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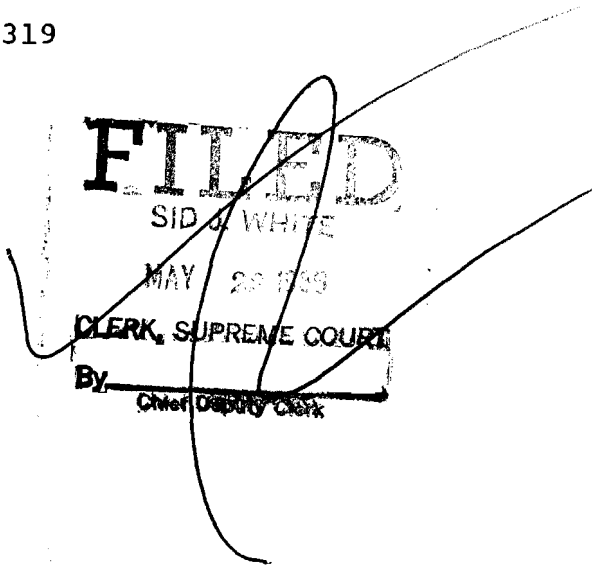
IN THE SUPREME COURT OF FLORIDA

CASE NO. 68.569

FIFTH DISTRICT - NO. 85-319



RENE L. SPENCE,

Petitioner,

vs.

DAVID O. HUGHES and IMPERIAL FOOD PRODUCTS, INC.,

Respondents.

ANSWER BRIEF OF RESPONDENTS

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EXPLANATORY STATEMENT

References are indicated by the use of the following symbols:

(S.) Reference is to the page number in Petitioner's (Spence) Initial Brief.

(A.) Reference is to the page number in Petitioner's (Spence) Appendix.

(App.) Reference is to the page number in Respondent's (Defendants) Appendix.

The Petitioner, Rene L. Spence, was the Plaintiff before the Trial Court and will be referred to as Plaintiff in this Brief.

The Respondents, David O. Hughes and Imperial Food Products, Inc., were the Defendants before the Trial Court and will be referred to as Defendants in this brief.

STATEMENT OF THE CASE AND FACTS

Defendants incorporate Plaintiff's Statement of the Case.

Defendants incorporate Plaintiff's Statement of the Facts with the following additional statements:

Plaintiff's statement that Defendants insurance was "purportedly" equivalent to coverage required in Florida is misleading. The policy of insurance issued by Aetna Casualty and Surety Company provided an extension of coverage for out of state occurrences to automatically comply with state insurance requirements.

Plaintiff's statement that the vehicle operated by the Defendants was not "designed . . ." for use on the highways of Florida is also misleading. The vehicle was a tractor-trailer and as such was clearly "designed" to be operated on the highway and after 90 days required to be insured.

SUMMARY OF ARGUMENT

The Defendants were provided with security which complied with the requirements of Florida law. Although Defendant's motor vehicle had not been in the state long enough to be required to be registered or licensed they were automatically provided with that level of security which would have been required after 90 days. As an incentive the No-Fault Law provides a limitation on the right to claim damages for pain, suffering, mental anguish and inconvenience. The Plaintiff admitted (A. 8-9) that she did not have an injury which surpassed the threshold requirements. The No-Fault Law applies and this action is barred because of the statutory tort exemption.

The Trial Court properly held the tort exemption applicable to this action based upon a constitutional interpretation of § 627.737, Fla. Stat. (1983). A contrary holding would violate the Equal Protection and Due Process clauses of the Fourteenth Amendment and the Privileges and Immunities clause of Article IV, Section 2, of the Constitution of the United States. The No-Fault Law is not unconstitutional. Any application of the statute which denies the tort exemption to a nonresident providing Florida security would result in an unconstitutional application of the law. Such an unconstitutional application would impermissably interfere with the fundamental right of interstate travel.

ARGUMENT

CERTIFIED QUESTION

ARE NONRESIDENTS WHO VOLUNTARILY OBTAIN PIP COVERAGE CONFORMING TO FLORIDA'S NO-FAULT LAW (§ 627.730-627.7405, FLA. STAT.) EXEMPT FROM TORT LIABILITY UNDER SECTION § 627.737, FLORIDA STATUTES, TO THE SAME EXTENT AS RESIDENTS WHO OBTAIN THE SAME COVERAGE BECAUSE REQUIRED BY STATUTE TO DO SO?

