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 UNTIED STATES DISTRICT COURT
OF APPEAL, SOUTHERN DISTRICT OF FLORIDA

REPLY BRIEF OF APPELLANTS

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INTRODUCTION

This Reply Brief includes sections and Roman numerals to separate sections that mirror the Appellee's Answer Brief. Therefore, the title of the arguments will be noted only by Roman numerals and arguments thereunder pertain to the same arguments of Appellee. Emphasis is added unless otherwise specified.

STATEMENT OF THE CASE AND OF THE FACTS

Appellee argues in its statement of the case that the trial court recognized that Florida Statute 627.7263 invokes a shifting only where a lessee has a primary carrier and that since the New Hampshire policy is an excess policy, the lessee never had a primary carrier. The error committed resulted from the trial court's cursory examination of the insurance policy. Had the judge recognized that the New Hampshire has built into it a contractual provision making it the primary carrier where the laws of any state he drives in requires that he has a primary carrier, the outcome would obviously have been a judgment in favor of the appellants and against New Hampshire.

The legal trap set forth by the Appellee is simple, attractive, and renders the contracted for benefit void ab initio. If it is true that the contractual clause New Hampshire elected to put in its contract is meant to apply only in the absence of a primary lessor, then why is language stating same absent from the policy?

Since the policy affords coverage to travelers using rental vehicles in any state in America, there will always be a primary

lessor. In Florida, however, the primary obligation to be liable for the first $10,000 can be shifted by the lessor. Nothing in the New Hampshire policy would prevent the normal operation of Florida statutes. The trap, then, is that for New Hampshire's rationale to apply, it would never be required to be responsible for rental cars. Any claims involving rental vehicles would be denied since a lessor is involved. Yet the policy covers only non-owned rental vehicles. How can any court lend meaning to a business travel policy that alleges to provide primary coverage to comply with financial responsibility laws to its insured while in rental vehicles except when there is a lessor? The only rationale answer is that New Hampshire intended to provide its insured with the Financial Responsible limits throughout the United States for rental vehicles where required by statute. That is the clear intent of the policy and that is the only interpretation that would lend value to the clause.

Appellee next points out that the trial court classified the New Hampshire policy as a true umbrella coverage policy, which is true. That was error. The trial court failed to recognize what the Federal Appellate Court had so much difficulty with: a true excess policy does not contain a clause allowing it to drop down and become primary. Obligating itself to provide the financial responsibility limits of Florida separated New Hampshire's policy from the typical true excess and was New Hampshire's marketing attempt to capture a larger share of the market. It should not now be allowed to unilaterally strike the clause when a claim arises

under that very clause.

Appellee next argues that the trial court applied this Court's holding in Southeastern Fidelity Ins. Co. v. Cole, 493 So.2d 445 (Fla. 1986) regarding the inability of a rental contract to establish the provisions of the insurance policy. The case before the Court is materially different. Grant and Lindo's are not trying to establish the terms of the policy through the rental contract. The terms of the policy clearly state that New Hampshire will step down to assume the liability for the financial responsibility limits where its insured is required to maintain such limits. That clause is not in the rental contract, it is in the insurance policy. The rental contract simply mirrors the Florida Statute allowing it to shift the vicarious liability for the operation of using a dangerous instrumentality to the lessee for the financial limits set out by statute. New Hampshire's argument that the rental contract is the source of coverage is incorrect. Therefore, Southeast is easily distinguishable.

New Hampshire next argues that a unilateral action of its insured cannot be the source of coverage. However, this argument again ignores the fact that the New Hampshire policy foresees such liability and creates the coverage. There was no action of Grant that was not specifically covered by the policy's terms. In other words, if New Hampshire provided coverage for non-awned rental vehicles driven by their insured in America where financial responsibility limits were required, no act of Grant created any new obligation for New Hampshire. There is no language of the

insurance policy that conflicts with the statute or the lease agreement. It is the language of the clause in the policy that New Hampshire claims to be ambiguous. The argument that the true excess language of the policy should override the clause in the same policy promising to provide coverage for the financial responsibility limits of states requiring its insured to maintain same is not only self-serving, but construes the policy in favor of the drafter. Florida law requires contracts to be construed against the drafter.

