047

IN THE
SUPREME COURT OF FLORIDA

CASE NOS. 80,175

INSURANCE COMPANY OF
NORTH AMERICA,
Petitioner,

v.

BOBBY COOKE, d/b/a
CONTINENTAL TOP SHOP,
Respondent.

ON REVIEW FROM THE
SECOND DISTRICT COURT OF APPEAL
LAKELAND, FLORIDA

REPLY BRIEF OF PETITIONER INSURANCE COMPANY OF NORTH AMERICA

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I.

STATEMENT OF THE CASE

Cooke avers that INA's recitation of certain facts regarding the generation of notices of intent to cancel by INAC are "untrue", and "inaccurate". INA adopted the recitation of facts by the Second District Court in its opinion below. To the extent that such facts are material to this appeal, and to the extent that the recitation of facts by the Court below is inaccurate, INA defers to the record.

II.

ARGUMENT IN RESPONSE

Cooke characterizes as "absurd" the results reached by the Third District Court in Tate v. Hamilton, 466 So.2d 1205 (Fla. 3rd DCA 1985), the Fourth District Court in Bankers Ins. Co. v. Pannunzio, 538 So.2d 61 (Fla. 4th DCA 1989), and the dissent by Judge Lehan in the opinion of the Court below. Cooke favors his interpretation of a certain 1978 decision of a New York court applying a New York statute, and a North Carolina case decided in 1968. Cooke argues that those cases show that there are strong public policy considerations which should lead to the rejection of the law expressed in the Pannunzio case, and that insurance statutes should be strictly construed "in order to protect the public at large", and "injured third parties" who may be "injured victims" of the insured.

The cases cited by Cooke in support of his propositions are distinguished from the case before the Court by the fact that each of them involved cancellation of compulsory automobile liability insurance policies rather than voluntary general liability insurance policies. Country Wide Insurance Co. v. Allstate Ins. Co., 63 A.D. 2d 951, 406 N.Y.S. 2d 313 (N.Y. App. 1978) involved a cancellation notice regarding a motor vehicle liability policy which failed to comply with the statutory requirement that the notice be printed in at least 12-point type. The New York court stated that the statute (Vehicle and Traffic Law §313(1)) was designed to permit persons injured in motor vehicle accidents to recover for their injuries, and must be strictly construed to effect the legislative purpose that all motor vehicles be insured. Country Wide, supra, at p.314. The statute was for the benefit and protection of the public exposed to the hazard posed by other persons driving automobiles, and not to relieve persons driving automobiles from their obligation to pay the required premiums for the insurance afforded.

Grant v. State Farm Mutual Insurance Company, 159 S.E. 2d 368, N.C. App. 76 (1968) also dealt with a compulsory motor vehicle liability insurance policy, and with the policy issue favoring protection of the innocent victims injured by persons who default on the payment of their insurance premiums. The subject policy was issued pursuant to an Assigned Risk Plan and for the purpose of fulfilling the requirement of the Financial Responsibility Act.

The court in Grant, supra, was concerned with whether a person

insured under a compulsory motor vehicle liability insurance policy should be permitted to cancel such policy through the insured's agent or attorney-in-fact. The court quoted with approval the case of Allstate Insurance Company v. Hale, 270 N.C. 195, 200, 154 S.E. 2d 79 (1967), as follows:

> "The primary purpose of the law requiring compulsory insurance is to furnish at least partial compensation to innocent victims who have suffered injury and damage as a result of the negligent operation of a motor vehicle upon the public highway. Insurance covering liability arising out of the ownership, maintenance and use of a motor vehicle on the highway in the amount required by statute is mandatory. If the policy exceeds the amount required the policy to the extent of the excess is voluntary. Voluntary insurance is contractual and determines the rights and liabilities of the parties inter se. Assigned risk insurance is compulsory both as to the insurer and the insured made so by law. Such policy must be interpreted in the light of the statutory requirement rather than the agreement or understanding of the parties. The requirements of the statute with respect to cancellation must be observed or the attempt at cancellation fails. Such policies 'are generally construed with great liberality to accomplish their purpose'."

