IN THE SUPREME COURT OF FLORIDA

CASE NO. 76,083

DISTRICT COURT OF APPEAL,
4TH DISTRICT - NO. 86-6996

MICHAEL LIPOF,

Petitioner,

v.

FLORIDA POWER & LIGHT COMPANY,

Respondent.
_____/

PETITIONER'S INITIAL BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Petitioner, MICHAEL LIPOF ("LIPOF"), suffered personal injuries in an automobile accident on September 2, 1983, in which he was struck by an underinsured vehicle while driving his personal automobile. (R.1-2; and R.62). At the time, LIPOF was employed by Respondent, FLORIDA POWER & LIGHT COMPANY ("FP&L"), as a meter reader and bill deliverer, having been hired in 1981. See, Lipof v. Florida Power & Light Company, 15 F.L.W. 1514 (Fla. 4th DCA April 25, 1990). (See Petitioner's Appendix, Exhibit 1). At the time of the accident, FP&L provided LIPOF's compliance with automobile insurance requirements under Florida Statutes through an "Employee Vehicle Agreement". (R.2, Exhibit A of the Complaint; R.57; R.62; and Petitioner's Appendix, Exhibit 2). The Employee Vehicle Agreement, which was drafted by FP&L, covered LIPOF's personal vehicle and, in particular, provided LIPOF:

a. compliance with the Florida Financial Responsibility Law and the Florida Automobile Reparations Reform Act;

b. excess indemnity protection with a combined bodily injury and property damage limit of $500,000.00 each occurrence for the benefit of FP&L and LIPOF, with each bearing one half (1/2) the actual cost of such protection;

c. fire, theft and comprehensive protection; and

d. full collision or upset protection with a $50.00 deductible, which applied whether LIPOF's vehicle was being

utilized for FP&L business or for LIPOF's personal use. (R.1-2, Exhibit A of the Complaint; R.57; and Petitioner's Appendix, Exhibit 2).

The Employee Vehicle Agreement further provided that uninsured motorist (U.M.) coverage was rejected. (R.1-2, Exhibit A of the Complaint; and Petitioner's Appendix, Exhibit 2). No opportunity was given to LIPOF to select U.M. coverage, nor was such coverage offered or available to LIPOF. (R.1-2, Exhibit A of the Complaint; R.58; and Petitioner's Appendix, Exhibit 2). As a result of the 1983 accident, LIPOF suffered serious permanent injuries. (R.1-2).

LIPOF subsequently filed suit against FP&L seeking a declaration from the Court that LIPOF was entitled to U.M. benefits pursuant to the Employee Vehicle Agreement. Essentially, LIPOF argued that he was entitled to U.M. benefits under the Agreement, as FP&L undertook to provide LIPOF with liability coverage, as detailed above, without providing him the option of accepting U.M. coverage in an amount equal to his liability coverage or making a knowing rejection thereof. Further, LIPOF was not notified on an annual basis of his options regarding U.M. coverage. (R.1-2).

FP&L moved for summary judgment against LIPOF on the basis that as a matter of law, it owed no duty to LIPOF to offer him U.M. coverage under the Employee Vehicle Agreement. (R.22-23). FP&L therein argued that it was LIPOF's employer and a self-insured utility and as such, had no duty to offer LIPOF U.M. coverage under §627.727, Florida Statutes (1983). (R.23-24).

The trial court granted FP&L's motion for summary judgment and LIPOF then appealed the decision of the trial court to the Florida Fourth District Court of Appeal. (R.55; and R.66). The Fourth District Court of Appeal thereafter affirmed the entry of summary judgment by the trial court in favor of FP&L and filed its original opinion on March 14, 1990. Lipof, supra p.1. The Fourth District Court of Appeal, however, upon Petitioner's Motion for Rehearing or Certification, certified the following question to the Supreme Court of Florida:

> WHETHER AN EMPLOYER IS OBLIGATED TO PROVIDE AN EMPLOYEE WITH THE OPPORTUNITY TO ACCEPT OR REJECT UNINSURED MOTORIST INSURANCE, WHERE THE EMPLOYER PROVIDES THE EMPLOYEE, THROUGH HIS EMPLOYMENT CONTRACT, WITH INSURANCE IN COMPLIANCE WITH THE FLORIDA FINANCIAL RESPONSIBILITY LAW AND THE FLORIDA AUTOMOBILE REPARATIONS REFORM ACT AND WITH OTHER INDEMNITY AND INSURANCE COVERAGES ON THE EMPLOYEE'S PERSONAL VEHICLE WHICH IS USED BY THE EMPLOYEE IN THE EMPLOYER'S BUSINESS.

