IN THE SUPREME COURT OF FLORIDA

CASE NO. 68,569

5th District - No. 85-319

RENE L. SPENCE,

Petitioner,

vs.

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

Respondents.

INITIAL BRIEF OF PETITIONER

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STATEMENT OF THE FACTS

On July 21, 1983, Respondent/Defendant, DAVID O. HUGHES (hereinafter referred to as HUGHES), a Pennsylvania resident, was driving a vehicle owned by Respondent/Defendant, IMPERIAL FOOD PRODUCTS, INC. (hereinafter referred to as IMPERIAL), in a westerly direction on State Road 400 in Orlando, Orange County, Florida. Petitioner/Plaintiff, RENE L. SPENCE (hereinafter referred to as SPENCE), a Florida resident, was driving a vehicle owned by Carl Watts, a Florida resident, in a westerly direction on State Road 400 in Orlando, Orange County, Florida. HUGHES and SPENCE were operating their respective vehicles with the knowledge and consent of the vehicles' owners. At the aforementioned time and place, the vehicle driven by HUGHES collided with the rear end of the vehicle driven by SPENCE, causing SPENCE injuries which were of a non-permanent nature.

The vehicle which was owned by IMPERIAL and being driven by HUGHES, was not designed or required to be licensed for use on the highways of the State of Florida. The PIP coverage provided by the non-resident Respondents, HUGHES and IMPERIAL, purportedly is equivalent to that which residents of the State of Florida are required to obtain by the Florida Motor Vehicle No Fault Act, hereinafter referred to as the No Fault Act.

STATEMENT OF THE CASE

On July 3, 1984, Petitioner, SPENCE, filed a Complaint against Respondents, HUGHES and IMPERIAL, seeking damages in tort for pain, suffering, mental anguish and inconvenience because of bodily injury. On August 23, 1984, a Default was entered against the Respondents, however, this Default was vacated on October 10, 1984. Subsequently, on October 10, 1984, HUGHES and IMPERIAL, filed an Answer to the Complaint admitting negligence, but denying liability based upon the exemption from tort liability expressed in §627.737, Florida Statutes. HUGHES and IMPERIAL claimed by Affirmative Defense, that the tort exemption applies to them because they voluntarily obtained PIP coverage equivalent to that which Florida residents are required to obtain. In response, SPENCE filed a reply to the Affirmative Defenses admitting that she has not suffered an injury which meets the threshold requirement of §627.737, Florida Statutes, but denying that the tort exemption contained in the No Fault Act, applies to a non-resident, regardless of the fact that they voluntarily obtained PIP coverage.

Thereafter, SPENCE, HUGHES and IMPERIAL filed Motions for Summary Judgment and alternatively, Judgment on the Pleadings, on the issue of liability.

Then, on December 26, 1984, SPENCE, HUGHES and IMPERIAL filed a Joint Statement of Facts in which it was stated that there were no genuine issues as to any material facts concerning liability, and requesting the Court to resolve the issue of liability based upon the undisputed facts and the argument of counsel.

Next, on January 3, 1985, the parties simultaneously filed separate Memorandums of Law supporting their positions as to the applicability of the No Fault Act to a non-resident. Thereafter, on January 8, 1985, the Court heard Oral Arguments on this issue.

The Court entered a Final Order on February 6, 1985, in which the Respondents' Motion for Summary Judgment was granted and the Petitioner's Motion for Summary Judgment was denied and the Motions for Judgment on the Pleadings were found moot. In reaching its conclusion, the Court made the following findings:

1. The Florida Motor Vehicle No Fault Law is applicable to this action.

2. The tort exemption as expressed in §627.737, Florida Statutes is applicable to these non-resident defendants.

3. The vehicle driven and owned by the non-resident defendants was not required to be registered and licensed in Florida.

4. The non-resident defendants were not required under Florida law to maintain security on the vehicle, however, the non-resident defendants obtained security.

5. The insurance policy covering the non-resident defendants provided the Plaintiff with the same rights and protections required of a resident motorist by the Florida Motor Vehicle No Fault Law.

6. The non-resident defendants are, therefore, entitled to the privileges and immunities granted by the Florida Motor Vehicle No Fault Law, including the tort exemption expressed in §627.737, Florida Statutes.

SPENCE appealed this Order to the Fifth District Court of Appeals, the original Notice of which was filed on February 27, 1985, and amended on March 12, 1985.

