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IN THE SUPREME COURT OF FLORIDA

CASE NO. 79,398

JAMES GRANT and
LINDO'S RENT-A-CAR, INC.,

Appellants,

vs.

NEW HAMPSHIRE INSURANCE CO.,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
OF APPEAL, SOUTHERN DISTRICT OF FLORIDA

BRIEF OF APPELLANTS

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STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

This is an appeal from a final order dismissing a complaint in favor of Appellee New Hampshire Insurance Co., ("New Hampshire") and against Appellants James Grant ("Grant") and Lindo's Rent-A-Car ("Lindo's"), that was appealed to United States Appellate Court and then certified to the Supreme Court of Florida. This brief is submitted by Appellants Grant and Lindo's. The symbol "R" refers to the record on appeal. All emphasis appearing in this brief is supplied by counsel unless otherwise noted.

The trial court ruled as a matter of law that Appellants Grant and Lindo's (plaintiffs below) had failed to state a cause of action for Grant's insurer to defend either Grant or Lindo's, that Lindo's failed to effectively shift the primary layer of liability to the lessee (and hence New Hampshire) pursuant to Fla. Stat. 627.7263 (1986), and that the New Hampshire policy could not drop down below $100,000 regardless of policy language to the contrary. The appellate court then certified the cause to this Court.

Jurisdiction was premised upon 28 U.S.C. 1291 for the entry of a final order pursuant to Federal Rule of Civil Procedure 41(b) when appealed to the U.S. Court of Appeal and is now premised upon Florida Rule of Appellate Procedures 9.030(a)(2)(C) and 9.150.

B. STATEMENT OF FACTS

On April 7, 1988, Grant purchased a U.S.A. Travel Excess Non-Owner insurance policy from New Hampshire. The policy included a self-executing conformity clause providing coverage up to the

Financial Responsibility limits of any state through which Grant passed as well as a duty to defend Grant for automobile liability claims. On April 27, 1988, while the New Hampshire policy was in full force and effect, Grant rented a vehicle in Florida from Lindo's. On April 28, 1988, Grant was involved in an automobile accident with Constance Standley while operating the rental vehicle. A lawsuit was initiated by Constance Standley against the driver, Grant, the lessor, Lindo's, and the owner, H. R. Bently (hereafter Bently).

Grant made demand on his insurance carrier to defend him, which was refused. Lindo's made demand on New Hampshire to assume the primary layer of financial responsibility, which was refused. A declaratory and breach of contract action was filed wherein the Honorable Judge Moreno dismissed the Corrected Amended Complaint with prejudice.

C. STANDARD AND SCOPE OF REVIEW

The standard of review is whether or not the trial judge abused his discretion in dismissing the underlying complaint in light of the allegations therein. The effect of a motion to dismiss is to admit the well pleaded allegations of a complaint; therefore, this Court must determine if the complaint stated a cause of action when taken as true. Regan v. Davis, 97 So.2d 324 (Fla. 2d DCA 1957). Should this Court determine that the underlying complaint did, in fact, state a cause of action for which relief may be granted, then it should reverse the dismissal of the complaint.

SUMMARY OF THE ARGUMENT

Under Florida law, the owner and renter (where properly shifted) of a Florida registered vehicle must comply with the Financial Requirements statutes. Visitors to Florida who operate vehicles registered to some state other than Florida generally do not have to comply with these requirements. However, when a nonresident elects to operate a rental vehicle registered in Florida, they may come within the purview of Florida law and must comply with the financial responsibility statutes.

An insurance carrier that drafts an insurance policy affording benefits to its insured may not, in a separate part of the same policy, take such benefit away. Where, as herein, a policy clearly provides coverage as per the financial requirements of any state in America through which its insured travels, it may not thereafter limit such coverage to an excess limit since, in doing so, it would virtually nullify the benefit. Since no state in America requires financial responsibility beyond $100,000, a clause limiting coverage for financial responsibility beyond $100,000 renders the whole provision meaningless.

