furnished by mail this 13th day of December, 1985, to all counsel on attached mailing list.



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