IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
MAR 19 1986
CLERK, SUPREME COURT
By Chief Deputy Clerk

ALLSTATE INSURANCE COMPANY

Petitioner,

vs.

EXECUTIVE CAR & TRUCK LEASING INC., et al.,

Respondents.

CASE NO. 67,368

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COMMERCIAL UNION INSURANCE COMPANY, et al.,

Petitioner,

vs.

EXECUTIVE CAR & TRUCK LEASING, et al.,

Respondents.

CASE NO. 67,409

BRIEF OF RESPONDENTS ON THE MERITS COMMERCIAL UNION INSURANCE COMPANY and ACTION BOLT & TOOL COMPANY

(RESPONSE TO ALLSTATE'S BRIEF OF PETITIONER)

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REFERENCE:

Fla.Stat. Section 627.736	2,6

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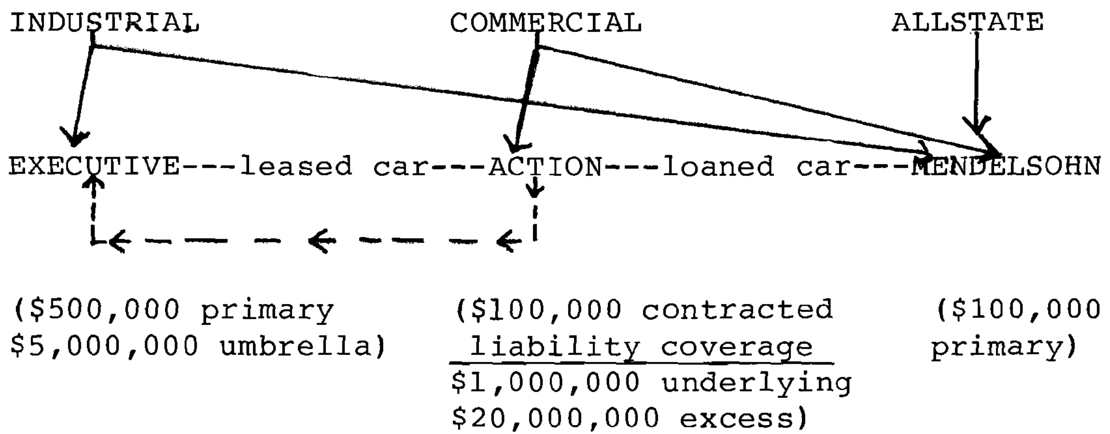
STATEMENT OF THE FACTS AND CASE

Commercial Union Insurance Company and Action Bolt & Tool Company adopt and incorporate the Statement of the Facts and Case contained in our Brief of Petitioners on the Merits filed January 31, 1986. As an aid to the court in viewing the graphic representations of the various assertions of the parties on the insurance coverage issue, Commercial Union and Action provide the following diagram which reflects the positions of all the parties.



KEY:

→ - contract insures party
←--- void contractual indemnity

SUMMARY OF THE ARGUMENT

The Appellate Court has correctly applied valid case law in holding that a tortfeasor's insurance must be exhausted next, after the financial responsibility limits are met, when the tortfeasor has failed to shift his allocation of liability to another party. In determining priorities of the available primary coverage, the court must look to the agreements between the parties to decide the portion of primary coverage for which each insurer is liable. INA; Reliance; Executive; infra. In the absence of any agreement between the active tortfeasor and the other parties, the tortfeasor's insurance must be exhausted before the insurers of the parties that are only vicariously liable are required to pay.

Holding the tortfeasor primarily liable for his policy limits, after the car owner has paid the statutory amount, is consistent with Florida law and strong public policy. The owner must pay the initial $10,000 in primary coverage by statute, which codifies the public policy under the Dangerous Instrumentality Doctrine. Fla.Stat. Section 627.736 The next party to provide primary coverage is the tortfeasor, who must be held primarily responsible for his wrongful act under established common law principles and notions of fairness.

However, Florida recognizes the right of a party to

contract away this possible liability.

But in the absence of such an agreement the tortfeasor must be held liable to the full extent of his insurance coverage before the vicariously liable parties are required to pay.

The Fourth District's opinion finding that Allstate must provide the second level of coverage is correct under both Florida law and public policy and must be affirmed.

ARGUMENT

THE FOURTH DISTRICT CORRECTLY DETERMINED THAT THE SECOND LEVEL OF PRIMARY COVERAGE MUST BE PROVIDED BY THE NEGLIGENT DRIVER'S INSURER, ALLSTATE.