Id. On May 22, 1990, LIPOF filed his notice to invoke the discretionary jurisdiction of the Supreme Court of Florida to review the decision of the Fourth District Court of Appeal.

ISSUE PRESENTED

WHETHER AN EMPLOYER IS OBLIGATED TO PROVIDE AN EMPLOYEE WITH THE OPPORTUNITY TO ACCEPT OR REJECT UNINSURED MOTORIST INSURANCE, WHERE THE EMPLOYER PROVIDES THE EMPLOYEE, THROUGH HIS EMPLOYMENT CONTRACT, WITH INSURANCE IN COMPLIANCE WITH THE FLORIDA FINANCIAL RESPONSIBILITY LAW AND THE FLORIDA AUTOMOBILE REPARATIONS REFORM ACT AND WITH OTHER INDEMNITY AND INSURANCE COVERAGES ON THE EMPLOYEE'S PERSONAL VEHICLE WHICH IS USED BY THE EMPLOYEE IN THE EMPLOYER'S BUSINESS.

SUMMARY OF ARGUMENT

The Fourth District Court of Appeal erred in affirming the entry of summary judgment below in favor of FP&L. The decision of the Fourth District rested upon its finding that FP&L was a self-insurer and as such, had no obligation to offer LIPOF U.M. coverage on his vehicle, which was used by LIPOF in the scope of his employment with FP&L. In the case at bar, however, FP&L was not a true self-insurer with respect to LIPOF, its employee, as FP&L provided coverage for LIPOF on his personally owned vehicle.

Specifically, FP&L became an "insurer" as the same is defined by Florida law as to LIPOF when it agreed, via its Employee Vehicle Agreement, to arrange for LIPOF's compliance with both the Florida Financial Responsibility Law and the Florida Automobile Reparations Reform Act and to secure excess indemnity protection and other coverage, including fire, theft, full collision and comprehensive, for LIPOF on his personal vehicle. Such an arrangement does not constitute "self-insurance," as the coverage inured to the benefit of LIPOF regardless of whether his vehicle was being used for business or personal purposes. Thus, the Employee Vehicle Agreement, though not labeled an insurance policy, functioned in that capacity for LIPOF. Accordingly, FP&L was LIPOF's insurer and was obligated to provide him the option of selecting uninsured motorist benefits under the Florida uninsured motorist statute. It is undisputed by FP&L that no such option was offered to LIPOF.

The cases cited and relied upon by both FP&L and the Fourth District Court of Appeal in support of FP&L's position all involve

employers or other self-insurers which had waived U.M. coverage on their own vehicles on behalf of permissive users. Not one of those cases involved a "self-insurer," such as FP&L, which attempted to waive U.M. coverage on a vehicle both owned and operated by the employee. Thus, LIPOF's case presents an issue of first impression to this Court.

Courts in Florida have for years reaffirmed the public policy behind the Florida uninsured motorist statute. This Honorable Court itself has recognized on several occasions that the U.M. statute was created to provide broad protection to the citizens of Florida against those who drive without insurance or adequate insurance. If LIPOF is denied the opportunity to select U.M. coverage from FP&L, the protection intended to be afforded by the U.M. statute will in effect be nonexistent. This Court should decide this case so that persons such as LIPOF, who use their vehicles for employment purposes and are "insured" by their employers, as LIPOF was by FP&L through its Employee Vehicle Agreement, can realize the benefits intended to be afforded by the Florida uninsured motorist statute.

