OA 8-27-86 047

app no

IN THE
SUPREME COURT
OF FLORIDA

NO. 68,124

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Petitioner.

vs.

LOUIS G. PRIDGEN, CANDY PRIDGEN,
ANTHONY SUMNER, and EARLE SUMNER.

Respondents.
/

APPELLANT'S INITIAL BRIEF

MATHEWS, OSBORNE, McNATT,
GOBELMAN & COBB

Harris Brown, Esquire
Robert B. Guild, Esquire
1500 American Heritage Life Bldg.
Jacksonville, Florida 32202
(904) 354-0624

Attorneys for Petitioner

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PRELIMINARY STATEMENT

This cause is before the Court to review the decision of the First District Court of Appeal reported as Pridgen v. Bill Terry's, Inc., 10 F.L.W. 2474 (Fla. 1st DCA Nov. 8, 1985), in which the District Court recognized express and direct conflict with the decision of the Third District Court of Appeal in Paris v. State Farm Mutual Automobile Insurance Co., 365 So.2d 439 (Fla. 3d DCA 1978), cert. den., 373 So.2d 460 (Fla. 1979).

In this brief, the parties will generally be referred to as petitioner and respondents, but, for convenience, petitioner and respondents may be referred to by name. References to the record on appeal will be by the symbol (R: _____). References to depositions transmitted with the record on appeal will be by the name of the person deposed and by the page number of the particular deposition as follows: (Pridgen p.).

STATEMENT OF THE CASE AND FACTS

Petitioner State Farm Mutual Automobile Insurance Company (State Farm) insured a 1978 Pontiac Firebird automobile owned by respondents Anthony and Earl Sumner. (R:10). State Farm also insured a 1978 Chevrolet Camaro owned by respondents Louis G. and Candy Pridgen. (R:11). The insurance policies contained comprehensive coverage, "Coverage D," which provided coverage for loss to the vehicles, including loss caused by

theft or larceny. (R:28-36). An exclusionary clause in the policy provided:

> THERE IS NO COVERAGE FOR
>
> . . . .
>
> 3. LOSS TO ANY VEHICLE DUE TO:
>
> . . . .
>
> d. CONVERSION, EMBEZZLEMENT OR SECRETION BY ANY PERSON WHO HAS A VEHICLE DUE TO A LIEN, RENTAL OR SALES AGREEMENT.

(emphasis in original). (R:32, 36).

Louis G. Pridgen entered into an agreement with William S. Royall, III, whereby Pridgen agreed to transfer the possession and title of his 1978 Camaro to Royall for the purpose of resale. (Pridgen: 4-17). Royall was employed as an automobile salesman by Bill Terry's, Inc., at the time of the transaction. (Pridgen: 7, 19). The proceeds of the resale of the Camaro were intended to be applied as a downpayment on a new car Pridgen intended to purchase. (Pridgen: 18). Pridgen also agreed with Royall that respondent Anthony Sumner was to deliver possession and title of the 1978 Firebird to Royall for resale. (Pridgen: 4-17). The proceeds from this resale were to be applied to the downpayment of the car Pridgen intended to purchase. (Pridgen: 18).

Pridgen and Sumner delivered possession and title of the subject automobiles to Royall and Royall sold the

automobiles, but did not deliver the proceeds of the sales to either Pridgen or Sumner. (Pridgen: 24-25, 28-30, 35-36). Instead, Royall applied the proceeds from the sales to pay his own personal debts. (Royall: 22). As a result of these transactions, Royall was adjudicated guilty of two counts of grand theft. (Royall: 9).

The respondents subsequently made demand upon petitioner for payment of the loss incurred as a result of Royall's conversion of the automobiles. (Sumner: 45-46). Petitioner denied coverage of the claims based upon the insurance policy conversion exclusion cited above.

The respondents thereafter filed suit against petitioner, Bill Terry's, Inc., and William S. Royall. (R:1-15). Petitioner filed a motion for summary judgment on the basis that the insurance policies excluded coverage where an automobile was voluntarily transferred under a sales agreement and a conversion occurs. (R:26-27). The trial court granted summary judgment in favor of State Farm. (R:42-43). In so doing, the court found that the respondents had "voluntarily delivered their vehicles to Mr. Royall for resale and he thereafter sold the same and converted the money to his own use." (R:42). Accordingly, the losses suffered by the respondents were due to a conversion and the loss was, therefore, excluded from coverage by the terms of the policy. (R:42).