The Petitioner, Allstate, has ignored the relevant case law that holds that once the financial responsibility law has been met the parties are free to contract among themselves to shift liability; failing to do so the loss must be borne by the active tortfeasor's insurer, Allstate, for the full amount of its coverage. The opinion of the Fourth District correctly applied this principle and its decision, finding Allstate liable to the full extent of its policy limits, must be affirmed.

In evaluating the levels of coverage in this case, the Fourth District properly relied upon Insurance Company of North America v. Avis Rent-A-Car System, Inc., 348 So.2d 1149 (Fla. 1977). The outcome under INA is the same as if the recent decisions starting with Allstate Ins. Co. v. Fowler, 480 So.2d 1287 (Fla. 1985) are applied to determine primary coverage. However the recent cases are factually distinguishable since none address the present situation, where a determination of primary coverage must be made between the tortfeasor, the lessor and the lessee. It is important to remember that the Fowler line of cases simply

provides a narrow exception to the general rule that contract language controls priority of coverage. Fowler, supra, 1290; Maryland Casualty v. Reliance Ins. Co., 478 So.2d 1068 (Fla. 1985); Metropolitan Property and Life Ins. Co. v. Chicago Ins. Co., 479 So.2d 114 (Fla. 1985). A closer examination of these cases however substantiates the Fourth District's finding that the active tortfeasor insurer, Allstate, must provide the remaining primary coverage to the full extent of its limits.

In both Fowler and Metropolitan Property the full amount of the primary coverage was exhausted before this Court applied the new rule, that allows a vicariously liable party entitled to indemnification to be subsequent to the insurance coverage of the active tortfeasor regardless of policy language. In other words, the court was not applying the Fowler principle to any question involving primary coverage, but only to excess coverage. Maryland v. Reliance addresses the situation in which the primary coverage is not exhausted and therefore the court must determine the priorities between the parties.

The Reliance case was a dispute between the lessor, insured by Reliance and the lessee, insured by Maryland Casualty, as to which party had to provide primary coverage and for what amount. The tortfeasor apparently had no insurance coverage so there was no issue as to his

contribution to the primary coverage. The parties had an oral lease agreement, which could not meet the statutory requirements for shifting the burden of primary coverage to the lessee. Based on this violation of Fla.Stat. Section 627.7263, the court determined that the lessor's policy with Reliance must provide the first portion of the primary coverage to the statutory limit of $10,000. Fla.Stat. Section 627.736. The remaining portion of the primary coverage had to be provided by the other contracting party, thus Maryland Casualty was liable to the full extent of its primary policy limits.

The determination of the second level of primary coverage between the contracting parties in Reliance was based on the application of the rule announced in Fowler. Maryland Casualty insured the active tortfeasor, while Reliance insured a vicariously liable owner entitled to indemnification from Maryland Casualty. Thus Reliance would have been entitled to be subsequent to Maryland Casualty's primary coverage regardless of any policy language, under the Fowler rule. While Reliance is factual distinguishable from the case sub judice, it is still precedential on the principle that the parties initial contract or agreement controls priority of coverage. Reliance is consistent with the application of the principles in the INA case, used by the Fourth District, which recognizes a party's right to

contract for the allocation of liability.

In the present situation primary coverage is available through the insurance of the active tortfeasor, the owner/lessor and the employer/lessee. The first determination that must be made is whether any of these parties has entered into an agreement for the allocation of liability above the minimum statutory amount. Insurance Company of North America v. Avis Rent-A-Car System Inc., supra, 1154; Truck Discount Corp. v. Serrano, 362 So.2d 390 (Fla. 1st DCA 1978) (There is no dispute that the car owner/lessor, Executive, is responsible for the $10,000 statutory amount.)

As the Fourth District correctly observed Allstate's insured had no agreement for the allocation of liability with either the lessee/Action or the lessor/Executive.

> It is also established that parties may agree to the allocation of liability. Truck Discount Corp. v. Serrano, 362 So.2d 240, 343 (Fla. 1st DCA 1978). In this case, the active tortfeasor, Mendelsohn, who is Allstate's insured, had no agreement for the allocation of liability with either the lessee or the owner/lessor. Accordingly, the driver's insurance policy with Allstate should be exhausted next.
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> Executive Car & Truck Leasing, Inc. v. DeSerio, 470 So.2d 21, 23 (Fla. 4th DCA 1985).

