4-15

ON APPEAL TO THE SUPREME COURT OF THE STATE OF FLORIDA
APPEAL NUMBER 85,300

DIANE S. HASSEN and
THOMAS S. HASSEN,

Petitioners/Appellants,

-vs.-

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, a foreign corporation,

Respondent/Appellee. /

Appealed from the Second District Court of Appeal
No.: 94-01241

RESPONDENT/APPELLEE'S ANSWER BRIEF

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PRELIMINARY STATEMENT

The Appellants, Diana S. Hassen and Thomas S. Hassen, her spouse, shall be referred to the "Appellants" or "insureds."

State Farm Mutual Automobile Insurance Company shall be referred to as "Appellee" or "State Farm."

The terms "uninsured motorist coverage" and "underinsured motorist coverage" as set forth in Appellants' Brief will likewise be used interchangeably.

The following symbols shall be utilized:

"O.R." -- Official Record

"UM" -- uninsured motorist coverage and underinsured motorist coverage.

STATEMENT OF THE CASE AND FACTS

Appellee, State Farm, accepts the Appellants' Statement of the Case and Facts, except where specifically contradicted or supplemented herein.

State Farm advised Appellants of its position not to waive subrogation rights based on the information available, as set forth in its letters of November 13, 1992 and December 30, 1992. (O.R. 109-112) Appellants, in spite of State Farm's advices to the contrary, went ahead and settled with the tortfeasor by executing a general release. (O.R. 120) Appellants thereafter filed an action for declaratory judgment, State Farm filed its Answer and Defenses, chief among which was its seventh defense that the action by Appellants was barred by virtue of Appellants' settlement with the alleged tortfeasor. (O.R. 36-38)

State Farm thereafter filed its Motion for Summary Judgment, contending that Florida Statute § 627.727(6)(a)(b) did not become effective until October 1, 1992, as amended, and therefor had no application to the instant cause. (O.R. 39-89) State Farm, in support of its Motion for Summary Judgment, filed Defendant's Memorandum of Law in support thereof and Appellants filed their Memorandum of Law in opposition thereto, both of which addressed the constitutional question of retroactive

application of F.S. § 627.727(6) (Supp. 1992). (O.R. 196-204) (O.R. 209-214)

The trial court denied State Farm's Motion for Summary Judgment and thereafter Appellants filed their Motion for Summary Judgment. (O.R. 208) (O.R. 221-223) State Farm thereafter filed its Memorandum of Law in opposition to Plaintiffs' Motion for Summary Judgment, again addressing the unconstitutionality of the statute as retroactively applied. (O.R. 224-229) The trial court, notwithstanding the constitutional arguments advanced by State Farm, granted Plaintiffs' Motion for Summary Judgment as to Count I of the Complaint. (O.R. 230-231) It is from the trial court's grant of a Final Judgment in favor of the Appellants that this case was appealed to the Second District Court of Appeal, which reversed and remanded it to the trial court with directions. The Second District Court of Appeal also certified the constitutional issues posed in the case as being ones of great public importance.

SUMMARY OF ARGUMENT

Florida Statute § 627.727(6)(a)(b), as supplemented in 1992, is an unconstitutional impairment of the obligation of contract embodied in the insurance policy issued prior to the effective date of the statute and constitutes a violation of Art. I, § 10 of the Florida Constitution.

While it is true F.S. § 627.727(6) (Supp. 1992) was not constitutionally challenged in its entirety in the trial court, it was constitutionally challenged. The action of the trial court in granting Plaintiffs' Motion for Summary Judgment inherently passed upon the constitutionality of F.S. § 627.727(6) (Supp. 1992). The statute as supplemented is clearly unconstitutional when retroactively applied in that it annuls, diminishes, and lessons the efficacy of the contract entered into between Appellants and State Farm prior to the enactment of said statute. The statute as applied is therefore an intolerable impairment of a contract right. Further, the statute as supplemented is in violation of Article I, § 10 of the Florida Constitution as it impairs the obligation of a contract. The statute is also a taking of property without due process in violation of the Fourteenth Amendment of the United States Constitution and Article I, § 9 of the Florida Constitution. The statute additionally violates the insurance

carrier's right of access to the courts as protected by Article I, § 21 of the Florida Constitution in that it sharply restricts State Farm's access to the courts by imposition of a financial barrier to the assertion of a claim or defense in court. The legislature has failed to demonstrate an overpowering public necessity for imposing such a financial restriction upon State Farm with a concomitant showing that no alternative method of addressing such public necessity exists.