ARGUMENT

I

Florida law has for many years considered a motor vehicle to be a dangerous instrumentality. The law holds all owners of motor vehicles vicariously liable for injuries caused by the use of their motor vehicles operated with their permission and consent. Due to the large number of nonresidents who travel through Florida and enjoy the use of rental vehicles, Florida Statute 627.7263 was created to enable the lessors to shift the responsibility to provide financial responsibility to lessees. The notion was obviously to allow the tortfeasor to be primarily obligated for the injuries he or she causes. The rental rates and economy of Florida now enjoy less of a burden and the tortfeasor is properly liable.

In cases where no insurance exists, public policy is to allow the injured party to recover; therefore, the shift will only apply where the tortfeasor has an insurance carrier. As a result, the public is protected. In this situation, however, the tortfeasor

does not get a "free ride". The lessee may then be sued by the lessor for any and all sums paid by the lessor, for the notion is to provide protection to the public, not to allow a tortfeasor to escape his obligations.

The New Hampshire policy included a clause that allowed its insured to expand coverage. All the insured had to do was operate a motor vehicle in a state wherein financial responsibility limits were required. Florida is such a state. Grant drove a Florida registered motor vehicle. His actions, clearly contemplated by the New Hampshire policy, invoked the clause in the policy for New Hampshire to provide him with coverage for the financial responsibility limits. There is no binding through a rental contract since there is binding through operation of the insurance policy. Any other interpretation yields two untenable results: first, the clause is rendered meaningless; second, the policy now has the strength to override American state statutes. A better result would be to lend meaning to the clause as drafted and to recognize that insurance companies cannot contract around statutes they do not like. A third result will occur in like cases: the lessor will sue an insured whose policy purported to provide him coverage. There is no equity in such a holding.

Amazingly, Appellee argues that its policy is a business policy and not subject to Florida Statute 627.7263. There are three reasons this argument should not have been made.

First, Florida Statute 627.7263 does not limit the ability to transfer coverage to personal insurers vis-a-vis business insurers.

The notion that it does is not supported by the statute, common law, public palicy, or logic.

Second, even were there some business insurance exception, the financial responsibility requirements New Hampshire agreed to provide its insured vitiate the notion.

Third, the policy specifically includes personal and business uses. Paragraph VIII in the definition section of the policy states:

> PURPOSES OF USE: Pleasure and Business. The term "Pleasure and Business" is defined as personal, pleasure, family and business use.

The allowable uses that are insured include personal uses. Therefore, it is totally immaterial what use was occurring at the time of the accident. If there were a distinction, then dismissing the complaint with prejudice was error below, since it may have been amended to include proper counts or deferred until a summary judgment could be heard.

Appellee notes of no cases he found where a lessee can obligate his carrier where there is no primary carrier. This is not accurate. Florida Statute 627.7263, the transfer statute, is clear and easy to read. If there is no insurance, there is no transfer of primary liability, though there is retention of an indemnity claim by the lessor. In the case of Commerce Ins. Co. vs. Atlas Rent-A-Car. Inc., 585 So.2d 1084 (Fla. 3d DCA 1991), the Third District Court of Appeals discussed all aspects of the pending claim bar one: does Florida Statute 627.7263 apply to a true excess policy that includes a clause to become primary where

financial responsibility limits are required? The distinction, however, is not one that Appellee may rely upon since the policy clause for providing financial responsibility to its insured while operating rental vehicles in America clearly fits the facts alleged.