The respondents appealed the summary judgment in favor of petitioner. The issue on appeal was "whether the trial court properly decided by summary judgment that the policies' exclusions . . . bar coverage of the losses [respondents] sustained." 10 F.L.W. at 2474. The District Court found that the policy language in question provided for coverage caused by loss to an insured's car, including theft or larceny. Id. The court found, however, that the exclusionary language excluding losses due to conversion was ambiguous. 10 F.L.W. at 2475. Such finding was based on the court's determination that it was uncertain whether the exclusionary language applied to situations "wherein a sales agreement is a result of the would-be purchaser's fraudulent inducements, or to situations in which a vehicle is first legally obtained and then is later converted by the intended buyer." Id. The court held that the conversion exclusion did not exclude loss incurred where the insured is induced to part possession of the automobile under false pretenses. 10 F.L.W. at 2476. Because there was a question of fact as to whether Royall intended to convert the proceeds of the sale of the automobiles at the time he obtained possession, the court reversed the trial court order granting petitioner summary judgment and remanded the cause to the trial court for further proceedings. 10 F.L.W. at 2474-76.

The petitioner subsequently moved the district court of appeal for rehearing. Said motion was denied.

Petitioner thereafter filed a jurisdictional brief with this court, seeking review of the district court's decision herein. The basis of the request for review was that the district court decision under review directly and expressly conflicted with the decision of the third district court of appeal in Paris, supra. This court accepted jursidiction of this cause on April 21, 1986.

SUMMARY OF ARGUMENT

The district court's opinion reversed a finding by the trial court that an exclusion in State Farm's policy was applicable to exclude coverage for the conversion of two automobiles voluntarily transferred to a salesman under a sales agreement. Petitioner contends that State Farm's exclusion is clear and unambiguous and directly applicable to the facts in the present case and, accordingly, that the trial court was correct in entering a summary judgment.

State Farm's policy provided coverage for losses including theft. However, State Farm's policy also had an exclusion that excluded coverage for losses when a vehicle is converted by any person who has the vehicle due to a sales agreement. In the present case, respondents voluntarily tranfered two automobiles to a salesman who converted them. State Farm contends that these facts fall directly within the exclusion which was correctly interpreted by the trial court in granting a summary judgment.

Petitioner submits that the district court erred in finding that State Farm's exclusion was ambiguous. Specifically, the district court held that the term "conversion" as used in the exclusion was ambiguous in that it could be interpreted as being either a conversion when a person has obtained "lawful possession" or a conversion occurring

after a person has obtained "unlawful possession." Accordingly, the case was remanded for a determination of the nature of the possession obtained by the salesman when he received the vehicles.

The district court erred in finding that the exclusion was ambiguous as to whether it required a "lawful possession." The language used by State Farm in its exclusion does not contain any term expressly or impliedly requiring that the converter obtain "lawful possession." When the language used in an exclusion is clear and unambiguous, it should be given its plain meaning. The plain meaning of the exclusion in the present case is that, although coverage is generally provided for theft, losses are excluded when the risk is increased by the owner in voluntarily transfering his vehicle to another person for resale. If that person then converts the vehicle, coverage is excluded. State Farm's exclusion broadly states that it is applicable to anyone "who has" the vehicle and the district court erred in requiring the additional element that the person "who has" the vehicle obtain same through "lawful possession."

In so holding, the district court's opinion directly conflicts with the case of Paris, supra. In addition, the district court misconstrued and misinterpreted various cases in this and other jurisdictions to support its holding that "lawful possession" was required as an element to establish the validity of State Farm's exclusion.

The district court also misinterpreted cases from other jurisdictions concerning the validity of State Farm's exclusion when the vehicle is transferred for the purpose of resale. The district court cited various cases which involve transfers of a vehicle in a direct sale. Such cases are distinguishable and inapplicable to the present case in which the vehicles were clearly transferred to a "middle man" for resale, the precise risk contemplated by the exclusion.