The premises considered, the Second District Court of Appeal should be affirmed in its reversal and remand of this cause to the trial court for further proceedings consistent with F.S. § 627.727(6) (1989). This Honorable Court should declare F.S. § 627.727(6)(a)(b) unconstitutional in its entirety for all of the reasons set forth herein.

ARGUMENT

THE DISTRICT COURT CORRECTLY RULED THAT F.S. § 627.727(6)(a)(b) (SUPP. 1992) UNCONSTITUTIONALIY IMPAIRED SUBSTANTIVE RIGHTS UNDER AN ANTECEDENT CONTRACT AND UNCONSTITUTIONALLY IMPAIRED CARRIER'S DUE PROCESS RIGHTS AND RIGHT OF ACCESS TO THE COURTS.

REMEDIAL OR SUBSTANTIVE?

The trial court, in granting summary judgment to the Appellants, effectively held that F.S. § 627.727(6) (Supp. 1992) was a remedial/procedural statute and therefore could be and should be retroactively applied under the facts of the instant cause. The action of the trial court is tantamount to a finding that F.S. § 627.727(6) (Supp. 1992) is constitutional in its entirety.

The insurance contract, at page 13, paragraph (2), states as follows:

> **"(2) THE INSURED SHALL NOT ENTER INTO ANY SETTLEMENT WITH ANY PERSON OR ORGANIZATION LEGALLY LIABLE FOR THE INSURED'S BODILY INJURY WITHOUT PRIOR WRITTEN CONSENT IF THE SETTLEMENT AGREEMENT PRECLUDES OUR RIGHT OF RECOVERY AGAINST SUCH PERSON OR ORGANIZATION."** (O.R. 55)

The accident alleged in the Complaint occurred on June 15, 1990 and the insurance policy, which was in full force and effect on said date, had previously been renewed on December 31, 1989, continuing coverage

through June 30, 1990 and renewed again March 26, 1990, continuing coverage through September 26, 1990. (O.R. 20-21)

Appellants, without question, entered into a settlement agreement and signed a release, releasing the third-party tortfeasor of any and all liability on April 2, 1993 in exchange for the sum of $100,000.00. (O.R. 89)

On the effective date of the policy at issue herein, § 627.727(6) (Fla. Stat. 1989) controlled the respective rights and obligations of the parties herein. Under the 1989 version of the statute, State Farm had thirty days from the receipt of notice of the agreement to settle, to waive its subrogation rights, authorize a full release, and agree to arbitrate the UM claim. Failure of State Farm to authorize settlement entitled the insureds to bring a lawsuit against the uninsured motorist and State Farm in order to resolve their respective liabilities for any damages to be awarded the insureds. The statute additionally provided that the award would be binding and conclusive as to the insureds' and State Farm's liability for damages up to its coverage limits. The statute further, however, required that the liability insurer's coverage must first be exhausted before any award could be entered against State Farm.

Florida Statute § 627.727(6)(a)(b)(c) (Supp. 1992) now states as

follows:

6)(a) If an injured person or, in the case of death, the personal representative agrees to settle a claim with a liability insurer and its insured, and such settlement would not fully satisfy the claim for personal injuries or wrongful death so as to create an underinsured motorist claim, then written notice of the proposed settlement must be submitted by certified or registered mail to all underinsured motorist insurers that provide coverage. The underinsured motorist insurer then has a period of 30 days after receipt thereof to consider authorization of the settlement or retention of subrogation rights. If an underinsured motorist insurer authorizes settlement or fails to respond as required by paragraph (b) to the settlement request within the 30-day period the injured party may proceed to execute a full release in favor of the underinsured motorist's liability insurer and its insured and finalize the proposed settlement without prejudice to any underinsured motorist claim.