Then, on April 3, 1986, the Fifth District Court of Appeals sitting an EN BANC, affirmed the trial court's Order. The Appellate Court split evenly, with three judges in the majority and three dissenting. The Court went on to certify that its decision passed upon a question of great public importance and certified the question as follows:

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

SUMMARY OF ARGUMENT

A strict construction of the No Fault Act, as is required by the fact that it is in derogation of common law, leads to the inescapable conclusion that non-residents who voluntarily provide PIP coverage are not tort exempt. In particular, a literal reading of §627.737, of the No Fault Act, which contains the tort exemption provision, places two (2) requirements on parties attempting to qualify for the tort exemption.

First, the party must be an owner, registrant, operator or occupant of a "motor vehicle". The No Fault Act defines motor vehicle as,

> "Any self-propelled vehicle with four or more wheels which is of a type both designed and required to be licensed for use on the highways of this State." (emphasis added). §627.732, Florida Statute.

Hence, if a vehicle is not of a type required to be registered in Florida, then its owner, registrant, operator or occupant is not entitled to raise the tort exemption.

Second, the party must have obtained PIP coverage as he or she was required to obtain by the Act. Non-residents are not required by the No Fault Act to obtain PIP coverage, except in limited circumstances none of which apply to the case at bar. Thus, non-residents are not tort exempt.

Therefore, since neither HUGHES nor IMPERIAL, as non-residents, are required to provide PIP coverage, and since the automobile owned by Imperial and operated by HUGHES was not of the type "required to be licensed for use on the highways of this state," the Respondents do not qualify for the tort exemption under either of the requirements of §627.737 of the Florida Statutes, regardless of the fact that they voluntarily obtained PIP coverage from their own state.

This conclusion is supported by the Department of Insurance's interpretation of the No Fault Act found at Section 4-27.09(2) of the Florida Administrative Code, which states that non-residents do not receive PIP benefits and are not tort exempt. Also, this conclusion is supported by the holdings in Julien v. Johnson, 438 So.2d 503 (Fla. 5th DCA 1983) and Deal Motors, Inc. v. Carrington, 305 So.2d 811 (Fla. 3rd DCA 1974).

Furthermore, this interpretation of the No Fault Act does not violate non-residents' rights to equal protection, due process or their right to travel, because the State of Florida had both a reasonable and compelling governmental interest for making a distinction between residents and non-residents. The Legislature passed the No Fault Act in an effort to lower insurance premiums in Florida. To extend the tort exemption to non-residents, would not serve this purpose. Instead, it would only

serve to unnecessarily limit Florida residents access to the courts.

However, should the Court disagree and find the Act's distinction between non-residents and residents unconstitutional, the only proper action would be to strike the entire tort exemption from the Act, rather than invade the province of the Legislature by changing the clear meaning of the Statute.

ARGUMENT

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

A strict construction of the No Fault Act leads to the inescapable conclusion that non-residents, who voluntarily provide PIP coverage, are not tort exempt. A strict construction is required because the No Fault Act is in derogation of the common law. Carlile v. Game and Fresh Water Fish Comm., 354 So.2d 362 (Fla. 1977). Without question, the No Fault Act, with its tort exemption, is in derogation of the common law right to traditional tort remedies. Therefore, it should not be expanded farther than a literal reading of its language requires, State v. Egan, 287 So.2d 1 (Fla. 1973).

The tort exemption of the No Fault Act is found at §627.737, of the Florida Statutes and provides in pertinent part:

> "(1) 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, and every person or organization legally responsible for his acts or omissions, is hereby exempted from tort liability for damages be-

> cause of bodily injury, sickness, or disease arising out of the ownership, operation, maintenance, or use of such motor vehicle in this state...." (Emphasis added).

A strict construction of this section of the No Fault Act, places two requirements on parties attempting to raise the tort exemption.

First, the party attempting to qualify for the tort exemption must be an owner, registrant, operator or occupant of a "motor vehicle". The No Fault Act defines "motor vehicle" as,

> "Any self-propelled vehicle with four or more wheels which is of a type both designed and <u>required to be licensed for use on the highways of this state</u> . . ." (Emphasis added) §627.732, Fla. Stat.