The duty to defend is vastly broader than the coverage afforded under an insurance polity. There is no exception in the New Hampshire policy limiting the defense of its insured to actions for sums greater than $100,000. Since the primary obligation to provide financial responsibility has been properly shifted to New Hampshire, it has an obligation to pay the initial $10,000 awarded to a successful claimant, as well as to defend its own insured.

New Hampshire's failure to defend its own insured has never been directly addressed by New Hampshire. The question of whether the duty to defend includes the owner of the vehicle has been alluded to, but never fully answered by a Florida Court. This Court should decide whether the obligation of the carrier providing primary liability per statute and contract must also defend the vicariously liable vehicle owner. Regardless of the answer, this Court should hold that New Hampshire must indemnify Lindo's for defending New Hampshire's insured due to New Hampshire's refusal to defend its own insured.

The trial court erred in dismissing the complaint which sought for the insurer of the lessee, Grant, to assume the defense of its insured and become primary for the first layer of financial responsibility. The duty to defend is contractual. The complaint alleged that Grant had only one insurer and thus only one contract obligating another to defend him. Therefore only one entity, New Hampshire, had a duty to defend Grant.

ARGUMENT

I) **FLORIDA REQUIRES AN OWNER OR RENTER OF A FLORIDA REGISTERED RENTAL VEHICLE TO MAINTAIN INSURANCE PRIOR TO BEING INVOLVED IN AN AUTO ACCIDENT FOR WHICH HE IS LIABLE.**

Florida Financial Responsibility laws begin with F.S. 627.733, Required Security, which states:

> (1) Every owner or registrant of a motor vehicle, other than a motor vehicle used as a taxicab or limousine, required to be registered and licensed in this state shall maintain security as required by subsection (3) in effect continuously throughout the registration or licensing period.

Under the first paragraph of this statute, Lindo's is and was required to maintain security for its vehicles.

> (2) Every nonresident owner or registrant of a motor vehicle which, whether operated or not, has been physically present within this state for more than 90 days during the preceding 365 days shall thereafter maintain security as defined by subsection (3) in effect continuously throughout the period such motor vehicle remains within this state.

Under this second paragraph, nonresidents are permitted to drive their vehicles in Florida up to ninety (90) days each year without registering the vehicle. Accordingly, since Lindo's vehicle was physically present within Florida the entire year, security was required.

> (3) Such security shall be provided:
> (a) By an insurance policy delivered or issued for delivery in this state by an authorized or eligible motor vehicle liability insurer which provides the benefits and exemptions contained in ss. 627.730-627.7405. Any policy of insurance represented or sold as providing the security required hereunder shall be deemed to provide insurance for the payment of the required benefits;

The third paragraph notes that the required security can be achieved via an insurance policy. Florida Statute 627.7263 states:

> 626.7263. Rental and leasing driver's insurance to be primary; exception
>
> (1) The valid and collectible liability insurance or personal injury protection insurance providing coverage for the lessor of a motor vehicle for rent or lease shall be primary unless otherwise stated in bold type on the face of the rental or lease agreement. Such insurance shall be primary for the limits of liability and personal injury protection coverage as required by ss. 324.021(7) and 627.736.

The requirements of Florida Statutes 627.736 (PIP) and 324.021(7) (liability) are clearly transferrable to the lessee of a Florida registered rental vehicle. Florida Statute 324.021(7) states:

> (7) Proof of financial responsibility.-That proof of ability to respond in damages for liability on account of accidents arising out of the use of a motor vehicle:
>
> (a) In the amount of $10,000 because of **bodily injury** to, or death of, one person in any one accident; ...

This statute, incorporated in Florida Statute 627.7263, clearly states that bodily injury is an element of financial responsibility that must be assumed by the lessee's insurer. An owner of a Florida registered motor vehicle must maintain minimum financial responsibility limits. This obligation may be transferred to the lessee of a rental car, regardless of whether he is a resident.