(6)(b) If an underinsured motorist insurer chooses to preserve its subrogation rights by refusing permission to settle, the underinsured motorist insurer must, within 30 days after receipt of the notice of the proposed settlement, pay to the injured party the amount of the written offer from the underinsured motorist's liability insurer. Thereafter, upon final resolution of the underinsured motorist claim, the underinsured motorist insurer is entitled to seek subrogation against the underinsured motorist and the liability insurer for the amounts paid to the injured party.

(6)(c) The underinsured motorist insurer is

> **entitled to a credit against total damages in the amount of the limits of the underinsured motorist's liability policy in all cases to which this subsection applies, even if the settlement with the underinsured motorist under paragraph (a) or the payment by the underinsured motorist insurer under paragraph (b) is for less than the underinsured motorist's full liability policy limits. The term "total damages" as used in this section means the full amount of damages determined to have been sustained by the injured party, regardless of the amount of underinsured motorist coverage. Nothing in this subsection, including any payment or credit under this subsection, reduces or affects the total amount of underinsured motorist coverage available to the injured party.**

The legislature has therefore by legislative fiat divested State Farm of its contractual right to insist that the insureds protect State Farm's rights to subrogation even in the advance of payment. State Farm's rights of subrogation are both contractual and equitable in origin and predated the legislature's enactment of F.S. § 627.727(6)(a)(b)(c) (Supp. 1992) and cannot therefore be retroactively taken away under the circumstances of the case *sub judice.*

Virtually no degree of contract impairment has been tolerated in this state. Yamaha Parts Distributors Inc. v. Ehrman, 316 So.2d 557 (Fla. 1975). Our Supreme Court in Yamaha, *supra,* stated as follows:

> **"Legislation is presumed to operate**

> **prospectively unless there exists a showing on face of law that retroactive application is intended."**

This Honorable Court in the case of Pomponio, et al. v. Claridge of Pompano Condominium, Inc., 378 So.2d 774 (Fla. 1979) stated as follows:

> **"As applied retroactively, absent a lessor's express consent to its incorporation into terms of lease, statute providing for deposit of rent into registry of court during litigation involving obligations under a condominium lease, was invalid as an unconstitutional impairment of obligation of contract, inasmuch as such statute potentially allowed retention in court of at least some portion of deposit of rent during entire term of litigation."**

The case *sub judice*. is not unlike the Pomponio case in that the insurance carrier is required to advance monies that it may not owe in order to retain a contract right it already had. State Farm, in the instant cause, if it chose to retain its subrogation rights, would be required to advance monies equivalent to the tortfeasor's offer whether or not those monies would ever be owed and would have to await determination at the trial on the liability and damages issues to try to get those monies back.

As pointed out by the Second District Court of Appeal in the instant cause, if State Farm chose to retain its subrogation rights it would be required to pay $100,000.00 before the insured had ever established

entitlement based upon liability and proof of their damages. State Farm would suffer the loss of the time value of the monies paid even if it recovered all of the monies paid to the insured at the conclusion of the litigation. Appellants argue that the trial court's ruling was correct because State Farm never responded to their requests for settlement within the thirty-day statutory time period. Appellants overlook the fact that it would have made no difference in the result if State Farm had responded within thirty days unless it either paid the monies offered by the tortfeasor or waived its subrogation rights. Neither of the choices offered by the Appellants or the statute offers State Farm any viable method through which it can be restored to the benefit of its bargain previously made. The requirement that the insureds must request permission to settle with the liability insurer is an illusory benefit to State Farm, in that "heads--it loses," "tails--it loses." State Farm either loses the right of subrogation or invites the opportunity to lose the funds that it advances in matching the tortfeasor's offer of settlement.

While it is true all retroactive provisions of legislative acts are not necessarily invalid, in order to withstand constitutional analysis such statutes must be truly remedial and not substantive. Village of El Portal v.