Therefore, if a vehicle is not of a type required to be registered in Florida, then its owner, registrant, operator or occupant is not entitled to raise the tort exemption. This interpretation is supported by the fact that the original definition of motor vehicle did not include the language that the vehicles be of a type "required to be licensed for use on the highways of this state." This language was specifically added by the Legislature in 1978. The original definition was as follows:

> "Motor vehicle means a sedan, station-wagon, or jeep type vehicle not used as a public livery conveyance for passengers and includes any other four

> wheel motor vehicle used as a utility automobile and a pickup or panel truck which is not used primarily in the occupation, profession, or business of the insured." §627.732, Florida Statute (1972).

In 1978 this definition was changed to the following:

> "Motor vehicle means any self-propelled vehicle which is of a type both designed and required to be licensed for use on the highways of this state . . ." §627.732, Florida Statute (1978). (Emphasis added)

The definition was changed again in 1982, however, the Legislature chose to retain the phrase,

> "required to be licensed for use on the highways of this state . . ." §627.732, Florida Statue (1982).

The only logical reason for the Legislature to have added and retained this phrase was to clarify their intention that the No Fault Act not be applied to non-residents whose motor vehicles are not required to be registered in Florida.

Second, the party attempting to qualify for the tort exemption must have obtained PIP coverage as he or she was required to do by the Act. Pursuant to §627.733 of the No Fault Act, non-residents are not required by the Act to obtain PIP coverage, except in limited circumstances none of which apply here. Thus, non-residents do not qualify for the tort exemption. It is particulary important to take notice of the Legislature's choice of the word "required" to understand that it is irrelevant whether non-residents voluntarily provide PIP coverage.

Applying these two requirements, which are contained in §627.737 of the No Fault Act, it becomes abundantly clear that the Respondents, HUGHES and IMPERIAL, do not qualify for the tort exemption. As to the first requirement, the Trial Court made a specific finding that the vehicle driven by HUGHES and owned by IMPERIAL was not required to be registered or licensed in Florida. Therefore, it is not a motor vehicle within the meaning of the No Fault Act. Thus, its owner, registrant, operator or occupant are not tort exempt. Next, as to the second requirement, the Trial Court made a specific finding that HUGHES and IMPERIAL were not required by the Act to provide PIP coverage. Accordingly, they are not tort exempt.

This conclusion is supported by the Department of Insurance's interpretation of the No Fault Act, found at section 4-27.09(2) of the Florida Administrative Code, which states that non-residents do not recieve PIP benefits and are not tort exempt. This rule interprets the Act as providing for two exceptions to the general rule that non-residents do not qualify for PIP benefits or the tort exemption, neither of which apply to the case at bar.

The first such exception is for situations in which the non-resident is attempting to collect PIP benefits from a resident for injuries sustained while occupying a motor vehicle which he does not own. This exception focuses on whether the owner of the motor vehicle is one

who is required to provide security by the No Fault Act, if so, the injured non-resident can recover PIP benefits, otherwise he can not. This exception is irrelevant to the case at hand because the non-resident, HUGHES, was not injured in the accident and is not attempting to collect PIP benefits. Furthermore, the owner of the vehicle, IMPERIAL, was not required to provide security by the No Fault Act as explained above.

The second exception to the rule that non-residents do not receive PIP benefits and are not tort exempt, found in the Department of Insurance's interpretation of the No Fault Act, applies only to situations in which the non-resident is required by the Act to provide motor vehicle security. There are only two occasions in which non-residents are required to provide security and they are both enumerated in subsection (1) of this section of the Florida Administrative Code, and they are as follows: One, when the nonresident maintains a motor vehicle in the state for more than ninety (90) days during the preceding 365 day period; and two, when the non-resident is required to license a motor vehicle in Florida by Florida Statute 320.38 (Employed in the state or children enrolled in public school). Since neither HUGHES, nor IMPERIAL fall into either of these two categories, they are not required to provide security, as the Trial Court so found, and thus, do not qualify for this exception.

Therefore, pursuant to the Department of Insurance's interpretation of the No Fault Act, the Respondents are not entitled to raise the tort exemption. This interpretation of the Act should be given great weight by the Court because it is the Department of Insurance which is charged with enforcing and interpreting the No Fault Act. Heftler Construction Co. and Sub. v. Depart. of Rev., 334 So.2d 129 (Fla. 3d DCA 1976), Greyhound Lines, Inc., Greyhound Lines-East Div. v. Yarborough, 275 So.2d 1 (Fla. 1973), Aluminum Co. of America v. Central Lincoln Peoples' Utility Dist., 81 L.Ed.2d 301, 104 S.Ct. 2472 (U.S. 1984).