I. A NONRESIDENT MOTORIST DRIVING AN AUTOMOBILE WHICH WAS NOT REQUIRED TO BE REGISTERED IN THIS STATE HAS THE TORT EXEMPTION PROVIDED BY THE FLORIDA MOTOR VEHICLE NO-FAULT LAW WHEN THAT NONRESIDENT MOTORIST HAS PROVIDED THE SAME TYPE OF INSURANCE COVERAGE WHICH RESIDENTS ARE REQUIRED TO PROVIDE.

The Plaintiff argues that Florida Administrative Code Rule 4-27.09(2) provides that nonresidents are not tort exempt. On the contrary, Florida Administrative Code Rule 4-27.09(2) provides:

> 4-27.09 Requirements and Exemptions Relating to Nonresidents.
>
> (2) Nonresidents do not receive PIP benefits and are not tort exempt except:
>
> (a) When injured in Florida while occupying a motor vehicle the owner of which is required to provide security by the Florida Automobile Reparations Reform Act.
>
> (b) When maintaining motor vehicle security as required by the Act.

Defendants are entitled to tort exemption under the exception stated in subparagraph (b). At the time of the accident, Defendants maintained motor vehicle security as required by the Act.

The policy of insurance issued by Aetna Casualty and Surety

Company provided an extension of coverage for out of state occurrences to automatically comply with state insurance requirements. Page two of the insurance policy reads as follows:

PART IV - LIABILITY INSURANCE

F. OUT OF STATE EXTENSIONS OF COVERAGE

1. While a covered auto is away from the state where it is licensed we will:

   a. Increase this policy's liability limits to meet those specified by a compulsory or financial responsibility law in the jurisdiction where the covered auto is being used.

   b. Provide the minimum amounts and types of other coverages, such as "No-Fault," required of out of state vehicles by the jurisdiction where the covered auto is being used.

Respondents were not required under Florida law to maintain security on the vehicle, however, security was provided. The fact that security was not required is irrelevant and secondary to the fact that security was provided.

The Trial Court was provided with a copy of the insurance policy covering Respondents (App. 17-24). The policy is clear; it automatically and immediately provides the required amount and type of insurance.

The purpose of the No-Fault Law "is to <u>provide for</u> medical, surgical, funeral and disability insurance benefits without regard to fault . . .". To accomplish that purpose the act is to

". . . require motor vehicle insurance securing such benefit, for motor vehicles required to be registered in this state . . ."; and as an incentive to provide the insurance the act provides ". . . . a limitation on the right to claim damages for pain, suffering, mental anguish and inconvenience." Section 627.731, Fla. Stat. (1983). Emphasis added. Epperson v. Dixie Insurance Co., So.2d 172 (Fla. 1st DCA 1984). The amount and nature of the security required to comply with the No-Fault Law is set forth in Section 627.736, Fla. Stat. (1983). The benefits are commonly referred to as "PIP" benefits.

The State's announced public policy for the No-Fault Law is to provide for medical, surgical, funeral and disability insurance benefits without regard to fault. In order to accomplish that the State has (a) set forth the amount and nature of the insurance benefits which are required to comply with the act, (b) required Florida residents to maintain the coverage and (c) provided an incentive by way of the tort exemption.

The tort exemption is found in Section 627.737, Fla. Stat. (1983). It begins by providing:

> "(1) every owner, registrant, operator, or occupant of a motor vehicle with respect to which security has been provided as required by Sections 627.730-627.7405 and every person or organization legally responsible for his acts or omissions, is hereby exempted from tort liability for damages because of bodily injury, sickness or disease arising out of the ownership, operation, maintenance, or use of such motor vehicle in this State to the extent that the benefits described in Section

> 627.736(1) are payable for such injury . . . under any insurance policy or method of security complying with the requirements of Section 627.733 . . .". Emphasis added.

Chapter 324 of the Florida Statutes requires a different type of financial responsibility before a motorist can operate a motor vehicle on the public streets and highways of this State. Section 324.021(7) sets forth the amount and nature of liability coverage that is required.