City of Miami Shores, 362 So.2d 275 (Fla. 1978).

This Honorable Court in the case of Village of El Portal, *supra*, citing from its opinion in McCord v. Smith, 43 So.2d 704 (Fla. 1950) stated as follows:

> **". . . that retrospective statutes are only constitutionally defective:**
> **. . . in those cases wherein vested rights are adversely affected or destroyed or when a new obligation or duty is created or imposed, or an additional disability is established, in connection with transactions or considerations previously had or expiated."**

The Supreme Court of Florida in the case of Seddon v. Harpster, 403 So.2d 409 (Fla. 1981) stated as follows:

> **"There is a presumption against retroactive application of a statute in absence of an express manifestation of legislative intent to the contrary."**

State Farm respectfully submits that F.S. § 627.727(6) (Supp. 1992) substantially alters the purpose of uninsured motorist coverage under the 1989 statutes and abrogates State Farm's vested right to have its liability under its contract determined before it is required to make payment, either in whole or in part.

The case *sub judice* is strikingly similar to the case of Allstate Insurance Company v. Garrett, 550 So.2d 22 (Fla. 2d DCA 1989) wherein

the court stated as follows:

> **"Statute providing that physical injury protection insurance benefits could not be withdrawn without report from physician licensed under same section of statute as physician providing treatment, unconstitutionally impaired obligation of contract embodied in insurance policy issued prior to effective date of statute."**

The Second District found in Allstate, *supra*, that any application of the amendment to § 627.736(7)(a) to Allstate's contract of insurance entered into before the amendment became effective constitutes a violation of Article I, § 10 of the Florida Constitution.

This Honorable Court in the case of Kluger v. White, 281 So.2d 1 (Fla. 1973) seemingly addressed a similar problem when it stated as follows:

> **"Where a right of access to courts for redress for a particular injury has been provided by statutory law predating the adoption of Declaration of Rights of Constitution of Florida, or where such right has become a part of the common law of state, legislature is without power to abolish such a right without providing a reasonable alternative to protect rights of people of state to redress for injuries, unless legislature can show an overpowering public necessity for abolishment of such rights, and no alternative method of meeting such public necessity can be shown."** (Emphasis added)

Assuming arguendo that Fla. Stat. § 627.727(6), as amended 1992, is constitutional when applied prospectively, such an argument cannot be made for retroactive application of the statute.

The court in the case of St. John's Village I, LTD. v. Department of State, Division of Corporations, 497 So.2d 990, (Fla. 5th DCA 1986), stated as follows:

> **"A 'remedial statute' is one which confers or changes a 'remedy'; a 'remedy' is the means employed in enforcing a right or in redressing an injury.'**
>
> **'Statute, requiring that limited partnership, prior to reinstatement, pay fine of $500 for each year or part of year during which limited partnership transacted business without authority, created new obligations and imposed new penalties, was not remedial in nature, and was substantive in nature, not procedural, and, thus, could only be applied prospectively, in absence of explicit legislative expression to the contrary."**

This Honorable Court more recently in the case of State Farm Mutual Automobile Insurance Co. v. Laforet, 20 F.L.W. S173 (Fla. 1995), in addressing the legislature's enactment of § 627.727(10) (Supp. 1992), stated as follows:

> **"The general rule is that a substantive statute will not operate retrospectively absent clear legislative intent to the contrary but that a procedural or remedial statute is to operate retrospectively.'**

'Even when the Legislature does expressly state that a statute is to have retroactive application, this Court has refused to apply a statute retroactively if the statute impairs vested rights, creates new obligations, or imposes new penalties.'

'When we apply these standards to the instant case, we find that section 627.727(10) cannot be applied retroactively because it is, in substance, a penalty. Without question, the Legislature has expressively stated that section 627.727(10) is remedial and is to be applied retroactively.'

'Just because the Legislature labels something as being remedial, however, does not make it so."