ARGUMENT

Issue

WHETHER AN EMPLOYER IS OBLIGATED TO PROVIDE AN EMPLOYEE WITH THE OPPORTUNITY TO ACCEPT OR REJECT UNINSURED MOTORIST INSURANCE, WHERE THE EMPLOYER PROVIDES THE EMPLOYEE, THROUGH HIS EMPLOYMENT CONTRACT, WITH INSURANCE IN COMPLIANCE WITH THE FLORIDA FINANCIAL RESPONSIBILITY LAW AND THE FLORIDA AUTOMOBILE REPARATIONS REFORM ACT AND WITH OTHER INDEMNITY AND INSURANCE COVERAGES ON THE EMPLOYEE'S PERSONAL VEHICLE WHICH IS USED BY THE EMPLOYEE IN THE EMPLOYER'S BUSINESS.

The Fourth District Court of Appeal, by affirming the summary judgment entered by the trial court for FP&L, essentially found that self-insurance is not considered to be a "policy" of insurance and that self-insurers, therefore, are not "insurers" who must make available Uninsured Motorist (U.M.) coverage in accordance with §627.727, Florida Statutes (1983).[1] In arriving at the above conclusions of law, the Fourth District relied on several Florida cases which in essence hold that the owner of a vehicle who is self-insured is not required to offer uninsured motorist coverage and can waive such coverage as to permissive users of the owner's

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[1] Citations herein will be made to the 1983 Florida Statutes (unless otherwise cited) as was done in the trial court and in the Fourth District Court of Appeal, despite the fact that the Employee Vehicle Agreement was entered into in 1981. As the issue posed by this case at the trial level was not whether a written rejection of U.M. coverage was required, but whether LIPOF's rejection was "knowing" and "informed" under the circumstances, the post-1981 amendment to Florida Statute §627.727 mandating a written rejection is not believed relevant to the issues herein. The requirements of Florida Statute §627.727, that a liability insurer provide U.M. coverage or obtain a knowing, informed rejection of coverage or election of lower limits than the bodily injury liability limits, remained the same in both the 1981 and 1983 versions of the statute.

vehicle. The Fourth District did recognize, though, that the issue of whether FP&L was obligated to offer U.M. coverage to LIPOF on his own personal vehicle has never before been decided in Florida. Further, neither LIPOF, FP&L, nor the Fourth District has located any cases outside of Florida dealing specifically with the factual scenario presented by this case. LIPOF's case against FP&L, therefore, is a case of first impression in Florida. LIPOF believes that the rule announced by the Fourth District Court of Appeal will have a detrimental effect on the ability of employees in Florida who utilize their own personal vehicles in the scope of their employment to acquire uninsured motorist insurance. Hence, this case presents an issue of great public importance to the citizens of Florida and should be decided by this Honorable Court. LIPOF contends that the trial court and the Fourth District Court of Appeal, in affirming the trial court's entry of summary judgment for FP&L, erred in their interpretations of FP&L's legal obligation to offer U.M. coverage on LIPOF's personal vehicle.

A decision on the issue presented by this case hinges on the determination of whether FP&L is an "insurer" with responsibilities under the uninsured motorist statute with regard to LIPOF, in view of FP&L's Employee Vehicle Agreement with LIPOF. The uninsured motorist statute, §627.727, Florida Statutes (1983), provides that U.M. coverage must be offered with, or as a supplement to, automobile liability insurance in Florida. The insured may reject such coverage, but such a rejection must be a knowing and informed one. See Lane v. Waste Management, 432 So.2d 70,73 (Fla. 4th DCA

1983). The statute has numerous requirements which must be complied with by automobile liability insurers, including a requirement that the named insured be informed annually of his coverage options. §627.727(1), Florida Statutes (1983). In the case at bar, it is undisputed that U.M. coverage was never offered to LIPOF in conjunction with, or supplemental to, the liability coverage provided to LIPOF by virtue of the Employee Vehicle Agreement. (R.57-58).

The Florida Insurance Code broadly defines insurance as

> "...a contract whereby one undertakes to indemnify another or pay or allow a specified amount or a determinable benefit upon determinable contingencies."

§624.02, Florida Statutes (1982). Similarly, an insurer is defined in the Insurance Code as:

> "...every person engaged as indemnitor, surety, or contractor in the business of entering into contracts of insurance..."