Finally, the district court erred in its analysis leading to the erroneous conclusion that the exclusion was ambiguous. Specifically, the district court held that a distinction exists between criminal and noncriminal conversions. Stated otherwise, the district court held that a distinction exists between various types of conversions depending upon the lawful or unlawful intent of the converter at the moment in which he first obtains possession of the property in question. No such distinction exists in the law. Accordingly, the district court's basic premise is incorrect and lead to the erroneous conclusion that the exclusion should be intepreted to find an ambiguity.

Based on the above, it is clear that the decision under review is contrary to established case law and should be reversed.

ARGUMENT

1. THE DISTRICT COURT ERRED IN REVERSING THE TRIAL COURT'S ENTRY OF SUMMARY JUDGMENT IN FAVOR OF STATE FARM.

The insurance policies in question provide comprehensive coverage which provides coverage for losses due to theft. The specific policy language reads as follows:

> 1. Loss to Your Car.
>
> We will pay for loss to your car except loss by collision, but only for the amount of each such loss in excess of the deductible amount, if any.
>
> Breakage of glass, or loss caused by missiles, falling objects, fire, theft, larceny, explosion, earthquake, wind storm, hail, water, flood, malice mischief or vandalism, riot or civil commotion, is payable under this coverage . . .

(emphasis added).

The insurance policies contain the following exclusion applicable to comprehensive coverage:

> THERE IS NO COVERAGE FOR
>
> . . . .
>
> 3. LOSS TO ANY VEHICLE DUE TO:
>
> . . . .
>
> d. CONVERSION, EMBEZZLEMENT OR SECRETION BY ANY PERSON WHO HAS A VEHICLE DUE TO A LIEN, RENTAL OR SALES AGREEMENT.

(emphasis added).

It is clear that the plain language of the insurance policies issued by petitioner provide coverage for loss due to theft. It is equally clear, however, that the plain language of the exclusionary clause excludes coverage for certain specified subcategories of theft. A loss due to conversion by a person who has the vehicle due to a sales agreement is specifically and unambiguously excluded from coverage.

The trial court correctly analyzed the policy of insurance issued by the petitioner and found that, under the facts of this case, the losses suffered by the respondents fall squarely within the exclusion of the policies. The trial court was correct in finding that the subject losses were sustained by reason of an excluded conversion and that, therefore, petitioner was entitled as a matter of law to a summary judgment.

The District Court of Appeal erroneously reversed the trial court order granting the petitioner a final judgment. Specifically, the district court erred in finding that the exclusion was ambiguous. As a result of the district court's erroneous determination that the contract language was ambiguous, the district court interpreted the exclusion to apply only when the loss was suffered through conversion by a person in "lawful possession." In so ruling, the district court erred in finding that the exclusion did not apply to exclude coverage for losses suffered when the converter did not

have "lawful possession." Finally, the district court of appeal compounded its error by ignoring the judicially sound reasoning in the Third District Court of Appeal decision in Paris v. State Farm Mutual Automobile Insurance Company, supra and misinterpreted relevant case law from this and other jurisdictions. As a result, the district court has created express and direct conflict with the Third District Court of Appeal and has improperly relied upon other cited cases to reach a result that is contrary to established law and the plain language of the policy at issue. The decision under review should, therefore, be reversed.

A. The District Court of Appeal erroneously held that the exclusion in question only applied to exclude coverage in cases where the person committing the conversion obtained "lawful possession" of the vehicle.

As stated above, the trial court found that the exclusion was ambiguous. Such finding by the court constitutes error.

It is undisputed that the policies issued by the petitioner provide coverage for the general category of losses caused by theft. However, the policy excludes coverage for losses caused due to conversion by a person who has the automobile due to a sales agreement. This exclusion is clear and unambiguous and is not subject to the interpretation given

it by the district court of appeal. The policy language makes no distinction between lawful and unlawful possession with regard to conversion, but excludes losses caused by the specific form of theft known as conversion. This exclusion applies to losses caused by conversions in cases of both lawful and non-lawful possession.

Despite the unambiguous language of the contracts, the district court embarked upon a confused and convoluted discussion of the distinctions between lawful and unlawful possession conversions so as to create an ambiguity where none exists.