Under the Dangerous Instrumentality Doctrine followed in

Florida, the owner of an automobile is charged with the knowledge that it is a dangerous instrumentality and is held primarily liable (to the extent of $10,000 per person and $20,000 per accident) for injuries sustained by third parties where the automobile has been negligently operated by one to whom the owner had entrusted the vehicle. See Allstate Insurance Company v. Fowler, 480 So.2d 1287 (Fla. 1985); Insurance Company of North America v. Avis, 348 So.2d 1149 (Fla.1977); Roth v. Old Republic Insurance Company, 269 So.2d 3 (Fla. 1972); section 324.151(1)(a) Fla. Stat. (1986); section 324.021(7) Fla. Stat. (1986); and section 627.7263(1) Fla. Stat. (1986).

The legislature enacted section 627.7263 Fla. Stat. (1986) to permit an exception to this rule in the case of lessors, who may shift the burden for providing primary financial responsibility limits to the lessee by notifying the lessee of this shift in the rental agreement in bold print. Patton v. Lindos Rent A Car, Inc., 415 So.2d 43 (Fla. 2d DCA 1981). This statute permits a lessee entering into a lease agreement to obligate his insurance carrier to provide the primary financial responsibility limits without specifically contacting the carrier prior to executing the lease. Commerce Ins. Co. v. Atlas Rent-A-Car, Inc., 16 FLW D2367 (Fla. 3d DCA 1991).

General rules of statutory construction dictate that legislative intent must be determined primarily from the language of the statute and its plain meaning should be applied. State v. Atlantic C.L.R. Co., 47 So 969 (Fla. 1908); S.R.G. Corp. v.

Department of Revenue, 365 So.2d 687 (Fla. 1978); and State v. Dalby, 361 So.2d 215 (Fla. 2d DCA 1978). Here, the statute clearly states that a lessor may shift its primary liability by stating so in bold print in the rental agreement.

The statutory section relating to financial responsibility, section 324.022 Fla. Stat. (1986), puts the onus of the financial responsibility and other related laws, including section 627.7263 Fla. Stat. (1986), on the vehicle itself. Section 324.022 Fla. Stat. (1986) states:

> Every owner and operator of a motor vehicle, **which vehicle is subject** to the requirements of ss. 627.730-627.7405 and required to be registered in this state, shall ... establish and maintain the ability to respond in damages for liability on account of accidents arising out of the use of the motor vehicle in the amount of $10,000 because of damage to, and destruction of, property of others in any one accident.

According to this statute, every Florida registered vehicle must possess such insurance and is subject to section 627.7263 Fla. Stat. (1986). Established principles of statutory construction dictate that such a conclusion be drawn. See Blount v. State, 138 So.2d (Fla. 1931) (a statute is to be taken, construed and applied in the form enacted); See also Thayer v. State, 335 So.2d 815 (Fla. 1976); Van Pelt v. Hillard, 78 So. 683 (Fla. 1918) (the legislature is presumed to have expressed its intent by the use of the words found in the statute).

It is the vehicle which when required to be registered in this state is subject to its financial responsibility and vehicle and

casualty insurance laws. Therefore, since the vehicle in this case was a Florida registered rental vehicle for which financial responsibility was required, it was the vehicle itself which was subjected to Florida's laws, and the financial responsibility requirements then transferred to the lessee.

Despite Florida's commitment to the policy underlying the dangerous instrumentality doctrine, i.e. ensuring a means of recovery by the innocent injured party, the legislature specifically provided a method by which such liability of a owner/lessor may be shifted to a lessee and his carrier. Furthermore, the Third District Court of Appeals ruled in Commerce, supra, that nonresident lessors were included in that class of individuals to whom Florida's Financial Responsibility was aimed. In Commerce, a Massachusetts resident rented a Florida registered vehicle from a Florida rental car agency and was subsequently involved in an accident with a Florida resident. In holding the nonresident subject to Florida's Financial Responsibility statutes, the Third District upheld the spirit and notion the legislature intended in its drafting of Florida Statute 627.7263.

There are a string of cases cited in Appellee's Answer brief to the United States District Court which state that financial responsibility does not apply to individuals until after one accident. These cases are discussing the ability to obtain a driver's license, not a vehicle registration. As such, these cases do not apply to the case sub judice in any way.