§624.03, Florida Statutes (1982). FP&L's Employee Vehicle Agreement, by its express terms, provided LIPOF with "excess indemnity protection with a combined bodily injury and property damage limit of $500,000 each occurrence," as well as other coverage on LIPOF's vehicle, including fire, theft, comprehensive and full collision protection. (R.1-2, Exhibit A of the Complaint; and Petitioner's Appendix, Exhibit 2). It is clear that the "Employee Vehicle Agreement" is in fact a contract whereby FP&L undertook to indemnify LIPOF if he caused injuries to another motorist or property damage while driving his vehicle. FP&L, by providing this "Employee Vehicle Agreement" as part of its

employment arrangement with LIPOF, thereby became an "indemnitor," as LIPOF would look to FP&L to indemnify him in the event he caused injuries or damage to another while driving his vehicle. The Employee Vehicle Agreement, though titled differently, in reality operates as a "contract of insurance," through which FP&L provided insurance to LIPOF.

Similarly, LIPOF would look to FP&L to "indemnify"[2] him if LIPOF's vehicle were damaged, either through fire, theft, or a collision, regardless of whether the damage occurred while LIPOF was on FP&L business or personal time. FP&L would use its status as a utility to avoid the substance of its arrangement with LIPOF. The Employee Vehicle Agreement need not be labeled a contract of insurance and FP&L need not be called an insurance company for the true substance of FP&L's status relative to LIPOF's to be discerned. This Court should not permit FP&L to hide behind its "public utility" status and therein frustrate the purpose and intent behind the Florida uninsured motorist statute.

FP&L relies heavily upon the definition of motor vehicle liability policy as contained in §324.021(8), Florida Statutes (1983), for its contention that the Employee Vehicle Agreement is not a liability policy. FP&L argues that because the Employee Vehicle Agreement is not "a policy of liability insurance...issued by an[y] insurance company authorized to do business in this

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[2]"Indemnify" is defined generally as "[t]o restore the victim of a loss, in whole or in part, by payment, repair, or replacement...; to secure against loss or damage;... to make reimbursement to one of a loss already incurred by him." BLACK'S LAW DICTIONARY 393, (Abridged 5th ed. 1983).

state," FP&L had no obligation under §627.727 to offer LIPOF U.M. coverage. FP&L's analysis, however, misses one very important step. Specifically, the term "motor vehicle liability policy" defined in §324.021(8) refers to one acceptable method of providing financial responsibility under Chapter 324, Florida Statutes, also known as the Florida Financial Responsibility Law. Under that law and in particular, §324.031, Florida Statutes (1983), an owner or operator of a vehicle is permitted to prove his financial responsibility, defined in §324.021(7), Florida Statutes (1983), as the "ability to respond in damages for liability on account of accidents arising out of the use of a motor vehicle," in one of four ways:

1) by furnishing satisfactory evidence of holding a motor vehicle liability policy;
2) by posting a bond with the Department of Highway Safety and Motor Vehicles conditioned on paying the statutory liability requirements;
3) by furnishing a certificate of the Department of Highway Safety and Motor Vehicles showing the deposit of cash or securities; or
4) by furnishing a certificate of self-insurance issued by the Department of Highway Safety and Motor Vehicles.

FP&L's argument throughout this litigation and on appeal has been that FP&L provided LIPOF's compliance with the Florida Financial Responsibility Law, as given in the Employee Vehicle Agreement,

through a program of self-insurance, which is the fourth option available under §324.031.

A close reading of §324.031, however, reveals the flaw in FP&L's argument. The option of being "self-insured" was not selected by LIPOF as his method of proving financial responsibility with respect to his vehicle. The above statute refers to the manner in which an owner or operator of a vehicle may prove his financial responsibility. LIPOF is the owner and operator of his vehicle and he did not elect to furnish a certificate of self-insurance in order to prove his financial responsibility under §324.031. Rather, the manner in which LIPOF proved his financial responsibility in accordance with the Florida Financial Responsibility Law was through the Employee Vehicle Agreement, which constituted LIPOF's evidence of holding a motor vehicle liability policy. LIPOF, therefore, elected to prove his financial responsibility through the first option under §324.031, and not through a program of self-insurance. While FP&L may be "self-insured" with respect to covering any damages claimed by LIPOF or a third party against FP&L, LIPOF is not self-insured and would look to FP&L's Employee Vehicle Agreement for "insurance" on his vehicle. FP&L's "self-insurance" is no longer that when FP&L undertakes to extend coverage to persons other than itself, i.e. to LIPOF, on his personally owned vehicle.

