IN THE SUPREME COURT OF FLORIDA

CASE NO. 76,083

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

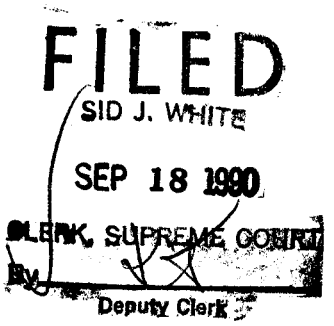
MICHAEL LIPOF,

Petitioner,

v.

FLORIDA POWER & LIGHT COMPANY,

Respondent.
_____/



PETITIONER'S REPLY BRIEF

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TABLE OF CITATIONS

OTHER AUTHORITIES

ARGUMENT IN RESPONSE AND REBUTTAL

CERTIFIED QUESTION

> 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.

In its Answer Brief, FP&L maintains a few lines of argument which attempt to defeat LIPOF's position that FP&L, by virtue of its Employee Vehicle Agreement, was obligated to offer LIPOF Uninsured Motorist coverage on his personal vehicle under the Florida Uninsured Motorist ("U.M.") Statute, §627.727, Florida Statutes (1983). To begin with, FP&L makes much of the language in its Employee Vehicle Agreement, which states that FP&L agreed to "secure" excess indemnity protection for LIPOF as well as "arrange" for LIPOF's compliance with both Florida's Financial Responsibility Law, §324.031, Florida Statutes (1983) and the Florida Automobile Reparations Reform Act (known as The No-Fault Act), §§627.730 through 627.7405, Florida Statutes (1982). See R.1-2, Exhibit A of the Complaint. Specifically, on page 9 of its Answer Brief, FP&L argues that it did not actually agree to <u>indemnify</u> LIPOF from losses up to $500,000.00, but rather, only agreed to "secure such protection for the employee." LIPOF respectfully submits to this Court that there is no true difference between agreeing to indemnify LIPOF and agreeing to "secure such

protection" for LIPOF. FP&L's argument is one of mere semantics which severely constrains the plain meaning of the language contained in its Employee Vehicle Agreement. Whether FP&L would provide such indemnification protection itself to LIPOF or would "secure such protection" from an outside party makes no difference to LIPOF, as FP&L nonetheless remained directly responsible under the terms of its Employee Vehicle Agreement to in fact provide LIPOF such indemnification. Should LIPOF have injured a third person while operating his vehicle, FP&L cannot deny that it would be responsible to LIPOF to provide such indemnification coverage in accordance with its Employee Vehicle Agreement. FP&L's argument on page 12 of its Answer Brief that "by no construction of the Employee Vehicle Agreement can it be argued that FP&L has agreed to indemnify its employees for damages they cause in a motor vehicle accident..." is wholly without merit in light of the plain language of the Employee Vehicle Agreement and its obvious meaning to LIPOF.

FP&L also notes the fact that it paid half the cost of the above-referenced excess indemnity protection, and appears to argue that as a result of FP&L paying for such coverage, FP&L was not consequently <u>providing</u> such coverage to LIPOF. The fact that FP&L "paid" for half of such coverage merely reflects FP&L's desire to be protected along with LIPOF, due to the risk of vicarious liability. What FP&L fails to point out is that LIPOF paid half the cost of the excess indemnity protection to FP&L, much as any insured would pay his insurer for such protection. See R.1-2,

Exhibit A of the Complaint. In truth, the "Employee Vehicle Agreement" constitutes a contract whereby FP&L undertook to indemnify LIPOF if he were to cause injuries to another motorist or property damage while driving his vehicle.

In addition to the above, FP&L relies heavily upon the argument that it is a self-insured entity which had no obligation to offer LIPOF uninsured motorist coverage. This argument, as has been suggested by LIPOF throughout the appeal of this case, is improper in that it focuses on the wrong party. It is not FP&L's status as a self-insurer that is the issue before this Court. Rather, it is LIPOF's status as a member of the motoring public and a person who was effectively provided insurance on his own vehicle by his employer, FP&L, that is the issue before this Court.