Ordinarily, a true excess will be protected against claims beneath its contractually imposed floor. Yet when the contract itself creates exceptions, those exceptions cannot be overridden by the body of the policy. Florida law has long held that a carrier may not take away in one section of the policy what it grants in another. Ambiguities are construed against the drafter and the courts uniformly read contracts in a way most favorable to affording meaning to the provisions therein. Applying those principles to the present **cause** results in holding that the true excess policy included an exception: to drop down and afford coverage in state that require financial responsibility. ***Any*** other interpretation results in a clause that can never be invoked. This is true because the policy provides no coverage for vehicles owned by the insured, rather there is coverage only for rental vehicles. Financial responsibility statutes are uniformly written for owners of motor vehicles, who must therefore always provide financial responsibility limits.

If the defense that "another carrier exists, so we don't have to pay" is recognized, then the carrier will never have to honor claims from its insureds. The transfer statute does not have an exception for lessors who have their own coverage. Conversely, the

laws of Florida do not have an exception wherein lessors are not required to maintain financial responsibility limits. Therefore, all lessors have financial responsibility coverage and may still transfer the obligation to the lessee.

We know from Commerce, supra, that Florida law applies to the present situation. We know that the New Hampshire policy has a clause that removes it from the category of being a "true excess" carrier. We also know that the policy was written to cover rental vehicles and protect the New Hampshire insured by providing the financial responsibility limits in states like Florida. What we do not know is why the carrier avoided its responsibilities and failed to defend its insured.

II.

Appellee begins by arguing that the conformity clause can be invoked only in cases where the damages exceed $100,000 (the floor of the excess policy). Since no state in America have financial responsibility laws requiring coverage in excess of $100,000, this argument is not convincing. The meaning of the clause would have to be to fool consumers into believing they purchased something of value by having the conformity clause put in their policy.

While Appellant will rely on its brief materially, it should be stated that the non-resident exclusions in Florida statutes apply to vehicles owned by the non-resident and were created to afford the non-resident time to travel through Florida without becoming subject to Florida's financial responsibility laws and also to allow new residents time to acquire the requisite insurance. These laws do not apply to non-residents who operate

Florida registered vehicles.

Appellee's argument in section II are confusing. New Hampshire appears to be arguing that non-residents driving Florida registered vehicles do not have to comply with Florida law regarding financial responsibility. If that premise were true, then the only lessees to whom financial responsibility could be transferred would be Florida residents. The very purpose of the transfer statute was to allow lessors to shift to all drivers of Florida registered vehicles, whether residents or non-residents, the obligation to provide financial responsibility.

Appellee argues that Florida does not require the driver of a rental vehicle to maintain liability insurance. This is incorrect. Florida requires all its residents to maintain personal injury protection coverage as well as property damage liability insurance, but also requires lessees to maintain liability insurance pursuant to Florida Statute 627.7263, incorporating Florida Statute 324.021(7)(a). That the financial responsibility limits are different for rental vehicles is conceded; however, since the policy was a rental car policy, it is the financial responsibility limits for rental vehicles that must control. Appellee has cited no authority whatsoever that involves the financial responsibility of rental vehicles and has totally ignored the statutes regarding rental vehicles and financial responsibility. As such, the second argument is fatally flawed.

The "one accident" rule is still law as to personally owned vehicles. However, the policies regarding the use of rental vehicles are of great public importance. Florida Statute 627.7263

was written specifically for lease situations and is duplicated nowhere else in Florida law. The ability to allow the owner of a dangerous instrumentality to avoid third party liability can be accomplished only by the transfer of that obligation to the lessee's insurance carries. By requiring lessees to maintain financial responsibility that includes liability for third parties injured through the negligence of the lessee, Florida law has satisfied the great public need to have third party injuries remedied and have done so by making the tortfeasor liable.

New Hampshire's conformity clause was triggered by the occurrence of a vehicular accident in which its insured was a driver. New Hampshire's obligations under the policy it drafted was to drop down and provide whatever coverage Florida's financial responsibility laws imposed along with the defense of its insured. New Hampshire, however, utterly failed in its duties. It failed to recognize Florida Statute **627.7263** wherein its insured was required to maintain the financial responsibility types and amounts of coverage set forth in Florida Statute 324.021 and New Hampshire further failed to defend its **own** insured. There is little question that the underlying cause had injuries that could rise above the $100,000 floor of coverage, not to mention the underlying $10,000. Yet, despite this, New Hampshire refuses to follow Florida statutes or otherwise acknowledge its obligations as Grant's insurer.

