No Reg Case

IN THE SUPREME COURT OF FLORIDA

ALLSTATE INSURANCE COMPANY,
and the Estate of ROBERT D.
MENDELSOHN,

Petitioners,

vs.

CASE NO: 67,368

EXECUTIVE CAR & TRUCK LEASING,INC.,
INDUSTRIAL INDEMNITY INSURANCE
COMPANY, ACTION BOLT &
TOOL COMPANY, COMMERCIAL UNION
INSURANCE COMPANY and ALBERTA
DESERIO,

Respondents.

FILED
SID J. WHITE
FEB 10 1986
CLERK, SUPREME COURT
By
Chief Deputy Clerk

COMMERCIAL UNION INSURANCE COMPANY,
and ACTION BOLT & TOOL COMPANY,

Petitioners,

vs.

CASE NO: 67,409

EXECUTIVE CAR & TRUCK LEASING,
INC., INDUSTRIAL INDEMNITY
INSURANCE COMPANY, and ALBERTA
DESERIO,

Respondents.

BRIEF ON THE MERITS OF PETITIONERS ALLSTATE INSURANCE
COMPANY AND THE ESTATE OF ROBERT D. MENDELSOHN

WALTON LANTAFF SCHROEDER & CARSON
ATTORNEYS AT LAW
900 ALFRED I. duPONT BUILDING
MIAMI, FLORIDA 33131

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WALTON LANTAFF SCHROEDER & CARSON
900 ALFRED I. DUPONT BUILDING, MIAMI, FLORIDA, 33131, TELEPHONE (AREA CODE 305) 379-6411

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PRELIMINARY STATEMENT

Allstate Insurance Company and the Estate of Robert D. Mendelsohn are the petitioners and are referred to herein as Allstate and Mendelsohn.

Executive Car and Truck Leasing, Inc. and Industrial Indemnity Insurance Company are also petitioners. Action Bolt & Tool Company and Commercial Union Insurance Company and Alberta DeSerio are the respondents. These parties are referred to herein by name as Executive, Industrial, Action, Commercial and DeSerio, respectively. The following symbols will be used:

"A" - Petitioner Allstate's Appendix.

"R" - Record on Appeal.

All emphasis is supplied unless otherwise indicated.

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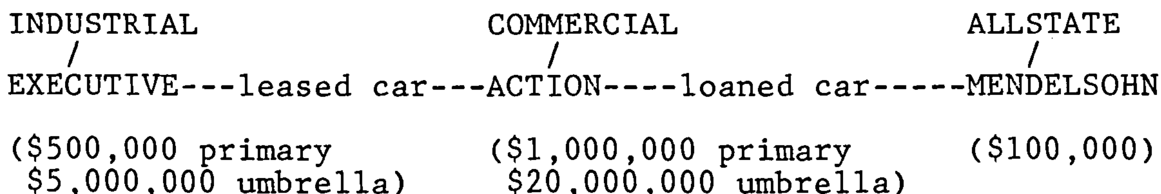
STATEMENT OF THE CASE AND OF THE FACTS

Executive leased an automobile, a 1980 Chevrolet Citation, to the predecessor in interest to Action under a written lease (R. 310-314). Executive was insured by Industrial by a policy which provided $500,000 in primary coverage and $5,000,000 in umbrella coverage. Action was insured by Commercial. Commercial had $1,000,000 underlying coverage and $20,000,000 umbrella coverage for Action. (R. 315-66) Action loaned the Citation to its employee Mendelsohn. Mendelsohn had $100,000 coverage with Allstate. (R. 216-30)

To assist the court's understanding of the parties and facts involved in this appeal, the following diagram is provided:



While Mendelsohn was driving the leased automobile on December 14, 1981, he was involved in an accident with appellee DeSerio in which DeSerio was injured and Mendelsohn was killed. DeSerio sued Mendelsohn's personal representative and all of the entities involved in the automobile's potential chain of liability: Mendelsohn's insurer, Allstate; the car's lessee, Action; Action's insurer, Commercial; the automobile's lessor, Executive; and Executive's insurer, Industrial.