Chapter 324 is not involved in this appeal but is mentioned only for the sake of completeness. At the time of the accident the Defendants had in full force and effect a policy of insurance that provided the amount and nature of insurance required by both the No-Fault Law and the Financial Responsibility Law. The Defendants have made every attempt to comply with Florida's insurance laws and should be entitled to the benefits provided by statute. A ruling delaying those benefits for 90 days makes no sense and would encourage nonresidents to delay obtaining the coverage - a result clearly contrary to public policy.

The issue presented on appeal is one of statutory interpretation. Section 627.737 grants an exemption from tort liability for certain damages to,

> ". . . every owner, registrant, operator, or occupant of a motor vehicle with respect to which security has been provided as required by § 627.730-627.7405 . . .".

Plaintiff places particular emphasis on the word "required". The

tort exemption statute does not grant an exemption to those individuals required to provide security, but rather, grants an exemption from tort liability to those individuals actually providing the security.

> ". . . is hereby exempted . . . to the extent that the benefits . . . are payable for such injury . . . under any insurance policy or other method of security complying with the requirements . . .". § 627.737(1), Fla. Stat. (1983).

The phrase "as required" merely defines the type of security which must be provided to benefit from the exemption.

The Florida Motor Vehicle No-Fault Law may be interpreted and applied in a constitutional manner, therefore, the statute itself need not be declared unconstitutional. In Deel Motors, Inc. v. Carrington, 305 So.2d 811 (Fla. 3rd DCA 1974), the plaintiff was injured by a new, unregistered, car being test driven by the defendant. The No-Fault Statute (§ 627.731 (1974)) referred to "registered" motor vehicles and the plaintiff argued that since the car was still part of inventory and not registered the act should not apply. The Court disagreed. It felt the plaintiff's interpretation made "an unwarranted distinction . . ." Id. at 812. "When a statute is capable of two interpretations, the one that produces an incongruous result should be avoided." Id. at 812. The Trial Court's application of the Florida Motor Vehicle No-Fault Law below avoids an unwarranted distinction and incongruous result because it does not penalize voluntary compliance with the No-Fault Law.

The First District in Cavalier Insurance Corp. v. Myles, 347 So.2d 1060 (Fla. 1st DCA 1977) held that a motor vehicle although registered in another state was a "motor vehicle" as defined in Section 627.732(1), Fla. Stat. (1975).

> "The above-quoted statute (Section 627.732[1]), which specifically defines 'motor vehicle' as used in the 'No-Fault' contains no requirement that the automobile in order to be so defined, be registered in the State of Florida nor does it contain any exclusion of automobiles not registered in the State of Florida." Id. Page 1062. Emphasis Added.

The present definition of "motor vehicle" is found in Section 627.732, Fla. Stat. (1985) and is broader than the 1975 definition. Plaintiff has underlined a portion of the Statute in her brief at page 9 but has emphasized the wrong part. The key words are "of a type . . .". If emphasis is placed where Plaintiff's suggest an unnatural and ungrammatical reading would result in drastically restricting vehicles which would be subject to the act. The Statute would be internally inconsistent. A vehicle within the State more than 90 days is not required to be registered if registered elsewhere. § 320.37 Fla. Stat. (1985). If it was not required to be registered in Florida it would not be a defined "motor vehicle" (using Plaintiff's interpretation) but the No-Fault Law would require it to be insured. A new car being test driven is not required to be registered and thus (using Plaintiff's interpretation) would not be a "motor vehicle". Both vehicles are, however, "of a type both designed and required to be licensed . . .". Both vehicles are, in fact,

"motor vehicles" and both are covered by the Statute as interpreted by the Trial Court and District Court of Appeal.

In Crawford v. Allstate Insurance Company, 51 A.2d 474 (Pa. Super ct. 1982) the Superior Court was required to determine whether a pickup truck modified for use on railroad tracks was a motor vehicle. The Trial Court said no because "at the time of the accident" it was not being used as a motor vehicle. The Plaintiff in the case at bar argues that the act should not apply because at the time of the accident our Defendant was not required to maintain coverage. The Crawford court rejected the argument because the truck was "of a kind required to be registered thereunder." Id. Page 477.