(The lease agreement allocating liability between

Executive and Action is involved in the determination of the third and fourth levels of coverage, which is addressed in the Brief of Petitioner - Commercial Union.) Absent an agreement between tortfeasor Mendelsohn and Action or Executive, the tortfeasor's insurance policy must provide the next level of primary coverage, to the full extent of its limits. Executive, supra 23. This conclusion is consistent with the current Florida law as stated in INA, Flower and Reliance, which all recognize the right to shift liability by contracts between parties. In Fowler, this Court did not overrule INA, but distinguished it on its facts. INA is still valid law, and the District Court correctly applied it to the facts of this case.

INA and Reliance are somewhat similar, in that each case was a dispute involving an allocation of primary coverage between contracting parties, the lessor and lessee. Moreover, the tortfeasors apparently were not sued or had no personal insurance coverage and therefore neither court addresses the tortfeasor's position in providing primary coverage, which is at issue in the present case.

INA, like Reliance, involved an employee of the lessee who caused an auto accident. Here the plaintiff sued the owner/lessor, Avis, and its insuror, Liberty Mutual, and the employer/lessee and its insurer, INA.

The lessor provided primary coverage for any rentee for

$100,000. INA insured the employer/lessee for $200,000 and Liberty Mutual provided Avis with excess coverage of $500,000. The trial court determined that Liberty Mutual should pay its primary coverage, followed by lessee's policy for its limits of $200,000 and the remainder to be paid by Liberty Mutual, which was $50,000. Liberty Mutual sought indemnification from INA for the $50,000. In answering the certified question of whether Liberty Mutual was entitled to indemnification from INA in the affirmative, this Court stated that once the public policy of the state was satisfied regarding the compensation of injured parties through the financial responsibility laws, then the contracting parties were free to shift the burden of loss.

> We hold that the public policy of the state was satisfied in this case when the injured's beneficiaries were compensated by the vehicle's owner for the negligent operation of a rented vehicle. The parties were free to contract between themselves to shift the burden of loss so long as they met the requirements of law, and in this case there is no suggestion that those requirements were not met.
>
> INA, at 1154.

If the tortfeasor in the present case had an agreement to shift liability to either Action or Executive then that contract would be determinative of the next layer of primary coverage, after the statutory $10,000. However, there was

no such agreement to allocate liability to any other party. In Reliance and INA, the agreement between the parties controlled the determination of the extent of liability for primary coverage. There is no agreement between Allstate's insured and any other party in this case.

By holding that the tortfeasor's insurer must follow next, after the financial responsibility law is satisfied, the Fourth District reaffirmed the common law principle that fault attracts primary responsibility. INA, supra, 1153. Three parties must provide primary coverage in this case. The first is Industrial Indemnity, insurer of the car's owner, as required under the financial responsibility statute and under strong public policy considerations that are expressed in Florida's dangerous instrumentality doctrine, which mandates that the owner is primary liable.

The second level of primary coverage must come from the insurer of the active tortfeasor, which comports with common law, and all notions of fairness, which require the wrongdoer to pay for his negligent acts. This conclusion is only abrogated when the tortfeasor has entered into an agreement with another party to assume responsibility for his liability. INA, supra, 1154; Fowler, supra, 1290; Executive, supra, 23. Absent the agreement, the tortfeasor must be next in line to provide primary coverage. This is completely consistent with INA and Reliance which both look

to the agreements of the parties to determine primary coverage. It is also consistent with the principle that an active tortfeasor must be held fully responsible before any party that is only vicariously liable.

Action can only be vicariously liable for the acts of the tortfeasor, Mendelsohn. Therefore, the tortfeasor's insurer, Allstate, was correctly found to be liable for its $100,000 policy limit, after the statutory amount of $10,000; and the Fourth District's determination of the second level of primary coverage is correct. (The third and fourth levels of primary and excess coverage are addressed in the Brief of Petitioner - Commercial Union.)

Absent a contractual shifting of liability, the tortfeasor must be held liable for primary coverage to the full extent of his policy limits and prior to the coverage provided by parties that are only vicariously liable. The Fourth District's opinion so holding must be affirmed.

CONCLUSION

The Fourth District correctly applied Florida law to find the active tortfeasor's insurance, absent a contract allocating its liability, must be exhausted next after the statutory minimum amount is met and the Appellate Court's decision on the second level of coverage must be affirmed.

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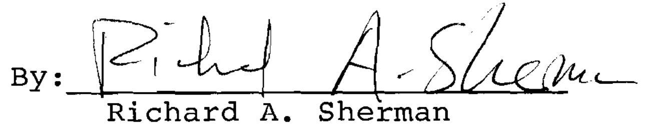
By: 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 17 day of March, 1986 to:

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