An analysis of the Florida Motor Vehicle No-Fault Law (Florida Automobile Reparations Reform Act) further substantiates the flaw in FP&L's classification of itself as a self-insurer under no

obligation to offer U.M. coverage to LIPOF. The Florida No-Fault Law, cited at §§627.730 through 627.7405, Florida Statutes (1982), was enacted to require owners or registrants of all motor vehicles required to be licensed in the state of Florida to provide medical, surgical, funeral and disability insurance benefits through motor vehicle insurance securing such benefits for persons injured in motor vehicle accidents, without regard to fault. §627.731, Florida Statutes (1982). In a fashion similar to the Florida Financial Responsibility Law, the No-Fault Law affords every owner or registrant of a motor vehicle the opportunity to provide security through one of various means, including through an insurance policy or through a program of self-insurance. §627.733(3), Florida Statutes (1982). FP&L again argues that it provided LIPOF's compliance with the Florida Motor Vehicle No-Fault Law, as given in the Employee Vehicle Agreement, through a program of self-insurance.

LIPOF, however, as the owner and registrant of his automobile, was at all times the party obligated to provide security under the above-referenced statute. LIPOF did not provide his security under the No-Fault Act through a program of self-insurance. From LIPOF's perspective, given that he as the owner/registrant of his vehicle was obligated to provide such security under the No-Fault law, the Employee Vehicle Agreement constituted that security, and FP&L thereby "insured" LIPOF. Under both the Florida Financial Responsibility Law and the Florida No-Fault Law, the focus of the statutory liability insurance or security requirement is the owner

or operator of the vehicle. FP&L neither owned nor operated LIPOF's vehicle. The owner of the vehicle in the case at bar is LIPOF and LIPOF was not self-insured. LIPOF was insured by another entity, FP&L, and FP&L can therein not escape the conclusion that it was agreeing to "indemnify" another.

The Fourth District Court of Appeal and FP&L relied on the case of Government Employees Insurance Company v. Wilder, 546 So.2d 12 (Fla. 3d DCA 1989) for the proposition that an individual self-insurer is not for most purposes an "insurer" under the Florida Insurance Code who would be obligated to offer uninsured motorist coverage. LIPOF respectfully submits that Government Employee's Insurance Company is of limited precedential value, as that case involved the layering of insurance policies and did not consider the issue currently presented to this Court by LIPOF. Further, reliance upon the Government Employee's Insurance Company case ignores the fact that with respect to LIPOF and his vehicle, FP&L provided coverage and "protection" and as such, ceased to be a self-insurer.

Nevertheless, FP&L has maintained throughout this litigation and appeal that it is a self-insurer and is therefore, treated differently from an "insurer" under the insurance statutes and case law prior to and including Government Employees Insurance Company. Specifically, FP&L has argued that it has no duty to offer uninsured motorist benefits to LIPOF, as the Insurance Code does not obligate a "self-insurer" to provide such benefits. In support of its argument, FP&L has previously cited §627.733(3)(b), Florida

Statutes (1982), which provides that a self-insurer under the Florida No-Fault Law "shall have all of the obligations and rights of an insurer under ss. 627.730 - 627.7405." FP&L essentially argues that the statute does not deem a self-insurer to have all of the obligations and rights of an insurer under the uninsured motorist statute, §627.727, and therefore, FP&L would have no obligation to offer U.M. coverage to LIPOF.

FP&L's analysis, however, again misses the mark. Clearly, there would be no reason for the legislature to have imposed the obligation of providing uninsured motorist coverage on a "self-insurer". After all, a self-insurer is merely one who assumes his own risk of responding in damages under either the Florida No-Fault Law or the Florida Financial Responsibility Law. It would be completely anomalous for one who is "self-insured" to be required by statute to offer U.M. coverage to itself.