Grant, supra, p. 370.

The excerpt from the Hale case quoted by the North Carolina court in Grant graphically illustrates the reason for limiting and restricting the insured's right to cancel a policy covering liability arising out of his use of a motor vehicle upon a public highway. In North Carolina (as in New York and Florida) the amount of such insurance required by statute is mandatory. Such insurance is compulsory both to the insurer and the insured, being made so by law. Such policies are governed and interpreted in the light of the statutory requirement rather than by the insurance contract,

agreements, or the parties understanding of the policy. In other words, the provisions of the insurance contract are supplanted by the statutes and the courts' interpretation thereof.

On the other hand, insurance in excess of the amount required by statute, or insurance not required by statute is voluntary insurance and is contractual. The contract of insurance, not the statutes applicable to compulsory insurance, determines the rights and liabilities of the insurer and insured to each other.

Florida has a separate and specific statute dealing with the cancellation of motor vehicle liability insurance policies. That statute, §627.728(1)(c) F.S.A., and its relation to §627.848 F.S.A., was considered by the First District Court in Martin v. Ritcheson, 306 S.2d 582 (Fla. 1st DCA 1975). Therein it was held that in order for an **automobile liability insurance policy** to be effectively cancelled, the insurer is required to send its insured a notice of cancellation regardless of whether the premium finance company has sent to the insured a notice of intent to cancel. As to such policies, statutory provisions prevail over contrary insurance policy provisions relating to cancellation.

Cooke has misstated the holding of the First District Court in Hall v. T.C. Saffold Paving Surfaces, 397 So.2d 725 (Fla. 1st DCA 1981). The First District did not hold, specifically or otherwise, that "an insurer could not simply rely on a request for cancellation by a finance company and was required to prove compliance by the finance company with §627.848 in order to prevail on a cancellation defense." Nor was it "noted" by the Court, as

is asserted by Cooke, "that it was the burden of the insurer asserting the defense of cancellation to prove that the finance company . . . had complied with the premium finance cancellation statute". And Hall, does not, directly or otherwise, contravene the holding of Pannunzio, or the construction of §627.848 F.S.A, urged by INA.

Hall involved worker's compensation insurance which, like compulsory motor vehicle liability insurance, is closely regulated by statutorily imposed conditions, contractural provisions and procedures for their enforcement, all as are imposed by §§440.01 et seq F.S.A. Workers' compensation insurance, in those instances when it is mandated, is insurance purchased by the employer specifically for the protection of its employees. The First District Court in Hall, declared that Part XIV of Chapter 627, Florida Statutes, sets out the law with reference to premium finance companies, and that §627.848 provides for the cancellation of insurance contracts by the premium finance company under certain conditions. The first of those certain conditions is that the premium finance agreement between the premium finance company and the insured must contain a power of attorney or other authority **allowing the premium finance company to cancel the insurance contract.** Secondly, if the insured defaults on his payments to the premium finance company, the finance company must then serve the insured with written notice, ten days in advance by any action of the finance company, of the premium finance company's intent to cancel. Third, if the insured does not act, the finance company

must mail the insurer a request for cancellation with a copy to the insured at his last known mailing address. The insurer **then** has the responsibility of complying with **all other**, statutory, regulatory and contractual restrictions, e.g. §§440.42(2) etc., F.S.A. requiring notice to the Worker's Compensation Bureau. It is clear that by its use of the words "then" the First District meant the time when the insurer received notice from the finance company, and by the words "all other" meant that the insurer was not required to comply with those three conditions set forth preceding the words "all other".

In Hall neither the insurer nor the premium finance company presented competent substantial evidence proving the existence of a power of attorney between the insured (Hall's employer) and the premium finance company, or to establish that the premium finance company had the employer's authorization to cancel insurance. Therefore, the First District Court held that the worker's compensation insurance was not cancelled where the premium finance company did not comply with the statutory requirements of §627.848 for cancellation in that it failed to establish that it had power of attorney or other authority from the insured employer to cancel the insurance policy.