II) THE SELF EXECUTING CONFORMITY CLAUSE IN NEW HAMPSHIRE'S EXCESS INSURANCE POLICY DOES SERVE TO EXTEND THE COVERAGE PROVIDED BY THAT POLICY TO MEET THE REQUIREMENTS OF FLORIDA'S FINANCIAL RESPONSIBILITY LAWS.

New Hampshire foresaw the possibility that its insured may travel to different states and be subjected to the Financial Responsibility laws of such states. In fact, on page 8 of the New Hampshire policy, section 13 addresses this issue:

> 13. TERMS OF POLICY CONFORMED TO STATUTE: If under the provisions of the motor vehicle financial responsibility law, compulsory insurance law, "no-fault" law, or any similar law of any governmental jurisdiction within the territorial limits of this policy, a non-resident is required to maintain certain insurance and such insurance requirements are greater than the insurance provided by this policy, the limits of the company's liability and the kinds of coverage afforded by this policy shall be as set forth in such law in lieu of the insurance otherwise provided by this policy, but only to the extent required by such law, and only with respect to the operation or use of a motor vehicle in such jurisdiction; provided, that the insurance under this provision shall be reduced to the extent that there is other valid and collectible insurance under this or any other vehicle liability insurance policy.

By claiming that section 627.7263 Fla. Stat. (1986) does not apply to non-residents, New Hampshire is attempting to evade its clearly foreseeable and contractually assumed liability under its policy as well as the Florida Financial Responsibility laws.

Where, as herein, the nonresident's automobile insurance policy does provide that it will conform to the financial responsibility laws of states through which the insured drives, how else could the policy be interpreted but that to find the policy does apply and falls within Florida law.

It should be noted that the lessee remains liable regardless

of his coverage so long as he is not an insured of the lessor. Therefore, either the nonresident personally or his insurance carrier will ultimately be responsible for any damages awarded to an injured plaintiff. Allstate Ins. Co. v. Fowler, 480 So.2d 1287 (Fla. 1985) and Quinlan Rental & Leasing, Inc. v. Linnel, 484 So.2d 630 (Fla. 2d DCA 1986). New Hampshire's notion is that its self-conforming policy is beyond Florida law; yet, it concedes its insured is subject to Florida law. This is non sequitur. This case involves far more than an insured binding his carrier (which he should also be able to do under notions of incidental contracts), this case involves the preconceived expectation on behalf of the carrier that its insured will subject it to the laws of foreign jurisdictions, and then the carrier refusing to defend its insured despite specific contractual language to the contrary.

Florida has a definite interest in seeing that the interests sought to be furthered by its dangerous instrumentality doctrine and its attendant exception for lessors, are protected in this situation. Florida's dangerous instrumentality doctrine and its financial responsibility laws evidence its interest in protecting the public from losses resulting from the operation of motor-vehicles on its highways. Insurance Co. of North America v. Avis Rent-A-Car System, Inc., 348 So.2d 1149 (Fla.1977). In enacting section 627.7263 Fla. Stat.(1986), the legislature intended to limit the liability of Florida lessors who lease Florida registered vehicles in Florida and to protect unwary lessees of automobiles

from responsibility of providing primary financial responsibility unless it was conspicuously designated in bold type. Sentry Indemn. Co. v. Hartford Acc. & Ins. Co., 425 So.2d 652 (Fla. 5th DCA 1983). This interest of Florida increases in significance when it is taken into consideration that tourism is one of Florida's major industries and the number of non-residents (with out-of-state insurance policies) leasing Florida vehicles is significant and greater here than in most states.

Florida's interest in shifting lessors' liability to lessees for the primary layer of financial responsibility when leasing vehicles that are required to be insured pursuant to the State's Financial Responsibility Statute is directly at issue.

III) AN EXCESS INSURER OWES A DUTY OF DEFENSE AND INDEMNIFICATION TO ITS INSURED UNDER FLORIDA STATUTE 627.7263, WHERE THAT STATUTE HAS BEEN PROPERLY INVOKED BY THE LESSOR OF A FLORIDA REGISTERED RENTAL VEHICLE.