By reason of its erroneous determination that the exclusion was ambiguous, the district court construed the policy language and erroneously determined that the exclusionary provision only applied to exclude coverage for losses suffered due to a conversion by one who obtains lawful possession of the vehicle. The district court held that the exclusion is valid only if the person obtaining the vehicle takes "lawful possession" and that the exclusion is invalid if the person obtains the vehicle through fraudulent means. Accordingly, the district court reasoned that a jury question was presented as to the intent of Royall at the time he took the subject vehicles. 10 F.L.W. at 2475.

It is submitted that the intent of the party committing the conversion and the lawful or unlawful nature of

the possession of the vehicle converted is irrelevant under the facts of this case. The policy language excludes coverage for losses caused by conversion. Such exclusion does not depend upon the nature of the possession or the intent of the party committing the conversion. The district court's injection of the lawful possession requirement for the application of the exclusion constituted error.

The Fifth Circuit Court of Appeal decision in Balogh, Inc. v. Pennsylvania Millers Mutual Fire Insurance Co., 307 F.2d 894 (5th Cir. 1962), involved a situation analogous to that presented in the instant case. In Balogh, the alleged insured voluntarily transferred jewelry to a salesman on consignment which was converted. Coverage was denied based upon an exclusion for conversion when the property was "delivered or entrusted by whomsoever for any purpose whatsoever." The trial court granted summary judgment in favor of the insurer. On appeal, the court rejected the argument that the intent of the party receiving the property was critical and that if this party intended to steal the property, it was not "delivered or entrusted." Id. at 895-6. In so ruling, the court pointed out that it is the intent of the party delivering the property which is critical:

> The test is the intent or state of mind of the person turning the item over to another, not the intent or state of mind of the person receiving the item. The risk that someone will swindle or trick the insured is excepted from the coverage, by its plain terms.

Id. at 897.

Accordingly, the Fifth Circuit affirmed a Summary Judgment of the Trial Court in favor of the insurer.

In the present case, although a question may exist as to whether Royal intended at all times to convert this property, it is clear from the record that the Pridgens and Sumners voluntarily transferred the vehicles for the purpose of resale. Accordingly, this loss falls within the plain language of the policy that a conversion occurring when the converter has the vehicle pursuant to a "sales agreement" is excluded.

In finding that the exclusionary language applied only where conversion was committed by a person in lawful possession of the vehicle, the district court created conflict with the Third District Court of Appeal decision in Paris, supra, and misconstrued and improperly relied upon relevant case law. The district court expressly states that its opinion conflicts with Paris. 10 F.L.W. at 2476. In recognizing conflict, the district court stated:

> We understand Paris to say that regardless of whether the insured was deceived as to the true nature of the transaction, he was not deceived about the fact of title immediately passing to the intended purchaser, therefore, the clause of exclusion operates to bar coverage. We cannot agree with this reasoning. Paris seems to follow, without specifically citing, case law authority holding that if one voluntarily parts with both possession and title of his vehicle, such person cannot recover from his insurer, regardless of whether the taker obtained the vehicle by fraudulent means.

Id.

Petitioner strongly asserts that the factual circumstances giving rise to the Paris decision are identical to those in the present case and that the Third District Court of Appeal in Paris correctly decided that the exclusionary clause in State Farm's policy was valid under these circumstances.

In Paris, the insured entered into an agreement with a car salesman to sell his car because he was preparing to leave the country. 365 So.2d 439. The insured delivered possession of his automobile to the salesman along with the keys and Certificate of Title executed in blank for the purpose of permitting the salesman to sell the car. Id. at 440. The salesman was to deposit the proceeds from the sale into the insured's checking account. Subsequently, the salesman sold the car and deposited his personal check for the proceeds into the insured's checking account. Id. The salesman's check was returned for insufficient funds. The insured thereafter made demand upon his insurer for payment of the loss suffered. Id. The insurer denied coverage based on the conversion exclusion. Id.

The relevant portions of the insured's policy in the Paris case provided:

> COVERAGE D - COMPREHENSIVE.
>
> (1) The owned motor vehicle. To pay for loss to the owned motor vehicle except losses caused by collision.

> EXCLUSIONS - SECTION II
>
> This insurance does not apply under:
>
> (e) Coverages D and R to loss due to conversion, embezzlement or secretion by any person in possession of the owned motor vehicle under a bailment, lease, conditional sale, purchase agreement, mortgage or other encumbrance.