Furthermore, the opinion of the First District Court in Hall clearly refutes Cooke's argument, at p. 6 of his Answer Brief, that:

> ". . . the finance company cannot itself cancel the insurance policy: only the insurer can actually effect the cancellation of the insurance contract."

The First District Court in Hall includes the following language which clearly and correctly acknowledge that the legislature intended to permit finance companies acting pursuant to power of attorney to initiate cancellation:

> "Section 627.848 provides for **cancellation** of insurance contracts **by the premium finance company** under certain conditions. First, the premium finance agreement ... must contain a power of attorney or other authority **allowing the premium finance company to cancel** the contract. The premium finance company then must serve the insured with written notice ... of **its intent to cancel.**" (emphasis added)

Hall, supra, at p. 726.

The contract of insurance between INA and Cooke, in the common policy conditions, also refutes Cooke's argument by providing that the insurance policy may be cancelled by the insured. Cooke's contractual right or power to cancel the contract could be exercised, and in this case was exercised, by the Cooke through his attorney-in-fact, INAC. The Hall decision, supra, p. 726, holds that the insurer, upon receipt of a request to cancel by a premium finance company who has a power of attorney from the insured, has the responsibility of complying with contractual restrictions. The insured's right to cancel, exercised through his attorney-in-fact, is one of those contractual restrictions.

Cooke attempts to persuade this Court that the principles of the laws of agency and the powers of attorney given by an insured to a premium finance company embodying those principles are abrogated and nullified insofar as they purport to enable an

insured to cancel his insurance policy via his attorney-in-fact, and to permit or require an insurer to accept the power of attorney as authority for the attorney-in-fact to act for his principal, the insured. Cooke argues that the recitations of the case law of most other jurisdictions, as cited by J. Appleman, Insurance Law and Practice, support Cooke's contention. INA avers that the contrary is true.

The sections of the Appleman treatise mentioned by Cooke (J. Appleman, Insurance Law and Practice, §§5012, 5013 (1981)) are very limited sections of the treatise concerned with these issues. They are found in Volume 14B, Termination of Policy, and are concerned with statutory provisions as to the sufficiency of notice of cancellation, which in some jurisdictions and as to certain types of insurance, render agreements contrary to the statutes void. (See §§5012, 5113). A more pertinent, relevant and complete discussion as to premium financing, and defaults and forfeiture for non payment, is contained in Revised Volume 14A, Forfeiture For Non Payment, §8145 Premium Financing, pp. 193-196; §8169.25 Failure to Pay Premium Finance Company, p. 252-255; §8196.25, Sufficiency of Notice - Premium Financing, pp. 320 - 324. Those discussions of the laws of the various jurisdictions considered, including Florida, are the basis for the following statement in §8145, p. 194 - 195 that fairly encompasses INA's position in this litigation:

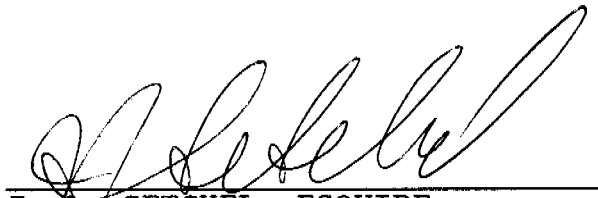
> "But, generally, it has been found that the provisions in the financing agreement give the lender ... the absolute right to cancel or demand or order cancellation, the cancellation being considered to be by the insured rather than the insurer. And such provision has been

considered not to be against public policy ...."

CONCLUSION

In conclusion, for the reasons and upon the authority set forth in Petitioner's Initial Brief, the decision by the Court below reversing summary judgment granted by the Trial Court should be reversed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by United States Mail on this the 15th day of October, 1992, to Bruce A. Walkley, Esquire, 202 Moody Avenue S., Tampa, Florida 33609 and Steven L. Brannock, Esquire, Post Office Box 1288, Tampa, Florida 33601.

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