Two cases relied upon by FP&L for its assertion that a self-insurer does not always take on the obligations of an insurer are Farley v. Gateway Insurance Company, 302 So.2d 177 (Fla. 2d DCA 1974) and Zinke-Smith, Inc. v. Florida Insurance Guaranty Association, Inc., 304 So.2d 507 (Fla. 4th DCA 1974). In Farley, the Second District Court of Appeal noted that an insurer, as defined in §624.03, is one in the "business of selling insurance." Farley, 302 So.2d at 179. The Farley case involved a passenger who was injured in a vehicle insured by Gateway Insurance Company. Id. Gateway Insurance argued that the passenger could have looked to his resident relative's No-Fault insurance policy to cover his

injuries and that, as the resident relative failed to obtain a No-Fault policy, the passenger was only entitled to collect benefits from the resident relative himself, who became an "insurer" by virtue of his failure to have obtained No-Fault coverage. Id. The Court in Farley held that a motor vehicle owner who fails to purchase insurance does not necessarily become an "insurer," but rather, only has the rights and obligations of an insurer under the Florida Automobile Reparations Reform Act. Id.

Zinke-Smith involved an employer who provided worker's compensation benefits through a program of self-insurance. Zinke-Smith, supra p. 15, at 508. In Zinke-Smith, the Court considered the issue of whether Zinke-Smith, the self-insured employer, had become an "insurer" such that an excess worker's compensation policy issued to Zinke-Smith constituted reinsurance which would not qualify for benefits under the Florida Insurance Guaranty Association Act. Id. at 508-510. The Fourth District Court of Appeal concluded that an employer who provides worker's compensation coverage through a program of self-insurance does not automatically become an "insurer" as defined by the Florida Insurance Code and that the excess worker's compensation policy, therefore, was direct insurance rather than reinsurance. Id. at 509.

Neither Farley nor Zinke-Smith adds anything to assist this Court in evaluating LIPOF's claim against FP&L. FP&L's entire argument rests on its assertion that it is a "self-insured" utility which has not taken on the responsibility of an "insurer" under the

Florida U.M. Statute. While Farley and Zinke-Smith do state that a self-insurer does not necessarily become an "insurer" within the meaning of the Florida Insurance Code, such a holding does not bolster FP&L's position. This is because FP&L, while perhaps a "self-insurer" as to itself, attempted herein to provide coverage for LIPOF on his personal vehicle. In so doing, FP&L has clearly extended itself beyond being a "self-insurer" and in reality has become an "insurer" with respect to LIPOF and his vehicle. FP&L did not merely insure against its "own risk" when it agreed to indemnify LIPOF. See Zinke-Smith, supra p. 15 at 509, n.2.

In the case at bar, the Fourth District Court of Appeal also relied on several earlier cases from other Florida District Courts of Appeal in holding that FP&L as a self-insurer did not have a duty to offer LIPOF U.M. coverage. Those cases each considered essentially the same issue and held that self-insured car leasing companies can waive uninsured motorist coverage on their own vehicles and are not obligated to offer uninsured motorist coverage under the Florida U.M. statute to short term lessees of their vehicles. Morpurgo v. Greyhound Rent-A-Car, Inc., 339 So.2d 718 (Fla. 1st DCA 1976); Guardado v. Greyhound Rent-A-Car, Inc., 340 So.2d 510 (Fla. 3d DCA 1976); MacKenzie v. Avis Rent-A-Car Systems, Inc., 369 So.2d 647 (Fla. 3d DCA 1979). Although the above three cases would appear to be factually close to the circumstances surrounding the LIPOF-FP&L arrangement, one crucial distinction remains. In each of the above three cases, the car leasing company

provided its compliance with the Florida Financial Responsibility Law through a program of self-insurance of its own vehicles and made a knowing rejection of uninsured motorist coverage, which was held to be binding on short term lessees of the companies' vehicles. It is important to note that in each of the above three cases, the insured owner of the vehicle was provided the opportunity to make a knowing rejection of uninsured motorist coverage.