Furthermore, this interpretation is supported by the holdings in two Florida cases which have addressed the issue of the applicability of the No Fault Act to non-residents.

The first case is, Julien v. Johnson, 438 So.2d 503 (Fla. 5th DCA 1983). That case is factually similar to the case at bar in that a non-resident was driving a vehicle which was registered and insured in another state and had an accident in Florida causing injury to a resident of Florida. However, in Julien, the Florida resident, in an effort to collect PIP benefits, was arguing that the No Fault Act applied to non-residents, as opposed to arguing that the Act did not apply to non-residents, as is the case here. In holding that the No Fault Act did not apply to non-residents, the Court stated,

> "Sec. 627.731 applies the No Fault act to motor vehicles registered in this state. The vehicle here was registered in Massachusetts." Id. at 505.

Based on this holding, the Court found that the Florida residents had their remedy under usual tort principles rather than under No Fault.

The second case which supports the conclusion that non-residents are not tort exempt, is Deal Motors, Inc. v. Carrington, 305 So.2d 811 (Fla. 3d DCA 1974). In that case the Court stated, as to the application of the No Fault Act to out of state vehicles,

> "the intent of the legislature was to exclude the obvious, that is, a motor vehicle that is registered in a state or district other than Florida." Id. at 812.

That case was decided under the old statutory definition of motor vehicle which did not include the phrase, "required to be licensed for use on the highways of this state", which was added by the legislature in 1978. §627.732, Florida Statute (1978). Certainly, this subsequent addition by the legislature further supports the correctness of that Court's interpretation of the No Fault Act.

Furthermore, the Legislature's distinction between residents and non-residents is not violative of equal protection or due process standards. In determining the constitutionality of the No Fault Act, as applied to

non-residents, it is helpful to look to Lasky v. State Farm Insurance Co., 296 So.2d 9 (Fla. 1974), in which the Court reiterated the test to be applied to legislation attacked on equal protection or due process grounds. As to equal protection, the court stated,

> "In order to comply with the requirements of the equal protection clause, statutory classifications must be reasonable and not arbitrary, and all persons in the same class must be treated alike. Silver Blue Lake Apartments v. Silver Blue Lake Home Owners Assn., 225 So.2d 557 (3d DCA 1969). When the difference between those included in a class and those excluded from it bears a substantial relationship to the legislative purpose, the classification does not deny equal protection. Daniels v. O'Connor, 243 So.2d 144 (Fla. 1971)." Id. at 18

As to due process of law, the test is whether the statute bears a reasonable relation to a permissible legislative objective and is not discriminatory or arbitrary or oppressive, Lasky, supra. Id. at 15.

Therefore, in order to determine whether the No Fault Act's distinction between residents and non-residents violates equal protection or due process standards, the legislative purpose must be determined. After an extensive analysis of the statute, together with other sources such as legislative history, law review commentary and opinions of other courts, the Supreme Court in Lasky, supra, summarized the purposes of the legislature in en-

acting the No Fault Act. These purposes include a reduction of automobile insurance premiums and an assurance that persons injured in vehicular accidents would receive some economic aid in meeting medical expenses and the like, in order not to drive them into dire financial circumstances with the possibility of swelling the public relief roles. Id. at 14.

In essence, the No Fault Act was passed as an attempt to remedy problems faced by the citizens of Florida, stemming from an insurance crises involving skyrocketing automobile insurance premiums. The Florida Legislature was not concerned with remedying the automobile insurance problems of any state other than its own. In an effort to resolve this intrastate crisis, the Legislature created a system it believed would lower insurance premiums and, at the same time, expedite the receipt of some compensation, even when the claimant was at fault.

However, in order to receive these benefits, Florida residents gave up their traditional tort remedies, which included the possibility for greater recoveries for intangibles such as mental pain and suffering. Yet, this deprivation of traditional tort remedies was not extended to include actions agaist non-residents. To do so, would not have served the Legislative purpose of lowering insurance premiums in Florida. Thus, such an extension of the tort exemption would have constituted an unnecessary and

unreasonable intrusion on the common law rights of Florida residents.

Therefore, the distinction between residents and non-residents is by no means arbitrary or unreasonable, and all persons in the same class are treated alike. Furthermore, the difference between those included in the class and those excluded from it does bear substantial relationship to the legislative purpose, that being to lower automobile insurance premiums in the state, with minimal intrusion on the common law rights of its citizens.