DUE PROCESS/ACCESS TO THE COURTS

State Farm, under the 1989 version of F.S. § 627.727(6), had a vested right, both by virtue of the statute and its contract of insurance with the insured, to have its liability to pay damages conclusively resolved by a lawsuit. It had an absolute right not to be required to pay out monies it may not owe based upon private negotiations between the insured and the third-party tortfeasor, who are now allowed to decide what will be paid in advance, notwithstanding whether there is legal liability and no prior determination as to the amount of the damages. State Farm has been deprived of its rights as they existed by contract and by statute prior to the enactment of F.S. § 627.727(6) (Supp. 1992). The ability of the insureds and the third-party liability insurance carrier to determine the immediate liability of State Farm for an award of damages, including non-economic damages, without an opportunity for State Farm to assert its legal defenses, is a clear violation of State Farm's due process rights under the Fourteenth Amendment of the United States Constitution and Article I, § 9 of the Florida Constitution. State Farm's right of access to the courts as protected by Article I, § 21 of the Florida Constitution is likewise violated by the requirement of the payment of a sum of money as a condition precedent to an exercise of its constitutional right of access to the courts.

This Honorable Court in the case of Peoples Bank of Indian River County v. State, Dept. of Banking and Finance, 395 So.2d 521 (Fla. 1981) stated as follows:

> **"Legislature may determine by what process and procedure legal rights may be asserted and determine provided that procedure adopted affords reasonable notice and fair opportunity to be heard**

before rights are decided."

State Farm respectfully submits that the legislature in its amendment to F.S. § 627.727(6) (Supp. 1992) did not provide State Farm with a fair opportunity to be heard before rights were decided. State Farm's contractual rights predating the statute as supplemented were taken away and supplanted by a requirement that it pay money which it may never get back in order to preserve a long recognized right of subrogation. The opportunity to attempt to recover its payment through a subrogation action at some unspecified time after final resolution of the insured's UM claim does not ameliorate the due process violations since, as stated in Fuentes v. Shevin, 407 U.S. 67, 84-85, 92 S. Ct. 1983, 1996, 32 Lawyer's Edition 2d 556 (1972) "[i]t is now well settled that a temporary, non-final deprivation is nonetheless a deprivation in terms of the Fourteenth Amendment."

This Honorable Court in the case of Psychiatric Associates v. Siegel, 610 So.2d 419 (Fla. 1992) stated as follows:

> **"Right to go to court to resolve disputes is fundamental.'**
>
> **'Legislature may abrogate or restrict access to courts if it provides reasonable alternative remedy or commensurate benefit or showing of overpowering public necessity for abolishment of right and finds that there is no alternative method of meeting public necessity."**

The legislature in the case *sub judice* has not demonstrated any overpowering public necessity for imposing such a financial restriction with a concomitant showing that no alternative method of addressing

such public necessity exists.

The Academy likens State Farm's subrogation right in the instant cause to the inchoate right of dower and cites the case of Ryan v. Ryan, 277 So.2d 266 (Fla. 1973), which case is wide of the mark in that this Honorable Court points out that an inchoate right of dower is statutory and not a matter of contract as is present in the instant cause. The Academy assails the decision of the Second District Court of Appeal in part upon the basis that the right of the insurer, i.e., State Farm, to subrogation is nothing more than a mere expectancy which has not yet vested. The Academy further argues that the mere expectancy which has not yet vested is not a property right subject to constitutional protection. This argument by the Academy is interesting in that they rely in part upon the case of Allstate Insurance Co. v. Metropolitan Dade, 436 So. 2d 976 (Fla. 3d DCA 1983) which in part states as follows:

> **". . . subrogation contracts frequently grant the subrogee the means of insuring that the subrogor will protect the subrogee's rights, even in advance of payment. Not surprisingly, therefore, courts have traditionally held that in contractual subrogation actions, the statute of limitations runs from the date of the injury to the original 'rightsholder' and not from the date of payment by the subrogee. These traditional rules are stated in Don Reid Ford, Inc. v. Feldman, 421 So.2d 184 (Fla. 5th DCA 1982)."**

While the Appellants and the Academy argue there is no vested right of subrogation in State Farm, yet if a lawsuit were not filed by or on behalf of State Farm within four years from the date of the accident in question, the statute of limitations would have run out and State Farm would have

had no claim whatsoever. Under the argument advanced by the Appellants and the Academy, State Farm has no rights which are ripe for constitutional protection notwithstanding the fact those rights are lost by the expiration of the statute of limitations which starts running from the date of the accident.

