IN THE SUPREME COURT OF FLORIDA

ALLSTATE INSURANCE COMPANY

Petitioner,

vs.

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

Respondents.

CASE NO. 67,368

COMMERCIAL UNION INSURANCE COMPANY, et al.,

Petitioner,

vs.

EXECUTIVE CAR & TRUCK LEASING et al.,

Respondents.

CASE NO. 67,409

REPLY BRIEF OF PETITIONERS COMMERCIAL UNION INSURANCE COMPANY and ACTION BOLT & TOOL COMPANY

(TO MEMORANDUM ANSWER BRIEF OF ALLSTATE INSURANCE COMPANY AND MENDELSOHN)

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SUMMARY OF ARGUMENT

Allstate has failed to acknowledge that the first step in determining priority of primary coverage is to determine if the parties have entered into a contract which shifts or allocates their liability to another party. In Reliance, infra, this Court looked first to the lease agreement to determine the portion of primary coverage for which each party was responsible. Mendelsohn, the tortfeasor, did not enter into any agreement to shift his liability to Action or Executive.

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 varcariously liable parties are required to pay. Holding the tortfeasor primarily liable for his policy limits, after the car owner has paid the statutory financial responsibility of $10,000, is consistent with Florida law and strong public policy.

After the owner, 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. 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.

Assuming arguendo, that the active tortfeasor were allowed to prorate his primary coverage with that of Action and Executive; Commercial Union would be limited to proration based on $100,000, not $2,000,000 as Allstate suggests. Action contracted with Executive, in the lease agreement to provide $100,000 in coverage for the leased car. Commercial Union's obligation has been limited to this amount by the contract and the limitation must be given effect.

Since Mendelsohn did not agree to shift his liability to Action or Executive, he must be held responsible for the full amount of his policy limit without proration, and prior to the coverage of the contracting parties, that are only vicariously liable. The Fourth District's opinion finding that Allstate must provide the second level of coverage is correct under both Florida and public policy and must be affirmed.

POINT ON APPEAL

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

ARGUMENT

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

Allstate has failed to closely examine the Fowler line of cases, which, while factual distinguishable from the present case, still supports the Fourth District's determination that, absent a contract shifting primary liability to another party, the tortfeasor's insurance must be exhausted for the second level of coverage. The exhaustion of primary coverage was addressed only in Maryland Casualty Co. v. Reliance Ins. Co., 478 So.2d 1068 (Fla. 1985).

Reliance involved a dispute between the lessor and lessee as to which party was liable for what percentage of primary coverage, and the tortfeasor's personal insurer was not sued. In Reliance, the court first looked to the lease agreement between the parties to determine the priority of coverage. There was no shifting of liability from the lessor to the lessee, within the statutory requirements, and the court held that the lessor's insurer, Reliance, had to provide the first level of primary coverage. Maryland v. Reliance, supra 1070.

It was only after the contract between the parties was

examined did the court move to the second level of primary coverage and apply the Fowler rule. Pursuant to Fowler, the court examined the policy language to find that Reliance insured a vicarious liable party entitled to indemnification. Meeting this standard, Reliance was entitled to be subsequent to the insurer of the tortfeasor, Maryland Casualty, on the second level of primary coverage, regardless of any language contained in the insurance policies. Reliance, supra, 1070; Allstate Ins. Co. v. Fowler, 480 So.2d 1287, 1290 (Fla. 1985).

The application of the principle that parties are free to contract among themselves to shift the burden of loss was the basis of the decision in Reliance and is consistent with the Court's previous decision in Insurance Co. of North America v. Avis Rent-A-Car, Inc., 348 So.2d 1149, 1154 (Fla. 1977).

> 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.

The Fourth District first determined that Executive, as the car owner, was liable for the initial portion of the

primary coverage. To decide the next level of primary coverage the Appellate Court looked to the parties to see if there were any contracts whereby they had agreed to shift the burden of loss.

> 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).

This examination of the allocation of liability by the parties was a correct application of valid law as stated in INA and substantiated in Reliance. It is only after a determination has been made regarding the allocation of liability that the court may be required to look to the policy language. However in this case, that step is required only in the determination of the third level of coverage between the contracting parties, Action and Executive. It is only at this level that the court must look to the policy language of the lessor and lessee, as required by the Fowler rule, since Action and Executive covered the active tortfeasor as an additional insured.

Action and Commercial Union have not mistakenly overlooked this step. The Co-Petitioners have correctly applied it where necessary, to the third and fourth levels of coverage, not the second.

The Fourth District, even without the benefit of this Court's most recent decisions, correctly looked for an allocation of liability between the active tortfeasor and the other parties. Because Mendelsohn had not entered into such an agreement, the court found that the tortfeasor's insurance coverage must be next in line without proration, after the statutory financial responsibility amount of $10,000. Not only is this finding correct under INA and Reliance, but it is prefectly consistent with common law principles and public policy.

Fault attracts primary responsibility and after the public policy holding a car owner liable is satisfied, the tortfeasor must be held liable next, to the full extent of his coverage. In this manner the actual wrongdoer is required to pay before any party that is only vicariously liable. This conclusion is consistent with common law principles and comports with all notions of fairness. In the present situation, where primary coverage is available through three parties (the tortfeasor, the lessor and the lessee), the tortfeasor must be held liable before Action and Executive, where he failed to shift his liability to any

other party.

For the sake of argument only, if the tortfeasor were allowed to prorate his coverage with that of the vicariously liable parties, then the levels of coverage suggested at the end of Allstate's Brief would apply (Memorandum Brief, top of pg. 7). Commercial Union cannot be required to prorate for its total policy limits of $2,000,000 as Allstate initially asserts, since Action contracted to obtain $100,000 in coverage on the leased car. Commercial Union's obligation has been limited to this $100,000 by the lease agreement between Action and Executive and the limitation must be given effect.

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.

Absent a contractual shifting of liability, the tortfeasor must be held responsible for primary coverage to the full extent of his policy limits without proration, and prior to the coverage of the contractual 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 that 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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