More specifically, FP&L argues that it is a self-insurer which provided LIPOF's compliance with the Florida Financial Responsibility Law and the Florida No-Fault Law through a program of self-insurance and not through a motor vehicle liability insurance policy for LIPOF. Hence, FP&L argues that as a self-insurer, FP&L does not automatically become an insurer with the obligation under the Florida U.M. Statute to offer LIPOF uninsured motorist coverage. The flaw in FP&L's logic is that FP&L's status as a self-insurer becomes completely irrelevant upon a close analysis of the appropriate statutes. The Florida Financial Responsibility Law, §324.031, Florida Statutes (1983), and the Florida No-Fault Act, §§627.730 through 627.7405, Florida Statutes (1982), provide respectively that an owner or operator/registrant

of a vehicle may prove his or her financial responsibility and ability to provide medical and other benefits to persons injured in automobile accidents through one of several methods, which include the furnishing of a certificate of self-insurance or the furnishing of satisfactory evidence of holding a motor vehicle liability policy. See §324.031, Florida Statutes (1983) and §627.733(3), Florida Statutes (1982). It is undisputed that FP&L is neither the owner, operator nor registrant of LIPOF's vehicle, which is the subject of the case at bar.

As LIPOF is the sole owner, operator and registrant of his vehicle, he is the person to whom the statutory requirements, of providing financial responsibility and proof of the ability to respond in damages, apply. With respect to LIPOF, no such certificate of self-insurance was ever furnished. That is because LIPOF was never self-insured. Rather, LIPOF satisfied his obligations under both of the above-referenced statutes by possessing the only evidence he had that he was financially responsible and able to provide such medical benefits should he injure someone while driving his vehicle, to wit: his Employee Vehicle Agreement with FP&L. As the Employee Vehicle Agreement is neither a bond, cash, other security, nor a certificate of self-insurance for LIPOF, said Agreement can only be considered LIPOF's evidence of holding a motor vehicle liability policy. When the above-referenced statutes are properly analyzed, it becomes clear that FP&L's Employee Vehicle Agreement with LIPOF operates in effect as a motor vehicle liability insurance policy, despite what

it is entitled, if it truly "arranges" for LIPOF's compliance with the Financial Responsibility and No-Fault Laws.

Another point raised by FP&L which merits discussion is its argument on page 21 of FP&L's Answer Brief that "the mere fact that a `self-insurance' program applies and gives protection to individuals other than the self-insured entity does not change the nature of the program." FP&L's argument in this regard relies on the fact that FP&L has itself accepted the risk, through a program of self-insurance, of providing the coverage it promised to LIPOF in the Employee Vehicle Agreement. What FP&L fails to recognize is that by providing such coverage to employees like LIPOF, FP&L has altered LIPOF's position, and LIPOF, not FP&L, is the proper focus of the Financial Responsibility and No Fault Laws. Specifically, by purporting to provide the coverages it agreed to "secure" and "arrange" for LIPOF, FP&L acted as an insurer toward LIPOF. In so doing, and in stating in its Employee Vehicle Agreement that uninsured motorist coverage was rejected, FP&L denied LIPOF that right which every insured vehicle owner in Florida has by statute, to wit: the right to choose between accepting or making a knowing rejection of uninsured motorist coverage. See Lane v. Waste Management, 472 So.2d 70,73 (Fla. 4th DCA 1983) and Mullis v. State Farm, 252 So.2d 229 (Fla. 1971).[1]

[1]FP&L cannot deny that the effect of its "securing" and "arranging" for those coverages enumerated in the Employee Vehicle Agreement was to insure or provide insurance to LIPOF.

Again, when the inquiry is properly focused on the vehicle owner, who is LIPOF, the effect of FP&L's arrangement becomes evident.

FP&L makes yet another argument which pervades its Answer Brief, i.e., that LIPOF failed to cite any case law which supports his proposition that FP&L was obligated to offer him uninsured motorist coverage. In response to FP&L's argument, LIPOF respectfully asserts to this Court that every judicial proposition of law initiated at some point in time from a case of first impression. LIPOF's case is such a case of first impression. The reason LIPOF has not cited any case which directly supports his contention that FP&L was obligated to offer him U.M. coverage is that no case with facts identical to LIPOF's, involving a vehicle owned by an employee which an employer undertakes to insure, has ever reached the appellate level and resulted in a written opinion. The fact that LIPOF's case is one of first impression should not penalize his position before this Court. Although the Florida Legislature has not directly stated in the uninsured motorist statute that employers are obligated to offer U.M. coverage to their employees in situations such as the one at bar, LIPOF's argument is hardly "a leap of faith from an unsubstantiated foundation," as FP&L would have this Court believe. (See FP&L's Answer Brief at page 19.)