The Second District Court of Appeal in the case of Attorney's Title Insurance Fund, Inc. v. Punta Gorda Isles, Inc., 547 So.2d 1250 (Fla. 2d DCA 1989) stated as follows:

> **"Subrogation claims are appropriate controversies for expedited presentation which can be pursued as contingent claims prior to payment. West's F.S.A. RCP Rule 1.180."**

The Second District Court obviously recognized the fact that the statute of limitations does indeed expire in the state of Florida four years from the date of the accident and therefore expedited presentation is indeed appropriate lest the right be lost.

Appellants and the Academy advance the argument that since the constitutional issues of due process and access to the courts were not argued in the trial court, that Appellee cannot be heard to raise these constitutional claims at this juncture. This Honorable Court in the case of Canter v. Davis, 489 So.2d 18 (Fla. 1986) stated as follows:

> **"Although prudence dictates that issues such as constitutionality of a statute's application to specific facts should normally be considered at trial level to assure that such issues are not later deemed waived, once the Supreme Court has jurisdiction, it may, at its discretion, consider any issue affecting case."**

The Second District Court of Appeal appropriately pointed out that it could be argued that their determination that the 1992 statute cannot be retroactively applied to the Hassens' claim moots any further consideration of State Farm's additional argument that a prospective application of the statute cannot stand constitutional scrutiny. The court, however, pointed out that the law is clear--that mootness does not destroy an appellate court's jurisdiction when the question raised is of substantial public interest and is likely to recur, especially when due process rights are at stake. Times Publishing Co. v. Burke, 375 So.2d 297 (Fla. 2d DCA 1979). This Honorable Court likewise in the case of Holly v. Auld, 450 So.2d 217 (Fla. 1984) stated as follows:

> **"Mootness does not destroy an appellate court's jurisdiction when questions raised are of great public importance or are likely to recur."**

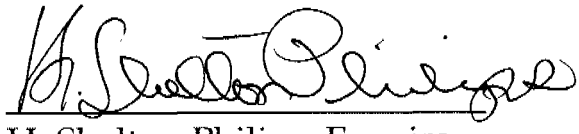
The Second District Court of Appeal is to be commended for not abdicating its opportunity to address a matter of great public importance and particularly important to the bench and bar. The questions certified herein will and must be addressed by this Honorable Court at some juncture and sooner is better than later.

CONCLUSION

The premises considered, the decision of the Second District Court of Appeal should be affirmed and the cause remanded to the trial court for the entry of an order consistent therewith.

This Honorable Court should declare Florida Statute § 627.727(6) (Supp. 1992) unconstitutional in its entirety.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to **Diana L. Myers, Esquire and Mark H. Perenich, Esquire**, Perenich, Carroll, Perenich, Avril & Caulfield, P.A., 1875 North Belcher Road, Suite 201, Clearwater, FL 34625, Attorney for Appellants; **Roy D. Wasson, Esquire**, Suite 402 Courthouse Tower, 44 West Flagler Street, Miami, FL 33130 and **Barbara Green, Esquire**, 999 Ponce de Leon Boulevard, Suite 1000, Coral Gables, FL 33134, Attorneys for Amicus Curiae, Academy of Florida Trial Lawyers; and **George A. Vaka, Esquire**, Fowler, White, Gillen, Boggs, Villareal and Banker, P.A., 501 East Kennedy Boulevard, Post Office Box 1438, Tampa, FL 33601, Attorney for Amicus Curiae, Florida Farm Bureau Mutual Insurance Company, this 21st day of July, 1995.

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