SUPREME COURT OF FLORIDA

CASE NO. 67,385

FIREMAN'S FUND INSURANCE COMPANY,

Petitioner,

vs.

GEORGE POHLMAN,

Respondent.

ON CERTIFIED CONFLICT FROM THE DISTRICT COURT OF APPEAL, THIRD DISTRICT OF FLORIDA

REPLY BRIEF OF PETITIONER

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REPLY ARGUMENT

THE DECISION SOUGHT TO BE REVIEWED SHOULD BE REVERSED BECAUSE APPLICATION OF FLORIDA STATUTES §627.4132 (1980) UNCONSTITUTIONALLY IMPAIRS THE CONTRACTUAL OBLIGATIONS BETWEEN THE PARTIES, CONTRACTED FOR PRIOR TO THE ENACTMENT OF THE AMENDED STATUTE, IN VIOLATION OF ARTICLE I, SECTION 10 OF THE FLORIDA CONSTITUTION.

A. The Statute Should Be Applied Prospectively Only, As The Rights Of The Parties Vested At The Time The Contract Was Entered Into.

Respondent argues that principles of statutory construction should not be considered as they were not properly raised. On the contrary, the issue before the court is whether the 1980 amendment to Fla.Stat. §627.4132, can be applied to a contract entered into prior to the effective date of the amendment. Statutory construction will certainly be encompassed within this issue. In addition, statutory construction was argued by petitioner in their Brief to the Third District Court of Appeals (at p. 8) wherein we relied on the reasoning of Dewberry v. Auto Owners Insurance Co., 363 So.2d 1077 (Fla. 1978) in that generally, a statute speaks from the time it goes into effect.

Respondent contends that Amended Statute 627.4132 is remedial in nature and therefore should be given retroactive application. It is settled law that a statute is presumed to be prospective unless the legislature clearly manifests a contrary intention. Cove Club Investors, Ltd. v. Sandalfoot South One, Inc., 438 So.2d 354 (Fla. 1983); State v. Lavazzoli, 434 So.2d

321 (Fla. 1983); Walker & LaBerge, Inc. v. Halligan, 344 So.2d 239 (Fla. 1977); Seitz v. Duval County School Board, 366 So.2d 119 (Fla. 1st DCA 1979); Lewis v. Creative Developers, Ltd., 350 So.2d 828 (Fla. 1st DCA 1977).

When the legislature amended §627.4132 in 1980 it clearly stated "this act shall take effect on October 1, 1980" Chapter 80-364, §2, Laws of Florida. As the Attorney General found in his opinion interpreting the same phrase used in the enactment of the uninsured motorist statutes in 1961, the statute would not affect insurance policies issued prior to the enactment of the statutes which had effective dates of coverage subsequent to the enactment. 1961 Op. Att'y Gen. Fla. 061-101 (June 19, 1961).

Statutes which do not alter contractual or vested rights are not within the general rule against retroactive operation. Rothermal v. Florida Parole & Probation Commission, 441 So.2d 663 (Fla. 1st DCA 1983). In the case at bar, however, the vested contractual rights of the parties at the time of entering into the insurance contract would be altered by the retroactive application of the statute.

Respondent argues that they do not seek to apply the Amended Statute retroactively to govern the rights of the parties in this action as the statute, as amended, by its terms does not apply to the case at bar and the question regarding uninsured motorist coverage should be governed by Mullis v. State Farm Mutual

Automobile Insurance Co., 252 So.2d 229 (Fla. 1971). This argument is erroneous as the statute in effect at the date the contract was entered into should apply. Respondent urges that because the statute was amended the common law must be applied. This is incorrect. The law is, that if a right has vested under a statute, repeal or amendment of the statute does not divest the holder of the right. Division of Worker's Compensation, Bureau of Crimes Compensation v. Brevda, 420 So.2d 887 (Fla. 1st DCA 1982). The rights of the parties in the case at bar vested at the time the contract was entered into.

B. The Statutory Change, If Applied To The Contract At Hand, Unconstitutionally Impairs The Contract Between Pohlman and Fireman's Fund.

The Respondent relies heavily on Pomponio v. Claridge of Pompano Condominium, 378 So.2d 774 (Fla. 1979), in their argument that there is no unconstitutional impairment of contract in the case at bar. This reliance is misplaced. Pomponio dealt with a statute which, although this Court found was intended by the legislature to be applied retroactively, nevertheless held no retroactive application as to do so would unconstitutionally impair existing vested rights. In Pomponio this Court followed its decision in Yamaha Parts Distributors, Inc. v. Ehrman, 316 So.2d 557 (Fla. 1975) and stated that virtually no degree of contract impairment is tolerable in Florida. Admittedly, some

small amount of impairment may be tolerable. The degree to which a party's contract rights are impaired must be weighed carefully against the source of authority upon which the state purports to alter the contractual relationship and the evil it seeks to remedy. This Court modified the test considered by the United States Supreme Court in Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978) and stated that Florida would not tolerate the broad impairment of contracts acceptable under the Federal Contract Clause analysis. Fireman's Fund contract rights would be greatly impaired by not applying §627.4132 as it was written at the time the contract was entered into. The two parties to the contract agreed that there should be no uninsured motorist coverage in the case at bar. Fireman's Fund relied on the contract as entered into by the parties in determining the proper policy premium. To impose upon Fireman's Fund an additional liability of up to $1.5 million would be grossly unfair and a great impairment to the rights of the parties as agreed to in the contract for insurance.

The coverage provided by the insurance policy in the case at bar remained constant throughout the 3 year duration of the policy. The respondent's reliance on Hartford Accident & Indemnity Co. v. Sheffield, 375 So.2d 598 (Fla. 3d DCA 1979) is misplaced. In Sheffield the insurer, an individual, entered into a new contract of insurance in which the liability coverage was

decreased resulting in a lower premium. The court found that the difference in premium and coverage between the two policies required the conclusion that a new contract was entered into. In the case before the court the premium was adjusted annually as agreed to in the original contract for insurance. Fireman's Fund did not adjust the premium, to reflect the increased risk incurred by the amendment of §627.4132, as they relied on the fact that their contract with Pohlman was entered into prior to the amendment of the statute.

The addition of a new vehicle to a fleet policy (here we are likewise dealing with a commercial policy) or even to a personal automobile policy does not constitute a material change in the policy thereby not creating a new contract of insurance Cote v. American Fire & Casualty Company, 433 So.2d 590 (Fla. 2d DCA 1983); Sentry Insurance Mutual Co. v. McGowan, 425 So.2d 98 (Fla. 5th DCA 1982). In the case at bar, there was a three-year commercial policy in which one vehicle was deleted and one vehicle added to the coverage. This does not constitute a material change in the policy and does not create a new contract of insurance.

CONCLUSION

The law in effect at the time this contract was entered into controls. The contract of insurance was entered into prior to the 1980 amendment of this statute. There is no uninsured motorist coverage available to the respondent in this case. For

the foregoing reasons, this Court is respectfully requested to vacate the Third District's decision with direction to reinstate summary final judgment in favor of petitioner.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 26 day of September, 1985 to: BETSY E. GALLAGHER, ATTORNEY-AT-LAW, Talburt, Kubicki, Bradley & Draper, Attorneys for Appellants, 701 City National Bank Building, 25 West Flagler Street, Miami, Florida 33130; JOHN LOWE, ESQUIRE, 1428 Brickell Avenue, Miami, Florida 33131; and WILLIAM C. MERRITT, ESQUIRE, 111 Southeast Third Street, Miami, Florida 33130.

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