IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

CASE NO. 67,368

ALLSTATE INSURANCE COMPANY,

Petitioner,

v.

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

Respondents.

ON PETITION TO INVOKE DISCRETIONARY REVIEW OF DECISION OF THE DISTRICT COURT OF APPEAL FOURTH DISTRICT OF FLORIDA

PETITIONER'S BRIEF ON JURISDICTION

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On behalf of Allstate Insurance Company

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PREFACE

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STATEMENT OF THE FACTS

The facts are shown in the opinion of the Fourth District. Action Bolt and Tool Company [Action] was the lessee of the vehicle in question and loaned the vehicle to its employee, Mendelsohn. While driving the automobile Mendelsohn was involved in an accident with Alberta DeSerio in which Mendelsohn was killed and DeSerio was injured.

DeSerio's suit ensued ultimately receiving a verdict for $1,200,000.00 against the owner and lessor of the motor vehicle, Executive Car and Truck Leasing, Inc. [Executive], (insured by Industrial Indemnity Insurance Company [Industrial] with a policy for $500,000.00 underlying coverage and $5,000,000.00 umbrella coverage) Action, (insured by Commercial Union Insurance Company [Commercial] with a policy for $1,000,000.00 underlying coverage and $20,000,000.00 umbrella coverage) and Mendelsohn, the permissive user of the vehicle, (insured by Allstate Insurance Company [Allstate] with primary coverage in the amount of $100,000.00.)

As to cross-claims for declaratory relief regarding the priority of insurance coverage, the trial court determined that

Industrial would provide primary and umbrella coverage up to the $5,500,000.00 limits; Allstate ($100,000.00) and Commercial ($1,000,000.00) would provide the next level of coverage, pro-rata and the next level of coverage would be provided by Commercial's ($20,000,000.00) umbrella. The appeal below ensued.

On appeal all parties conceded that Executive was liable up to at least $10,000.00 under this State's Financial Responsibility Law. § 627.7263(1), Fla. Stats. The Fourth District further found that Allstate should contribute the next $100,000.00 since it insured the active tortfeasor (Mendelsohn). (A 3-5) As between the insurance policies of the lessor/owner (Industrial) and the lessee (Commercial), the Fourth District determined that since the lessee agreed under the lease agreement to indemnify the lessee completely, Commercial's policies ($21,000,000.00) should be exhausted prior to the Industrial Indemnity coverages ($5,500,000.00). (A 5-7)

ISSUE

DOES THE DECISION OF THE FOURTH DISTRICT CONFLICT WITH SUNSHINE DODGE, INC., V. KETCHEM, 455 So.2d 395 (Fla. 5th DCA 1984) AND MARK COLE V. SOUTHEASTERN FIDELITY INSURANCE COMPANY, 10 FLW 1330 (Fla. 3rd DCA, May 28, 1985)?

In the present case the Fourth District has held that the owner/lessor has primary coverage under its insurance policy, but only up to the $10,000.00 minimum of the Financial Responsibility Law §627.7263(1), Fla. Stat. (1983). (A 3)

The Fourth District stated that beyond this minimum the parties are free to contract for different allocations of liability coverage. (A 4-5) However, since the active tortfeasor, permissive driver Mendelsohn, was held to have no agreement for the allocation of coverage with either the lessor or the lessee, his personal insurance policy with Allstate was to be exhausted next in satisfaction of the judgment. (A 4-5) The Court opined that since: " * * * the owner and the lessee were only vicariously liable, their insurers should be subsequent in coverage to the separate insurers of the negligent driver." (A 5)

The latter ruling is in express and direct conflict with Sunshine Dodge, Inc. v. Ketchem, 455 So.2d 395 (Fla. 5th DCA 1984). In direct contradiction, Sunshine Dodge creates no such precedence of coverage based on whether the insurance policy was the tortfeasor's insurance policy. Rather, in Sunshine Dodge, the material question is whether the driver of the vehicle was an insured under the lessor's policy. In this vein, the Fifth

District found that if the permissive driver of a lessee is an additional insured for the full coverage limits under the lessor's policy, the lessor's insurer may not relieve itself of responsibility within its coverage as against one of its own insureds. Sunshine Dodge, 455 So.2d at 397; see also, Cole, et al. v. Southeastern Fidelity Insurance Company, 10 FLW 1330, 1331 (Fla. 3rd DCA, May 28, 1985). Mendelsohn was an additional insured under the lessor's policy (A 8-10) and the lessee's policy for the full coverage limits of those policies (A 11-13).

Moreover, in Cole the Third District expressly recognizes conflict on this subject with the decisions coming out of the Fourth District and other districts, including apparently the decision on appeal here. In Cole the Third District described the conflict as follows:

> Of the decidedly non-uniform Florida decisions in this field, we conclude that Sunshine Dodge, Inc. v. Ketchem, 445 So.2d 395 (Fla. 5th DCA 1984) embodies a correct analysis of the legal situation before us and therefore follow its holding. In our view, Sunshine Dodge properly recognizes both (a) the binding effect of the provisions of the respective policies of the lessor and the lessee-driver. See Insurance Company of North America v. Avis Rent-A-Car System, Inc., 348 So.2d 1149 (Fla. 1977), and (b) the rule that an insurer, such as the appellee Southeastern, can not seek to relieve itself of responsibility within its coverage against one of its own insureds. Ray v. Earl, 277 So.2d 73 (Fla. 2d DCA 1973), cert. denied, 280 So.2d 685 (Fla. 1973). In contrast, Reliance Insurance Company v. Maryland Casualty Company, 453 So.2d 854 (Fla. 4th DCA 1984), review granted (Fla. Case no. 65-873)[10 FLW April 5, 1985], incorrectly overlooks the former consideration, and both the majority and the specially concurring opinions in Allstate Insurance Company v.

> Value Rent-A-Car of Florida, Inc., 463 So.2d 320 (Fla. 5th DCA 1985) ignore the latter doctrine and the fact that it applies even when, as here and in Value Rent-A-Car, the negligent driver is an additional insured under the policy secured by the owner-lessor. Compare Allstate Ins. Company v. Fowler, 455 So.2d. 506 (Fla. 1st DCA 1984) (contary rule when active tortfeasor is not insured under policy of one only vicariously responsible) and American Home Assurance Company v. City of Opa Locka, 368 So.2d 416 (Fla. 3d DCA 1979) (same); but cf. Executive Car and Truck Leasing, Inc. v. DeSerio, ___ So.2d ___ (Fla. 4th DCA Case no 84-119, opinion filed. May 1, 1985) [10 FLW 1102]: Chicago Insurance Company v. Soucy, ___ So.2d ___ (Fla. 4th DCA Case no. 83-2016, opinion filed. November 28, 1984) [9 FLW 2485]]

Cole, 10 FLW at 1331.

Thus, the Fourth District's decision clearly conflicts with Cole and Sunshine Dodge and the conflict is wholly irreconcilable. Petitioner submits that the Supreme Court should grant this petition to clarify the confusion among precedents.

CONCLUSION

The Fourth District's decision directly conflicts with the decisions in Cole and Sunshine Dodge, and therefore this Court has jurisdiction to determine the merits of this Petition.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished, by mail, this 25th day of July, 1985, to:

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