See also Senft v. Keystone Insurance Company, 479 A.2d 1066 (Pa. Super ct. 1984).

In Lasky v. State Farm Insurance Company, 296 So.2d 9 (Fla. 1974) this Court was faced with an Equal Protection argument that the Florida No-Fault Law was a restraint on a nonresident's right to travel. This Court declined to address this issue because all parties were Florida residents, thus there was no standing for the argument. In Lasky, this Court did provide the following guidance: "It seems apparent, however, that nonresidents invoking the privilege of operating dangerous instrumentalities over Florida highways do so subject to Florida's restrictions and regulations thereon." Id. at 23. This statement, while dicta, is not without value as precedent. Weisenberg v. Carlton, 233 So.2d 659 (Fla. 2d DCA 1970).

If a nonresident must operate a motor vehicle under Florida's restrictions and regulations, that same nonresident should be granted similar privileges, immunities and exemptions that Florida law provides to its residents. In Johnson v. Liberty Mutual Insurance Co., 297 So.2d 858 (Fla. 4th DCA 1974), the plaintiff was a nonresident and the defendant was a resident, the opposite situation from the case at bar. The Court held that the resident-defendant was exempt from tort liability because the nonresident-plaintiff failed to surpass the threshold requirements.

> "It is clear that an insurer is required to pay personal injury protection benefits for bodily injury sustained in this State by any other person while occupying the owner's motor vehicle. The phrase 'any . . . person' makes no distinction whatsoever as to the residency of the injured person so long as the person is injured 'in this State . . . while occupying the owner's motor vehicle.'. A resident passenger and a non-resident passenger have equal access to the courts and are equally subject to the same restrictions, limitations and conditions. Therefore, if the owner of a motor vehicle complies with the security requirements of the act, he is immune from tort liability to the extent as prescribed therein irrespective of whether the tort action is maintained by a resident or a non-resident." Id. at 860. Emphasis by the Court.

Thus if the Plaintiff in the case below had been a nonresident in a motor vehicle and voluntarily complied with Florida's No-Fault Law she would have been entitled to receive the PIP benefits required by Florida Law without regard to the amount of time spent in the State according to Johnson and if Plaintiff's interpretation is adopted would not have been subject to the

threshold requirements of the law. If the Plaintiff is correct under those circumstances she would have been entitled to all of Florida's benefits and none of the limitations. Such a result would be contrary to public policy and manifestly unjust.

In our case if the Defendant Hughes had brought a counterclaim for personal injury against the Plaintiff Spence, counsel for the Plaintiff would have this Court apply different standards for the counterclaim than for the main claim. Under the law of Johnson, our Defendant, Hughes, must surpass the threshold in order to maintain a counterclaim for personal injury against our Plaintiff, Spence. Fundamental fairness and the doctrine of equal protection should require Spence to meet the threshold requirements also.

The Court, in Johnson, made the following statement:

> ". . . if the owner of a motor vehicle complies with the security requirements of the act he is immune from tort liability to the extent as prescribed therein irrespective of whether the tort action is maintained by a resident or a nonresident."

Id. at 860. It also should be irrelevant whether the tort action is maintained against a resident or a nonresident so long as the required security has been provided, as in the instant case.

II. DENIAL OF THE TORT EXEMPTION TO A NONRESIDENT PROVIDING SECURITY VIOLATES THE NONRESIDENT'S RIGHTS TO EQUAL PROTECTION AND DUE PROCESS.

Plaintiff must concede that her lawsuit would be barred if all facts remained the same, but for the residency of Defendant.

If Defendant had been a Florida resident or had been a nonresident in this state 90 days out of the preceding 365 days, the Plaintiff agrees that her lawsuit would have been barred. By relying on one distinct fact, the period of time Defendant was in the state, Plaintiff argues the law of the case is altered. Such an arbitrary application denying the benefits of the no fault law is violative of constitutional principles. See In Re: Estate of Greenberg, 390 So.2d 40 (Fla. 1980).