Moreover, FP&L's argument on page 22 of its Answer Brief that LIPOF has not made any effort to "explain what statute imposes that obligation on FP&L" is simply untrue. LIPOF's argument has been and continues to be that the substance of FP&L's "Employee Vehicle

Agreement" with LIPOF was such that FP&L insured LIPOF. The coverage FP&L agreed to provide to LIPOF through the Employee Vehicle Agreement is not illusory. As such, FP&L's Employee Vehicle Agreement operates as a "contract of insurance" through which FP&L conducted the "business of selling insurance" to employees such as LIPOF. While LIPOF acknowledges that FP&L is a public utility, he vehemently denies FP&L's argument that it is not in the business of selling or dispensing insurance, given the explicit terms of the Employee Vehicle Agreement. In view of the above, FP&L was LIPOF's insurer, though FP&L's ordinary business may not be that of entering into contracts of insurance. See §624.02, Florida Statutes (1982) ("`Insurance' is a contract whereby one undertakes to indemnify another...") and §624.03, Florida Statutes (1982) ("`Insurer' includes every person engaged as indemnitor, surety, or contractor in the business of entering into contracts of insurance..."). Thus, the Employee Vehicle Agreement was LIPOF's "motor vehicle liability insurance policy" although not titled the same by FP&L. The fact that FP&L may have improperly ventured into the insurance business without a license should not enable FP&L to avoid the true spirit of the Employee Vehicle Agreement. See §324.021(8), Florida Statutes (1983). Accordingly, Florida Statute §627.727 imposes upon FP&L, as a result of its Employee Vehicle Agreement through which it voluntarily undertook to provide liability insurance to LIPOF, the corresponding obligation to offer LIPOF uninsured motorist coverage. See §627.727, Florida Statutes (1983).

While LIPOF concedes that the case law presented to the Fourth District Court of Appeal may not directly support his contentions herein, as argued by FP&L in its Answer Brief at pages 17-18, it is also true that those cases do not foreclose LIPOF's position. The cases cited by FP&L and relied upon by the Fourth District Court of Appeal admittedly do not decide the facts presented by LIPOF's case. Those cases, rather, decided the issue of whether self-insured owners of vehicles would be entitled to waive uninsured motorist coverage on their vehicles and would not be obligated under the Florida U.M. statute to offer uninsured motorist coverage to short term lessees of those vehicles. See, 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). LIPOF, unlike the insured owners of the vehicles involved in the above cited cases, was not provided the opportunity to accept or make a knowing rejection of uninsured motorist coverage, as contemplated by the Florida U.M. statute.

It is interesting to note that FP&L fails to deal in its Answer Brief with the true substance of the transaction at issue, to wit: that FP&L agreed to provide certain coverages in accordance with Florida Statutes and in effect "insured" LIPOF's own vehicle, but failed to give him that to which he was entitled, i.e., the opportunity to accept or make a knowing rejection of uninsured motorist coverage under the Florida U.M. Statute. Furthermore, FP&L ignores the fact that it not only provided LIPOF with

indemnification coverage and his compliance with Florida Statutes, but that it also provided LIPOF with fire, theft and comprehensive protection as well as full collision protection on LIPOF's vehicle. The fact that FP&L's primary business may not be that of issuing policies of insurance should not cloak the true nature of its relationship with LIPOF, which was that of insurer and insured. As FP&L's Employee Vehicle Agreement functioned as a "motor vehicle liability policy of insurance" for LIPOF, FP&L had the duty under the Florida Uninsured Motorist Statute, as a liability insurer of LIPOF, to provide LIPOF with the opportunity to select U.M. coverage or knowingly make a rejection of same. It is undisputed that FP&L never provided LIPOF such an opportunity to select or make a knowing rejection of U.M. coverage, which has long been upheld by Florida courts as an indispensable requirement in ensuring that the citizens of Florida be provided broad protection against uninsured motorists. See, Salas v. Liberty Mutual Fire Insurance Company, 272 So.2d 1,5 (Fla. 1972) and Lane, supra p.5. Even the Fourth District Court of Appeal recognized that there are strong public policy considerations which favor LIPOF in the case at bar. See, Lipof v. Florida Power & Light Company, 558 So.2d 1067 (Fla. 4th DCA 1990).

LIPOF does not herein request that this Court legislate a change in the Florida uninsured motorist law. LIPOF merely seeks a proper interpretation of the true substance of FP&L's Employee Vehicle Agreement within the context of existing insurance law. The case at bar should be decided by this Court, as an adjudication

herein will determine an issue of great importance to employees such as LIPOF, i.e., their ability to obtain U.M. coverage when their employers purport to insure those employees' own automobiles. The summary judgment for FP&L should be reversed and this cause remanded to the trial court for a determination on the merits as to the extent of Uninsured Motorist coverage available to LIPOF as well as the damages he has sustained.

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail to Paul R. Regensdorf, Esquire, Fleming, O'Bryan & Fleming, P.O. Drawer 7028, Ft. Lauderdale, FL 33338, this 17th day of September, 1990.

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