Nevertheless, it is anticipated that Respondents will attempt to counter this conclusion by citing the dicta found in Lasky, supra, relating to the No Fault tort exemption. The dicta in question follows:

> "Appellants argue that the provisions of F.S. §627.737, F.S.A., infringe unconstitutionally on the rights of nonresidents to travel to or in the State of Florida. We need not reach the merits of this contention, since the record clearly reflects that Appellants are residents of this state and hence, without standing to invoke this argument.
>
> It is 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.

First, this statement was pure dicta, with no precedential value and, as such, should have no bearing on the result reached in this case.

Second, it is the position of the Petitioner that this language supports the constitutionality rather than the unconstitutionality of the Legislature's distinction between residents and non-residents.

In Lasky, supra, the injured resident was attempting to raise non-residents' right to travel as a ground for attacking the tort exemption. He claimed that the tort exemption which non-residents would encounter, if injured in Florida by a resident, would infringe on their right to travel. In that context, the Court indicated that a resident involved in an accident with a non-resident in the State of Florida would be entitled to raise the tort exemption and the non-resident could not be heard to complain. The reason being that, "non-residents invoking the privilege of operating dangerous instrumentalities over Florida highways do so subject to Florida's restrictions and regulations thereon." Id. at 23. In short, this means that a non-resident can not strip a resident of the benefits of the tort exemption which he has acquired through contributing to and sacrificing under the No Fault system, merely by being involved in an accident with him in Florida.

By the same rationale, a non-resident cannot acquire the benefits of the No Fault Act merely by entering the state and voluntarily providing PIP coverage from his or her own state. A non-resident does not contribute to

the give and take system which was established for residents of Florida, and, as such, should not be able to use that system as a shield against those for whose benefit it was intended. Such an extension of the tort exemption to non-residents would not serve the legislative purpose of reducing automobile insurance premiums in Florida, instead, it would serve to only further reduce Florida residents' access to the courts.

Also, it is important to note that by limiting the benefits of the No Fault Act's tort exemption to residents, the Legislature left available to non-residents all of the traditional tort defenses available to litigants in the State of Florida, thereby availing them of due process and reasonable access to the courts.

Finally, should the Court disagree with the conclusion that the Legislature's distinction between residents and non-residents is constitutional, the only proper response would be to strike the tort exemption from the No Fault Act. Certainly, by changing the language contained in the No Fault Act, the distinction between residents and non-residents could be eliminated. For example, the phrase which was added to the definition of motor vehicle by the Legislature in 1978, "which is of a type both designed and required to be licensed for use on the highways of this state", could be deleted.

If this were done, the definition of motor vehicle would read,

> "any self-propelled vehicle with four or more wheels . . .";

Also the word "required", found in §627.737 of the Act, could be replaced with "described". If this were done, §627.737 would read,

> "(1) Every owner, registrant, operator, or occupant of a motor vehicle with respect to which security has been provided as [described] by §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 infury, sickness, or disease arising out of the ownership, operation, maintenance, or use of such motor vehicle in this state...." (Brackets added)

These changes would eliminate the distinction between residents and non-residents, however, if such changes are required, they are for the Legislature to make, not the Judiciary.

CONCLUSION

The Respondents, HUGHES and IMPERIAL, as non-residents, are not entitled to raise the tort exemption contained in the No Fault Act, because they were not owners, registrants, operators or occupants of a vehicle which was required to be registered in this state and, because, they were not required by the Act to obtain PIP coverage. This conclusion must be reached if the Act is strictly construed, as is required by the fact that it is in derogation of common law.

Also, the Administrative Rules promulgated by the Department of Insurance, in the exercise of its duty to interpret and enforce the No Fault Act, support this conclusion, as do the cases cited herein by the Petitioner.

Therefore, the Court has only two alternatives available to it. First, it can find the Legislature's distinction between residents and non-residents constitutional and reverse the Appellate and Trial Courts below. Second, it can find the Legislature's distinction between residents and non-residents unconstitutional and strike the tort exemption from the Act. To do otherwise, would be to change the clear meaning of the No Fault Act, as enacted by the Florida Legislature, which action would not be a proper judicial function.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail/hand delivery to CARL D. MOTES, ESQUIRE, Post Office Box 633, Orlando, Florida 32802, this 2d day of May, 1986.

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