(R. 136-142) The parties filed various cross-claims for declaratory relief regarding the priority of insurance coverage. (R 156-186, 198-209, 213-214)

The trial court held in a Final Judgment on Cross-Claims that Industrial as the insurer of the lessor, Executive, had both the first level of coverage up to its primary policy limit of $500,000 and the second level of coverage up to its umbrella policy limit of $5,000,000; that Allstate's $100,000 policy and Commercial's $1,000,000 primary policy provided the third level of coverage on a pro rata basis; and that Commercial's $20,000,000 umbrella policy provided the last level of coverage. (R. 364-65)

At a later trial, DeSerio was awarded a verdict of $1,200,000 against all six defendants. (R. 51) An appeal before the Fourth District ensued. In Executive Car and Truck Leasing, Inc. v. DeSerio, 10 FLW 1102 (Fla. 4th DCA May 10, 1985) (slip op. at A. 1), the Fourth District disapproved the trial court's resolution of the coverage issue and instead held the levels of coverage to be as follows: first, because the lease agreement failed to state in bold type that the lessee is responsible for $10,000 coverage under the financial responsibility law, Section 627.7263(1), Florida Statutes (1983), the lessor's insurer, Industrial, would cover up to the first $10,000 of liability (A. 3); second, since other parties have a right of indemnification against Allstate's insured, Mendelsohn, because he was the active tortfeasor,

Allstate would provide the next level of coverage (A. 3-5); third, because the lease agreement between Executive and Action provided that the lessor would be indemnified totally by the lessee, Action's primary and umbrella policies would satisfy the next level of coverage with Executive's policies to follow. (A. 5-6) The Fourth District thus allocated the responsibility for payment of DeSerio's judgment as follows:

(1) Industrial Indemnity Company in the amount of $10,000;

(2) Allstate Insurance Company in the amount of $100,000;

(3) Commercial Union Insurance Company's primary policy in the amount of $1,000,000;

(4) Commercial Union Insurance Company's excess policy in the amount of $20,000,000;

(5) Industrial Indemnity Company's primary policy in the amount of $500,000;

(6) Industrial Indemnity Company's excess policy of $5,000,000.

(A. 6-7)

SUMMARY OF THE ARGUMENT

The Fourth District erred in determining that the personal insurer of the tortfeasor, Mendelsohn, would be entirely responsible for providing the second level of insurance coverage in this case. The court ignored the fact that Mendelsohn, as the permissive driver of an automobile leased by Action, became an "additional insured" under Action's policies with Commercial. Because Mendelsohn qualified as an additional insured under both Commercial policies, the language of the Commercial policies as well as Mendelsohn's own Allstate policy must be reviewed to determine the priority of their coverages. Had the Fourth District correctly done this, it would have discovered that Mendelsohn's Allstate and Commercial policies all contained excess "other insurance" clauses which were identical in effect. Since the Commercial and Allstate policies which provided all of Mendelsohn's collectible insurance contained the same type of excess clauses, well-established precedent requires pro-rating payment in satisfaction of the judgment based on the proportion of coverage of each policy.

Following these principles, the Fourth District's decision concerning the second level of coverage which requires Allstate to exhaust its coverage before Commercial's primary and umbrella policies are engaged is erroneous. Rather, based on principles recently reaffirmed by this Court in the three cases of Allstate Ins. Co. v. Fowler, 10 FLW 610 (Fla.

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November 27, 1985) (A. 13), Maryland Casualty Co. v. Reliance Ins. Co., 10 FLW 612 (Fla. November 27, 1985) (A. 15), and Metropolitan Property and Life Ins. Co. v. Chicago Ins. Co., 10 FLW 614 (Fla. November 27, 1985) (A. 17), the second level of coverage should be shared pro-rata among all policies covering Mendelsohn; namely, Allstate, Commercial primary and Commercial umbrella. The Fourth District's decision should thus be reversed and remanded with instructions to pro-rate the second level of coverage among the Allstate and Commercial policies.

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900 ALFRED I. DUPONT BUILDING, MIAMI, FLORIDA, 33131, TELEPHONE (AREA CODE 305) 379-6411

ARGUMENT

THE FOURTH DISTRICT ERRED IN DETERMINING THE SECOND LEVEL OF COVERAGE BY IGNORING THE FACT THAT MENDELSOHN WAS AN ADDITIONAL INSURED OF COMMERCIAL

In reaching its decision, the Fourth District mistakenly focused entirely on the fact that Mendelsohn was the active tortfeasor. Because of this, the court concluded that Mendelsohn's insurer, Allstate, is responsible for the level of coverage up to its policy limits immediately following the financial responsibility requirements. However, the Fourth District committed a critical error by ignoring entirely the fact that Mendelsohn was also an "additional insured" under both of his employer's Commercial policies. Had that fact been recognized, the court properly would have proceeded to the next level of analysis, which is to determine from the contract language of the Allstate and Commercial policies which insurer pays and in what order. If the Fourth District had thus proceeded correctly it would have determined that, because all of the Allstate and Commercial insurance policies contain fundamentally the same language governing situations where "other insurance" exists, these clauses cancel each other out and all the policies pay into the judgment on a pro-rata basis.