There is no rewriting of a policy in this cause. It should be noted that the New Hampshire policy would afford Grant no damages beneath $100,000 except for the conformity clause. This does not relieve New Hampshire of the obligation to defending

Grant, especially in a case where damages could exceed $100,000. The conformity clause, however, is the exception created by New Hampshire and adopts the law of the state in which Grant drives rental vehicles. In Florida, as shown above, this includes liability for the personal injuries of third parties up to $10,000. This is not a sanction, nor does it rewrite an insurance policy. Rewriting the policy would occur if, in the absence of the conformity clause, a court attempted to impose Florida's financial responsibility laws an New Hampshire. That would clearly be unfair. However, that is not the issue before the Court. The issue before the Court is whether a policy that incorporates the laws of Florida must be bound thereby.

III.

Lindo's is very aware that it is not an additional insured under the Grant/New Hampshire policy. Grant is very aware that he is indebted to Lindo's for the sums paid defending New Hampshire's insured. New Hampshire may not owe a duty to defend Lindo's, but their failure to defend their own insured has cost Lindo's a great deal of money that would otherwise never have been spent. This is true regardless of what the Court holds regarding financial responsibility since this was a claim that involved a demand that never fell below $100,000. The duty to defend is broad and must be invoked where claims occur within the policy amount. Should the Court agree with Appellants that New Hampahire was primary, then this obligation is even clearer. Indeed, Grant would have been justified settling the case for $500,000 with an agreement for the plaintiff not to collect the first $100,000. In such event, the

declaratory action would have been filed by the plaintiff. There is no difference in that set of facts and the present case with regard to New Hampshire's duty to defend Grant and their present duty to reimburse Lindo's as a result of their breach of the duty to defend their insured.

New Hampshire is, in effect, arguing that a carrier that breaches a duty to defend, thus causing the insured to become liable for the expense of the defense personally, should be subjected to a suit by the insured only, and not subjected to a suit by the real party in interest, the party burdened by the expense of the defense. There is no reason to allow the carrier such a windfall or the burdened party such a hard landing.

IV.

Appellee has attempted to construe Grant as a co-insured. This is confusing since New Hampshire elsewhere seemed to infer that Grant was not an insured. Part of the problem is that Lindo's rental contracts include a provision that where the lessee has no insurance, he will be insured by Lindo's (a self insurer). This either/or type language does not, at any time, under any circumstance, make Grant a co-insured with New Hampshire. There is a very finite line. Paragraph 7 states:

> 7. Renter shall be insured under Lessor's automobile liability insurance policy only if Renter has no other automobile liability insurance available to Renter with respect to Renter's use of the Vehicle. ...

If Lindo's is correct and New Hampshire's coverage applies, then Grant is not an insured of Lindo's. In that event, New Hampshire should reimburse Lindo's for the defense of Grant.

CONCLUSION

It is hereby respectfully submitted that for the reasons stated herein, the Final Order Granting Motion To Dismiss With Prejudice must be Reversed. This Court should hold that Florida Statute 627.7263 allows a lessor to shift liability for Florida Financial Responsibility limits, including 324.021(7)(a) regarding liability for personal injury; that such a shift was made herein by virtue af the New Hampshire conformity clause; and that New Hampshire owed its insured a duty of defense and must reimburse Lindo's for payment of same.

WE HEREBY CERTIFY that a true and correct copy of the above and foregoing was mailed this 18th day of May, 1992, to G. William Bissett, Preddy, Kutner, Hardy, Rubinoff, Thompson, Bissett & Bush, Attorney for Appellee, 501 NE First Avenue, Miami, FL, 33132.

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