In the case at bar, there is only one insurance policy that affords coverage to Great Britain citizen Grant, the New Hampshire policy. There is a lease agreement entered into in Florida between the car rental company and Grant. The aforesaid lease agreement directly and necessarily incorporates Fla. Stat. section 627.7263 (1986) since "(i)t is fundamental that the laws of Florida are part of every Florida contract". Department of Insurance State of Florida v. Teachers Insurance Company, 404 So.2d 735, 741 (1981), thereby successfully shifting primary liability to lessee Grant and his insurer New Hampshire.

The Florida Financial Responsibility statutes do not contain a duty on the part of the owner of a motor vehicle to defend the operator. Nor has there been any Florida case located that would infer such a duty. Should this Court find the lessor liable for the primary layer of Financial Responsibility, New Hampshire should still be found to be the only carrier providing coverage to Grant and thus the only entity that owes Grant a duty of defense.

IV) ASSUMING THAT NEW HAMPSHIRE DOES OWE A DUTY OF DEFENSE AND INDEMNIFICATION TO ITS INSURED, GRANT, NEW HAMPSHIRE OWES LINDO'S, A NON-INSURED UNDER THE POLICY, INDEMNIFICATION FOR FAILING TO DEFEND GRANT.

The duty of defense generally arises out of contract or statute. There is no statute directly giving rise to a duty of defense with regard to a lessee defending a lessor. Many insurance policies contain an "omnibus" insured clause wherein the permissive user of a vehicle will be defended and/or covered. However, the New Hampshire policy contains no such clause.

The next question is whether the burden of providing the primary layer of financial responsibility includes a duty of defense. For instance, where the lessee is insured and his carrier assumes the primary layer of financial responsibility, does the carrier have a duty to defend the lessor? Obviously where the policy provides that it will cover the owner as well as the tortfeasor the duty to defend both exists. But the instand policy has no such omnibus insured clause.

If the statute had intended to make the primary party liable for the defense of the remaining parties, then it would have clearly stated that in the statute. The omission of such language is telling. Without such an obligation, then the lessee and lessor must defend themselves regardless of who is primary.

When New Hampshire failed to defend its insured, forcing Lindo's to assume the defense of Grant, New Hampshire should be forced to indemnify Lindo's and/or Grant for the defense of Grant. There has never been an excuse tendered as to New Hampshire's

failure to defend its insured. That defense was a contractual obligation that was breached. To claim that it may be forgiven for leaving its insured's liability to fate merely because the vicariously liable entity paid for some or all of the defense is an offense to the judicial system. Such a decision would rend the very fabric of rental car law and leave the Florida rental car agencies with the duty to defend all lessees whose carriers ignore potential liability since Florida rental car agencies must assume the defense to avoid vicarious liability. Indemnity must exist to responsible lessors who are virtually forced to defend the insured lessee where the lessee's carrier refuses.

CONCLUSION

It is hereby respectfully submitted that for reasons stated herein, the Final Order Granting Motion To Dismiss With Prejudice must be Reversed. This Court should hold that the Florida Financial Responsibility laws apply to all persons owning or renting Florida registered vehicles; that the New Hampshire conformity clause extended the policy to comply with Florida Financial Responsibility laws; that New Hampshire owed a primary duty of defense and indemnification to its insured; that New Hampshire owed Lindo's a duty of defense for the primary layer of financial responsibility; and that New Hampshire owes Lindo's indemnification for its refusal to defend either its insured, Grant or Lindo's.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY a true copy of the foregoing was this 30th day of March, 1992 mailed to G. William Bissett, Esquire, attorney for Defendant/Appellee, 501 Northeast First Avenue, Miami, Florida 33132.

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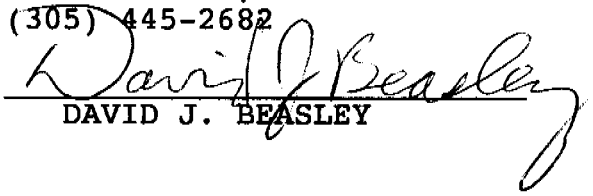

DAVID J. BEASLEY