After satisfaction of the primary $10,000 financial responsibility law requirement pursuant to Section 627.7263, Florida Statutes (1983), the Fourth District placed the second

level of coverage entirely on the active tortfeasor, Mendelsohn, and his insurer, Allstate Insurance Company. The court followed the principle recently reaffirmed by this court in Allstate, Maryland Casualty, and Metropolitan, supra, that the coverage of a party who is only vicariously liable and thus entitled to indemnity follows that of the insurer of the actively negligent party. See also, Morse Auto Rentals, Inc. v. Lewis, 161 So.2d 235 (Fla. 3d DCA 1964). The Fourth District then reasoned that, since the lessor of the vehicle, Action, and its insurer, Commercial, had agreed through the lease completely to indemnify the lessor, Executive, Commercial would assume the next level of coverage up to its total policy limits.

In placing Mendelsohn alone on the second level of coverage, the Fourth District entirely ignored the fact that he was an "additional insured" under both the Commercial primary and umbrella policies. Because Mendelsohn himself thus was an insured of Commercial, Commercial can have no right of indemnification against him or his insurer, Allstate.

The language of the Commercial policies clearly classifies Mendelsohn as an "additional insured." The Commercial primary policy states:

> D. WHO IS INSURED.
>
> 1. You are an insured for any covered auto.
>
> 2. Anyone else is an insured while using with your permission a covered auto you own, hire or borrow. (R. 339)

Because Mendelsohn was permissively using an automobile leased by Commercial's insured, he thus qualified as an additional insured under Commercial's primary policy.

Similarly, the Commercial umbrella policy provided that:

> (d) Any additional insured (not being the Named Insured under this policy) included in the underlying insurance, subject to the provisions in Condition B, but not for broader coverage than is available to such additional insured under a policy of underlying insurance set forth in Item 3 of the Declarations:
>
> (e) With respect to any automobile owned by the Named Insured or hired for use on behalf of the Named Insured, or to any aircraft owned by or hired for use on behalf of the Named Insured, any person while using such automobile or aircraft and any person or organization legally responsible for the use thereof, provided the actual use of the automobile or aircraft is with the permission of the Named Insured. (R. 339)

Since Mendelsohn was a permissive user of the insured automobile, he thus qualified as an additional insured under the Commercial umbrella policy as well.

As this court reaffirmed in Fowler, "[a] right of indemnity does not exist if the insurer of the vicariously liable party insures the actively negligent as an additional insured because an insurance company cannot sue its own insured for indemnity." 10 FLW at 611, citing Marina Del Americana, Inc. v. Miller, 330 So.2d 164 (Fla. 4th DCA 1976) (A. 14, 19). Here, then, Mendelsohn and Allstate may not be sued for indemnification by Commercial because Mendelsohn, the actively

negligent party, was an additional insured under both the primary and the umbrella policies issued by Commercial, the insurer of vicariously-liable Action.

Since there thus can be no right of indemnity between Allstate and Commercial, the language of their respective policies controls the order of coverage between them. Metropolitan Property and Life Ins. Co. v. Chicago Ins. Co., supra. (A. 7). More specifically, where no right of indemnity exists, this Court has directed that the "other insurance" clause controls the order of coverage. Fowler, supra, at 612 (A. 15). If all policies contain "other insurance" clauses which provide equally that the policy will be "excess" over other collectible insurance applicable to the liability, the clauses effectively cancel each other out. When that occurs, courts pro-rate coverage. Rouse v. Greyhound Rent-A-Car, Inc., 506 F.2d 410, 415-16 (5th Cir. 1975) (A. 31, 36-37); Sentry Ins. Co. v. Aetna Insurance Company, 450 So.2d 1233, 1236 (Fla. 2d DCA 1984) (A. 22, 25); Auto Owner's Ins. Co. v. Palm Beach County, 157 So.2d 820, 822 (Fla. 2d DCA 1963) (A. 26, 28). Consequently, the second level of coverage in this action should have been pro-rated because of the identical "other insurance" clauses of the Allstate and Commercial policies.