Id.

The Third District in Paris focused on the intent of the insured to voluntarily transfer possession of the vehicle to the salesman for the purpose of resale. The court stated:

> In the instant case, appellant was not deceived about the transaction, but willingly and voluntarily gave possession of the vehicle, the keys and a certificate of title completed in blank to Barbati for the purpose of his selling it.

Id.

Under the circumstances, the Court upheld State Farm's exclusion, finding that the salesman had the vehicle under a conditional sale agreement and that a conversion had occurred. In the present case, there can be no doubt that the Pridgens and Sumners voluntarily transferred their vehicles to William Royall for resale. While Royall had the vehicles, he committed a conversion. The facts of the present case clearly fall within State Farm's exclusion and are directly analogous to the facts presented in the Paris case.

It is submitted that the district court of appeal decision in Paris represents the better reasoned decision with

regard to the interpretation of the instant exclusion. The Paris court correctly held that a conversion had occurred so as to exclude coverage. Application of the Paris reasoning to the instant case necessitates a finding that a conversion has occurred and that the loss suffered by the respondents falls within the exclusionary language of the policy.

In addition, the district court erroneously interpreted other cited cases for the proposition that the exclusionary language in question includes a requirement that the person committing the conversion obtain the possession of the vehicle lawfully.

The court relied upon several decisions of both Florida and foreign courts for its determination that the exclusionary clause only applies where the conversion was committed by a person in lawful possession of the vehicle. The court found that the cited cases supported its conclusion that an exclusionary clause such as that presented here only applied to exclude coverage where the converter has lawful possession of the vehicle. A careful review of the cited cases, however, reveals that the court misinterpreted the decisions. The court relied upon the following cases: Fireman's Fund Insurance Co. v. Boyd, 45 So.2d 499 (Fla. 1950); Collins v. Royal Globe Insurance Co., 368 So.2d 941 (Fla. 4th DCA 1979); Great American Insurance Co. v. Gusman, 80 Ga. App. 471, 56 S.E.2d 319 (Ga. 1949); Massachusetts Fire & Marine Ins. Co. v. Cagle, 214 Ark. 189, 214 S.W.2d 909 (1948); Baxter Motors V. Iowa

Hardware Mutual Ins. Co., 146 N.E.2d 797, 15 Ill. App.2d 524 (1958).

The district court has overlooked the specific language used in the exclusionary clauses in each of these cases in reaching its decision. The relevant exclusionary language in each of the above-cited cases materially differs from that presented in the instant case in that the exclusion in the cited cases specifically excluded coverage only where a conversion occurred while the automobile was in the lawful possession of the converter. Conversely, in the instant case, the policy language does not specify that the converter must have lawful possession so as to limit the application of the exclusion.

In Fireman's Fund, supra, the policy of insurance covered "losses due to theft but specifically excluded losses due to conversion, embezzlement, or secretion by any person in lawful possession of the automobile under a bailment lease, conditional sale, mortgage or other emcumbrance." 45 So.2d at 500 (emphasis added). The exclusionary language interpreted in Collins excluded coverage for loss due to "conversion, embezzlement or secretion by any person in lawful possession of the automobile." 368 So.2d at 942 (emphasis added). Similarly, in Cagle, the exclusionary language specifically excluded coverage for losses due to "conversion, embezzlement or secretion by any person in lawful possession of the

automobile under a bailment, lease, conditional sale, mortgage or other encumbrance." 214 S.W.2d at 909 (emphasis added). Finally, the Gusman case involved an exclusion of loss due to a "conversion or embezzlement by any person in lawful possession of the automobile under a bailment, lease, condition sale, mortgage or other encumbrance." 56 So.2d at 319.

The above-cited cases all involved exclusionary language which specifically excluded conversions only where the person had lawful possession of the automobile. The instant exclusion does not contain such a restriction. Accordingly, each of the above cases was decided based upon the specific language used in the exclusions being analyzed. The district court erred in interpreting those cases as requiring that the converter must have lawful possession for the exclusion in State Farm's policy to be valid.