Plaintiff cites Julien v. Johnson, 438 So.2d 503 (5th DCA 1983) in support of her argument (S. 11). Julien is inapplicable and distinguishable. The plaintiff in Julien was a Florida resident who was a pedestrian hit by a car registered in Massachusetts, owned by a resident of Massachusetts and driven by a resident of Massachusetts. The plaintiff sought PIP benefits under the driver's policy. The Fifth District ruled that there was no coverage. First, the policy of insurance did not automatically provide coverage for PIP benefits outside the State of Massachusetts; second, under the facts of the case Florida statutory requirements did not require Florida PIP coverage; and third, the plaintiff sought benefits from the driver's policy whereas Florida's No-Fault act requires the owner to have the coverage. The Court held that the policy of insurance did not provide for the payment of PIP benefits in Julien. In the case at bar the insurance policy covering Defendant (App. 17-24) specifically extends coverage including "No Fault" for out of state occurrences. The PIP benefits which would have been required are

payable under the owner's policy; therefore, Defendants should be granted the tort exemption. Any holding to the contrary would impinge upon a fundamental right of interstate travel by imposing a penalty on those who would travel with full, state-to-state coverage. Shapiro v. Thompson, 394 U.S. 618 (1969).

In Hall v. King, 266 So.2d 33 (Fla. 1972) the Florida Supreme Court reversed a decision of the Florida Real Estate Commission revoking the license of Mr. Hall. Mr. Hall was a former Florida resident and a Registered Real Estate Broker. He moved out of the State of Florida and pursuant to the Florida Statute the Real Estate Commission revoked his license. The First District Court of Appeal affirmed the commission but certified the question to the Florida Supreme Court. The Supreme Court reversed and held as follows:

> "Unless there is a reasonable, compelling, State interest justifying the residency requirement, it cannot be upheld because it clearly has a chilling effect on Florida Real Estate Brokers who might wish to reside in another state. According to the Supreme Court of the United States in Shapiro v. Thompson . . . 'all citizens must be free to travel throughout the length and breath of our land uninhibited by statutes, rules or regulations which unreasonably burden or restrict this movement.' That right may be restricted only for a compelling State interest." Id. at 34. Emphasis by the Court.

In 1970, Duval County, pursuant to Florida Law required that indigent individuals reside in the County for one year preceding their application for free medical care. The durational residency statute was challenged in Federal Court and found to be

unconstitutional. Crapps v. Duval County Hospital Authority of Duval County, Florida, 314 F. Supp. 181 (B.M.B. Fla. 1970). The court observed that persons are exercising a constitutional right moving from state to state and that any classification which serves to hinder that right is unconstitutional in an absence of compelling State interest. Id. at 183.

If the No-Fault Statute were to be interpreted as urged by the Plaintiff it would become, in effect, a residency requirement which would operate to deny the benefits of the No-Fault Tort Exemption Statute to persons moving from state to state. The Supreme Court, of course, does not say that a state may not under any circumstances enact residency requirements but it does hold that "the standards for determining intent must be rationally related to the finding of that ultimate fact, and any resulting classification must be shown to promote a compelling state interest". Id. at 183. See also Arnold v. Halifax Hospital District, 314 F. Supp. 277 (D.M.D. Fla. 1970) and Sanchez v. Pingree, 494. F. Supp. 68 (D.S.D. Fla. 1980).

There are two standards by which such statutes are to be examined. The first and stricter standard is sometimes known as the strict scrutiny analysis. It requires a careful examination of the governmental interest claimed to justify the classification in order to determine whether that interest is substantial and compelling and requires an inquiry as to whether the means adopted to achieve the legislative goal are necessarily and precisely drawn. Estate of Greenberg, infra. at page 42. The

second and easier test is sometimes known as the rational basis or minimum scrutiny test. It requires only that a statute bear some reasonable relationship to a legitimate state purpose. The statutory classification to be held unconstitutionally volative of the equal protection clause under this test must cause different treatments so disparate as relates to the difference in classification so as to be wholly arbitrary. Estate of Greenberg at page 42.

> "The right of interstate travel has repeatedly been recognized as a basic constitutional freedom." Memorial Hospital v. Maricopa County, 415 U.S. 250, 39 L.Ed.2d 306, 94 S.Ct., 1076 (1974). At 39 L.Ed.2d page 313.