Examination of the "other insurance" clauses in the Allstate and Commercial policies reveals that they are

identical in effect and meaning. Commercial's primary policy provides that:

> B. OTHER INSURANCE
>
> 1. For any covered auto you own this policy provides primary insurance. For any covered auto you don't own, the insurance provided by this policy is excess over any other collectible insurance.
>
> * * *
>
> 2. When two or more policies cover on the same basis, either excess or primary, we will pay only our share. Our share is the proportion that the limit of our policy bears to the total of the limits of all the policies covering on the same basis. (R. 340) (A. 9)

Commercial's umbrella policy provides that:

> K. OTHER INSURANCE
>
> If other valid and collectible insurance with any other insurer is available to the insured covering a loss also covered by this policy other than insurance that is specifically, stated to be in excess of the insurance afforded by this policy, the insurance afforded by this policy shall be in excess of and shall not contribute with such other insurance. Nothing therein shall be construed to make this policy subject to the terms, conditions and limitations of other insurance. (R. 330) (A. 11)

Allstate's policy provides:

> IF THERE IS OTHER INSURANCE
>
> If a person insured is using a substitute private passenger auto or non-owned auto, our liability insurance will be excess over other collectible insurance. If more than one policy applies to an accident

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> involving your insured auto, we will bear our proportionate share with other collectible liability insurance. (R. 221) (A. 12)

The Allstate, Commercial primary and Commercial umbrella policies thus each contain an excess "other insurance" clause which provide that that policy will be excess over other valid and collectible insurance applicable to the liability. Rouse, supra. Because such clauses are equal in effect, they cancel each other out, and the coverages that they provide properly should be pro-rated. Such a pro-ration in this action results in the allocation of coverage as follows:

1. Industrial Indemnity contributes the financial responsibility ceiling of $10,000.

2. Allstate would contribute its $100,000 pro rata with Commercial's $1,000,000 primary policy and Commercial's $20,000,000 umbrella policy.

3. Industrial Indemnity's $500,000 primary policy and $5,000,000 excess policy would follow.

Allstate Insurance Company and the Estate of Richard Mendelsohn therefore submit that the Fourth District erred in ignoring the fact that Mendelsohn was an "additional insured" under the Commercial primary and umbrella policies and thus was not liable for indemnification to Commercial. This error in turn led to the Fourth District's failure to review the "other insurance" clauses of each policy to determine the priority of coverages. Such an analysis would have revealed that the "other insurance" clauses of the Commercial and

Allstate policies are all excess clauses which cancel each other out. Consequently, pro-ration of the Allstate and Commercial coverages on the second level properly should have been ordered.

CONCLUSION

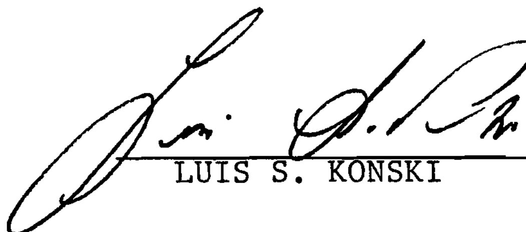
The decision of the Fourth District as to the second level of coverage should be reversed and remanded with instructions that Allstate and Commercial contribute to the liability judgment on a pro-rata basis based on the policy provisions. The first level and last levels of coverage were correctly decided and should not be disturbed.

WALTON LANTAFF SCHROEDER & CARSON
Attorneys for Allstate and Mendelsohn
900 Alfred I. duPont Building
169 East Flagler Street
Miami, Florida 33130
(305) 379-6411

By:
LUIS S. KONSKI

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 5th day of February, 1986 to: Ronald J. Fruda, Esquire, Post Office Box 190, Boynton Beach, Florida 33435; Larry Klein, Esquire, Suite 503, Flagler Center, 501 South Flagler Drive, West Palm Beach, Florida 33401; Ricahrd J. Olack, Esquire, Post Office Drawer E, West Palm Beach, Florida 33402; Carol Anderson, Esquire, Croissant Place, 1313 S. Andrews Avenue, Fort Lauderdale, Florida 33316; Lloyd J. Heilbrunn, Esquire, Law Offices of Brian C. Powers, 2328 - 10th Avenue North, Suite 6-A Concept 11, Lake Worth, Florida 33461; Douglas D. McMillan, Esquire, 8300 Douglass Avenue, Suite 800, Dallas, Texas 75225 and Eric A. Peterson, Esquire, Peterson & Fogarty, Post Office Drawer 3604, West Palm Beach, Florida 33402.



LUIS S. KONSKI

LSK4c/bj