The district court also misinterpreted the true holding of Baxter Motors, supra. The court cited Baxter Motors for the proposition that the petitioner could have properly excluded coverage for the loss suffered herein by placing language in the policies similar to that used in Baxter Motors which excluded loss resulting from any fraudulent scheme. 10 F.L.W. at 2475. The district court failed to realize, however, that the Baxter Motors court upheld the application of an exclusionary clause essentially identical to that involved herein despite the fact that the converter obtained possession of the car through fraudulent inducement.

In Baxter, the insurance policy contained two distinct exclusions. The first excluded loss resulting from a voluntary transfer of title and possession of the automobile where such transfer was induced by fraud. The second exclusion excluded loss resulting from conversion by any person entrusted with possession of the automobile. 146 N.E.2d at 797. The court found that the insured had transferred possession of the vehicle through fraudulent inducement but had not transferred title. Accordingly, the first exclusion concerning fraudulent transfers was not applicable. However, the court upheld the second exclusion finding that the vehicle was converted by one entrusted with possession. Id. at 800. Accordingly, the Baxter Motors court held that a conversion by a person entrusted with possession of the automobile was excluded, notwithstanding the fact that the possession was fraudulently induced. Id. Therefore, the Baxter Motors case rejects a requirement of lawful possession and supports the trial court's granting of summary judgment on behalf of petitioner in the present case.

As indicated, Boyd, Collins, Cagle, and Gusman all contain exclusions which explicitly state that the party committing a conversion must have "lawful possession". Similarly, Baxter Motors rejects a requirement of "lawful possession" in interpreting a conversion exclusion. None of these cases support the result reached by the district court in

the instant case. State Farm's policy in the present case broadly states that the exclusion is applicable to "any person who has" the vehicle. Said exclusion does not require "lawful possession" and should not be interpreted to add this additional element.

As discussed at length above, the district court erred in reading into the exclusion the requirement of lawful possession. The basic premise upon which the court relies in reaching its conclusion is that there is a distinction between criminal and noncriminal conversion. Stated otherwise, the district court's reasoning is based upon the premise that there are different kinds of conversion based upon when the criminal intent to convert is formed.

This distinction has not been recognized by Florida courts. Conversion is defined as "an active dominion wrongfully asserted over another's property inconsistent with his ownership therein. See Goodrich v. Malowney, 157 So.2d 829 (Fla.2d DCA 1963). This definition does not recognize or necessitate the existence of different categories of conversion based upon the intent of the converter at the time he takes possession. See also, 12 Fla.Jur.2d Conversion and Replevin §6.

Furthermore, the existence of a distinction between criminal and noncriminal conversion has been expressly rejected by the Eleventh Circuit Court of Appeals in National Union Fire Insurance Co. v. Carib Aviation, Inc., 759 F.2d 873 (11th Cir.

1985). In that case, an airline pilot had rented an airplane from Caribe upon the premise of flying from Miami to Orlando and back. However, the pilot actually flew to the Bahamas for the purpose of smuggling marijuanna. En route to the Bahamas, the airplane crashed and was destroyed. Carib subsequently made demand upon the insurer for payment of the loss incurred. Id. at 875.

The insurer refused payment based upon the exclusion which excluded coverage for "loss or damage due to coversion, . . ." by any person in possession of the aircraft under a bailment, lease, ..." Id. The court rejected Carib's argument that the phrase "in possession" in the exclusion required a "lawful possession." Accordingly, the court held that the loss suffered by Carib was excluded as a conversion by one in possession under a lease. Id. at 878-79. In so ruling, the court specifically held that the language of the exclusion was unambiguous to exclude losses due to civil or criminal conversions. Id. at 878.

The Carib decision directly contradicts the finding of the District Court of Appeal herein that the exclusion is ambiguous. Further, the holding in Carib directly refutes the district court's interpretation of the exclusion in question so as to require a lawful possession.

Based on the above discussion, it is clear that the district court of appeal erroneously ignored the well-reasoned

rationale of the Paris decision and misinterpreted the Boyd, Collins, Cagle, Gusman and Baxter Motors decisions to reach the conclusion that the instant exclusionary language only applied to situations in which the conversion was committed by a person in lawful possession of the vehicle. Such reasoning on the part of the district court constitutes error and the instant case should, therefore, be reversed.