In discussing the Shapiro decision the Court in Maricopa County said

> "In Shapiro we explicitly stated that the compelling-state interest test would be triggered by 'any classification which serves to penalize the exercise of that right (to travel) . . .' (emphasis in original)
>
> Thus, Shapiro and Dunn stand for the proposition that a classification which 'operates to penalize those persons . . . who have exercised their constitutional right of interstate migration,' must be jusitified by a compelling state interest." Id. at page 315.

The Statute as interpreted by the Trial Court and by the Fifth District Court of Appeal has no such constitutional infirmities. It is interpreted to apply equally to residents and nonresidents. The Statute is applied on a rational basis: the tort exemption is available if the required security has been provided.

Under a strict scrutiny analysis, Plaintiff's application of the statute would certainly be an unconstitutional infringement of nonresident's right to interstate travel. Even under a rational basis analysis, the differing standards would fail to meet constitutional standards. No rational basis could possibly support the application of the tort exemption to a nonresident-plaintiff versus resident-defendant action and yet hold the tort exemption inapplicable to a resident-plaintiff versus nonresident-defendant action. See, Lasky and Greenberg.

The tort exemption applies regardless of any requirement to maintain security, so long as such security is provided. Florida Administrative Code Rule 4-27.09(1) provides two occasions in which nonresidents are required to provide security:

> (1) Nonresidents are not required to provide PIP coverage except:
>
> (a) When maintaining a motor vehicle in the state for more than 90 days during the preceding 365 day period.
>
> (b) When required to license a motor vehicle in Florida by Florida Statute 320.38 (employed in the state or children enrolled in public school).

Defendant's motor vehicle was not maintained in this state for more than 90 days during the preceding 365 day period. Taking Plaintiff's argument to its logical conclusion, a nonresident maintaining a motor vehicle in this state for 89 days would not be granted the tort exemption, however, by remaining in

Florida one more day, the tort exemption is available. The 90-day limit in § 627.733(2) merely describes the total time in one year a nonresident may travel in this state without being required to provide Florida security. Epperson, infra. Should security be provided prior to the 90th day, there is no rational basis for withholding the tort exemption. Discrimination against a nonresident who has been in this state less than 90 days would violate constitutional rights to Equal Protection and Due Process. See, Lasky and Greenberg. Statutory classifications of 90-day nonresidents and less-than-90-day nonresidents bears no reasonable relationship to the legislative purpose with regard to the tort exemption. Indeed, such classifications of nonresidents is purely arbitrary.

Plaintiff argues that the exclusion of nonresidents from the tort exemption does not violate Equal Protection or Due Process. Plaintiff's argument ignores the fact that all nonresidents are not excluded. A 90-day nonresident providing security is granted the tort exemption. § 627.733, Fla. Stat. (1983). There is no substantial relationship to any legislative purpose when a less-than-90-day nonresident providing security is denied the tort exemption.

Plaintiff seeks to enforce the rules and regulations of Florida over nonresidents, yet decline reciprocal privileges, immunities and exemptions. One of the purposes of the No-Fault Law is to bring about a reduction in automobile premiums and to assure that there will be financial aid for medical expenses and

lost wages (S. 16). By granting the tort exemption to nonresidents who have provided security, these purposes are achieved. Plaintiff states that this legislation is exclusively for the benefit of Florida residents (S. 16). The statute itself takes into consideration a class of nonresidents. § 627.733, Fla. Stat. (1983). The statutory nonresident classification should include all nonresidents who have provided security that meets the security requirements. A contrary holding would be arbitrary, unreasonable and interfere with the constitutional right to interstate travel.

CONCLUSION

The Defendants voluntarily complied with Florida's No-Fault Law and should be entitled to the protection of the tort exemption contained within the statute.

Under the circumstances of this case to deny to Defendants the protection of the tort exemption statute would result in denial of equal protection and an unconstitutional application of the statute.

This Court should answer the certified question in the affirmative and thus affirm the decision of both the Trial Court and the Fifth District Court of Appeal.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by U. S. mail to KEITH R. MITNIK, ESQUIRE, 538 East Washington Street, Orlando, Florida 32801, and to R. MARK SHELTON, ESQUIRE, 708 Jackson Street, Tampa, Florida 33602 this 21st day of May, 1986.

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