The case at bar involves quite a different scenario, as the insured owner is LIPOF, not FP&L. It is important in a case such as this to consider the public policy behind the U.M. statute. In Salas v. Liberty Mutual Fire Insurance Company, 272 So.2d 1,5 (Fla. 1972), this Honorable Court noted that the intent of the Legislature in enacting the U.M. statute was to provide the citizens of Florida with broad protection against uninsured motorists. This Court also stated, in Mullis v. State Farm, 252 So.2d 229,233,237-238 (Fla. 1971), that U.M. coverage was created by statute in Florida to protect those who are legally entitled to recover damages in an automobile accident, as if the uninsured motorist had carried the minimum limits of an automobile liability policy, and is not to be whittled away by exclusions not permitted by statute. The broad manner through which the Legislature intended U.M. coverage be made available to those legally entitled to recover damages forms the basis for the requirement in Florida that a rejection of U.M. coverage or selection of lower limits of coverage be knowingly made. See Kimbrell v. Great American

Insurance Company, 420 So.2d 1086 (Fla. 1982); and Lane, supra pp. 8-9. The broad statutory protection intended to be afforded by the U.M. statute to insureds was achieved in the three car leasing company cases relied upon by the Fourth District Court of Appeal in affirming the summary judgment entered below for FP&L.

The distinction between the case presented by LIPOF and that of the three car leasing companies becomes even more significant if one considers the following illustration, in view of the broad public policy behind the U.M. statute: If a person leases a car from a self-insured rental car company which opted to reject uninsured motorist coverage on its vehicles, and the renter is thereafter injured in an accident by an uninsured or underinsured motorist, that renter may nevertheless have the opportunity to recover U.M. benefits from his own uninsured motorist carrier. The renter has this option because he may have his own vehicle and have elected to accept uninsured motorist coverage through the insurance carrier on that vehicle, as opposed to the rented vehicle. LIPOF, on the other hand, can only look to FP&L for uninsured motorist coverage, because FP&L purported to insure LIPOF's vehicle. LIPOF is constrained by FP&L's provision of coverage on his vehicle and cannot seek U.M. benefits elsewhere, as LIPOF has no automobile insurance carrier other than FP&L. The above illustrates that for LIPOF, who both owns and operates his vehicle, the U.M. statute is meaningless, if construed according to FP&L. Such a result is certainly contrary to the legislative intent that broad protection be afforded by the U.M. statute to the citizens of this state.

The case of Del Prado v. Liberty Mutual Insurance Company, 400 So.2d 115 (Fla. 4th DCA 1981) expanded further upon the rule pronounced in the three car leasing company cases. In Del Prado, Liberty Mutual provided Talisman Sugar Company with liability insurance to cover various independent contractors who hauled sugar cane in their own vehicles. Del Prado, 400 So.2d at 115. Both Talisman and the haulers were named insureds. Id. at 116. Prado, an employee of a contract hauler, was involved in an accident with an uninsured motorist while driving his employer's truck. Id. Prado brought suit against Liberty Mutual seeking U.M. benefits, but the Fourth District Court of Appeal concluded that Prado was "merely a permissive user" of an insured vehicle and, therefore, was not entitled to U.M. coverage. Id. at 117. The owner of the vehicle, Prado's employer, maintained that it as the named insured had properly rejected U.M. coverage as was its privilege. Id. at 116. The Fourth District Court of Appeal, in denying Prado's claim for U.M. benefits, noted however that the situation might be entirely different if Talisman, the named insured, was insisting upon its right to accept or knowingly reject U.M. coverage. Id. at 116. Del Prado is consistent with Morpurgo, Guardado, and MacKenzie, in that in all of these cases, the named insured had the opportunity to accept or make a knowing, informed rejection of U.M. coverage. LIPOF, who in effect was the "named insured" by virtue of the Employee Vehicle Agreement, did not have such an opportunity to accept or make a knowing, informed rejection of U.M. coverage on his own vehicle.