B. The District Court of Appeal erroneously relied upon the cases of Phaholyothin v. State Farm Mutual Automobile Insurance Co., 432 N.W.2d 972 (Ill. App. Ct. 1982), Edwards v. State Farm Mutual Automobile Insurance Co., 296 N.W.2d 804 (Iowa 1980), and Modern Sounds & Systems v. Federated Mutual Insurance Co., 260 N.W.2d 183 (Nev. 1978).

The district court misinterpreted Phaholyothin v. State Farm Mutual Automobile Ins. Co., 432 N.W.2d 972 (Ill. App.Ct. 1982), Edwards v. State Farm Mutual Automobile Ins. Co., 296 N.W.2d 804 (Iowa 1980), and Modern Sounds & Systems v. Federated Mutual Ins. Co., 260 N.W.2d 183 (Nev. 1978).

In Edwards, Modern Sounds and Phaholyothin, the plaintiff delivered possession of an automobile to a buyer who wrongfully refused to pay for the vehicle.[3] None of these cases involved a transaction whereby the converter was a party who was given the vehicle for the express purpose of resale. Edwards, Modern Sounds and Phaholyothin each hold that an exclusion, similar to that in the present case, is not

applicable when the converter is a buyer in a direct sale as opposed to a "middle man" in a resale situation. This holding is specifically set forth in Modern Sounds as follows:

> The transaction with McMillon was complete upon the contemporaneous exchange of his check for title and possession of the car. The exclusion clause is aimed at persons in possession under executory contracts and agreements in which two or more persons have concurrent legal interests in a car and not at a buyer in a completed sale.

262 N.W.2d at 187.

Accordingly, Edwards, Modern Sounds and Phaholyothin correctly point out that the exclusion, similar to that in this case, is intended to apply to the increased risk when a vehicle is transferred to a third party for the purpose of resale. This is exactly the factual situation present by the instant case wherein Pridgen and Sumner transferred their vehicles to William Royall for resale. Clearly, the courts in Edwards, Modern Sounds and Phaholyothin would have found the exclusion to be applicable in the present case.

The district court misapprehended the holdings of Edwards, Modern Sounds and Phaholyothin which support petitioner's contention that the exclusion in State Farm's policy is applicable to the facts in the present case in which the vehicles were voluntarily transferred to a "middle man," William Royall, for the purpose of resale. The district court misplaced reliance on the above-discussed cases constitutes error.

C. The District Court Erred in holding that the applicability of the conversion exclusion depends on the nature of the conversion committed.

As discussed above, the district court of appeal erroneously found that the exclusionary language in question was ambiguous and erroneously found that the language only applied where the converter obtained lawful possesion of the vehicle. The court, in a further extension of its fallacious reasoning, continued its discussion to address a perceived distinction between non-criminal and criminal conversion. Based upon this perceived distinction, the court found that the exclusionary language in question only applied where the loss was due to a non-criminal conversion. Such reasoning is erroneous and is not supported by case law. Accordingly, the district court of appeal decision under review should be reversed.

Petitioner asserts that there is, in fact, no material distinction between criminal and non-criminal conversion. The court determined that it was "uncertain from the words used in the exclusionary clause whether they pertain to a taking which is accomplished by fraudulent inducement." The court does not, however, explain how it arrives at the determination that an ambiguity exists. The court states that there is a recognized distinction between criminal and non-criminal conversions and that the exclusionary language in question does not address

whether it applies to non-criminal or criminal conversion. Accordingly, the court found an ambiguity.

As stated above, there is no distinction between criminal and noncriminal conversion. The plain meaning of the contractual language excluding coverage for losses caused by conversion is to exclude all losses caused by conversion. The district court's finding of an ambiguity is unsupported by law and constitutes error.

Analogously, the district court finds significance in the moment at which a converter forms the wrongful intent to convert. Petitioner submits that this issue is irrelevant to a determination as to whether a conversion has occurred.

The district court overlooked Florida case law to the effect that (1) a conversion can occur regardless of whether the converter obtains the property lawfully, and (2) no asportation is necessary for a conversion to occur. West Yellow Pine Co. v. Stephens, 86 So. 241 (Fla. 1920); Senfeld v. Bank of Nova Scotia Trust Co., 450 So.2d 1157 (Fla. 3d DA 1984); General Finance Corp. of Jacksonville, Inc. v. Sexton, 155 So.2d 159 (Fla. 1st DCA 1963).