The duty to offer uninsured motorist insurance with limits not less than the limits of bodily injury liability insurance is one based upon statute in Florida. Nationwide Mutual Fire Insurance Company v. Kauffman, 495 So.2d 1184, 1186 (Fla. 4th DCA 1986). LIPOF contends that FP&L, by virtue of its Employee Vehicle Agreement, entered into the "business of selling insurance" and thereby had the duty to offer LIPOF uninsured motorist coverage in accordance with the U.M. statute. There is one case in Florida which may offer guidance in this Court's evaluation of LIPOF's claim. In Smith v. Reeves, 320 So.2d 432 (Fla. 4th DCA 1975), Reeves' employer, the National Cash Register Company (NCR) agreed that it would procure "adequate automobile liability insurance coverage" on Reeves' automobile which was to be used by Reeves in the course of his employment. Reeves, 320 So.2d at 433. Reeves filed suit on behalf of his son and individually against NCR, claiming that NCR breached its agreement by failing to obtain adequate limits of coverage. Id. The Fourth District Court of Appeal recognized that the Complaint asserted a "somewhat novel theory of liability," but held that Smith did state a third party beneficiary cause of action for breach of contract and for negligence and that the Plaintiffs were entitled to prove that NCR did not provide adequate automobile insurance coverage for its employee. Id. at 433-434. LIPOF, similarly, should be allowed to proceed against FP&L on his theory that FP&L failed to provide him with U.M. benefits after undertaking to "insure" his personal vehicle which was to be used in the course of his employment.

LIPOF's case was incorrectly decided by the trial court and the Fourth District Court of Appeal in view of the broad public policy behind the Florida U.M. Statute. Morpurgo, Guardado, MacKenzie and other similar cases are not binding on this Court in its determination of this case of first impression. Further, each of the out-of-state cases cited by the Fourth District Court of Appeal in its opinion in the instant case involved the question of whether an employer self-insurer or other self-insurer was obligated to provide uninsured motorist coverage on an owned vehicle which was merely used by an employee or other permissive user. See, Grange Mutual Casualty Co. v. Refiners Transport & Terminal Corp., 21 Ohio St.3d 47, 487 N.E.2d 310 (Ohio 1986); Hill v. Catholic Charities, 118 Ill.App.3d 488, 74 Ill.Dec. 153, 455 N.E.2d 183 (Ill. App. Ct. 1983); Mitchell v. Philadelphia Electric Co., 422 A.2d 556 (Pa. 1980); Mountain States Telephone & Telegraph Co. v. Aetna Casualty & Surety Co., 116 Ariz. 225, 568 P.2d 1123 (Ct. App. 1977). Not one of those cases involved an employer self-insurer who attempted to extend coverage to an employee on the employee's own vehicle which was used by the employee in the scope of employment, as did FP&L. Each of the cited out-of-state cases turned on the key conclusion that as self-insurers of their own vehicles, the employers (owner in Hill) did not issue "liability policies of insurance" and, therefore, were not obligated to provide uninsured motorist coverage to their employees (passengers in Hill), who were mere permissive users.

FP&L's status as a "self-insured" utility is irrelevant. It is LIPOF who is the focus under Florida law, and LIPOF is not self-insured. FP&L agreed, in its Employee Vehicle Agreement, to provide insurance to LIPOF, including LIPOF's compliance with the Florida Financial Responsibility Law and the Florida Motor Vehicle No-Fault Law. As such, FP&L's Employee Vehicle Agreement became, to LIPOF, a "policy of insurance." It cannot, therefore, be said that as a matter of law, FP&L had no corresponding duty to provide LIPOF with an opportunity to select U.M. coverage or knowingly reject such coverage as part of the Employee Vehicle Agreement. This case should be decided by this Court in order to prevent employers such as FP&L from rendering the U.M. statute meaningless to motorists like LIPOF. The summary judgment for FP&L should be reversed and this cause remanded to the trial court for a determination on the merits of the extent of U.M. coverage available to LIPOF as well as his damages.

CONCLUSION

Summary Judgment was incorrectly entered in favor of FP&L by the trial court in this cause. FP&L, through its Employee Vehicle Agreement, agreed to indemnify and insure LIPOF against liability to third parties, and provided other coverages to LIPOF on his own personal vehicle, without providing him the opportunity to select U.M. coverage or make an informed rejection of such coverage. To deny LIPOF and future employees like him the right to select U.M. coverage in such a situation would violate the broad public policy behind the uninsured motorist statute, which is that persons such as LIPOF, who are provided liability insurance, must also be afforded the opportunity to be insured against persons who drive without insurance or adequate insurance. The final summary judgment entered for FP&L should be reversed and this cause remanded for further proceedings on the merits of LIPOF's cause.

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