The court in Sexton stated the following:

> That disseisin of chattels which is called conversion has been described as an "act of dominion wrongfully asserted over another's personal property inconsistent with his ownership therein", "an act in derogation of plaintiff's possessory rights", "interference with the dominion of the true owner", "unauthorized assumption of powers

> of the true owner" and by many other well known and often quoted descriptive phrases. The gist of the action is interference with legal rights which are incident to ownership or the wrongful deprivation of the property of the owner and neither manucaption nor asportation is an essential element thereof.

155 So.2d at 161

In West Yellow Pine, a conversion occurred due to a wrongful cutting of timber on plaintiff's property despite the fact that most of the timber was not transported from plaintiff's property. Similarly, in Sexton, the converter transferred title to the vehicle despite the fact that possession of the vehicle remained in a third party. These cases explain that conversion can occur regardless of whether a party has originally taken possession lawfully or unlawfully. Further, the taking possession element is not critical in that no asportation is necessary. The focus of an action for conversion is wrongful interference with a property right as opposed to a wrongful taking of the property. This principle is explained in Senfeld as follows:

> Thus, the essence of conversion is not the possession of property by the wrongdoer, but rather such possession in conjunction with a present intent on the part of the wrongdoer to deprive the person entitled to possession of the property. . . .
> 450 So.2d at Pg. 1161.

Accordingly, there are actually three types of conversion: (1) wrongful taking; (2) wrongful withholding

where, except for the withholding, no act of conversion is committed; and (3) an act which, though possession was not initially wrongful, is an exercise of dominion amounting to a conversion. Yellow Pines, supra, Quitman Naval Stores Co. v. Conway, 59 So. 840 (Fla. 1912); Star Fruit Co. v. Eagle Lake Growers, 33 So.2d 858 (Fla. 1948).

Florida case law interpreting the elements of conversion does not require that the converter originally have "lawful possession". Instead, a conversion occurs when the converter wrongfully interferes with an ownership interest in the property, regardless of whether the property was actually taken. The district court's opinion injecting the additional requirement of "lawful possession" into State Farm's exclusion cannot be justified through interpretation of the term "conversion" as defined by Florida law.

In summary, the district court perceived a distinction between criminal and noncriminal conversion. In addition, the district court found significance in the intent of the converter at the moment he received the property in determining whether a conversion had occurred. These bases of the disrict court's opinion were fundamentally incorrect and unsupported by Florida case law. Relying on these incorrect premises, the district court found that State Farm's exclusion was ambiguous as to these perceived, but nonexistent, issues and therefore erred.

CONCLUSION

The only question presented in the instant cause is whether the loss suffered is within the exclusion of the policy of insurance issued by the petitioner. It is uncontested that the policy provides coverage for loss due to theft. However, the policy unambiguously excludes coverage for loss due to conversion by any person who has the vehicle due to a sales agreement.

As correctly found by the trial court below, the loss suffered by the respondents was due to a conversion by a person who had the vehicles due to a sales agreement. The exclusion is unambiguous in excluding the loss suffered by the respondents. Accordingly, the trial court correctly found that petitioner was entitled as a matter of law to summary judgment.

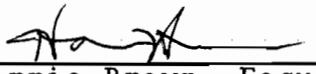
The district court of appeal erroneously determined that the exclusion was ambiguous. Furthermore, the district court erred in finding that the exclusion applied only in situations where the converter obtained lawful possession of the vehicle. The district court's interpretation of the exclusion is contrary to the plain meaning of the language used and is contrary to established case law.

Based on the above, petitioner respectfully submits that the district court of appeal erred in reversing the trial

court order granting summary judgment and requests that this court reverse the decision of the district court herein.

Respectfully submitted,

MATHEWS, OSBORNE, McNATT,
GOBELMAN & COBB

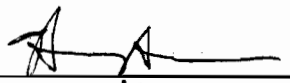


Harris Brown, Esquire
Robert B. Guild, Esquire
1500 American Heritage Life Bldg.
Jacksonville, Florida 32202
(904) 354-0624

Attorneys for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail to Joseph M. Ripley, Jr., Esquire, 401 Florida Theatre Building, Jacksonville, Florida 32202 this _____ day of May, 1986.



Attorney