IN THE SUPREME COURT OF FLORIDA

No. 85, 457

AMERICAN FINANCE ADJUSTERS, INC. and BOBBIE STEVENS,

Petitioners,

v.

AMERICAN BANKERS INSURANCE COMPANY OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON JURISDICTION

ON DISCRETIONARY REVIEW
FROM THE THIRD DISTRICT COURT OF APPEAL

Sheila W. Moylan
Fla. Bar No. 445150
Suite 300, Courthouse Tower
44 West Flagler Street
Miami, FL 33130
(305) 374-8919

Attorney for Respondent

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INTRODUCTION

Respondent acknowledges that there is a conflict between the long-standing authority on which the Third District relied in reaching its decision that the insurer had no duty to defend in the instant case, and a recent Fourth District Court of Appeal decision — which itself conflicts with prior Fourth District case law. However, because Petitioners' Statement of the Facts erroneously describes this conflict, Respondent here submits an accurate Statement of Facts.

STATEMENT OF FACTS

There were two issues before the Third District Court of Appeal in the instant case: first, whether there was *coverage* under an American Bankers' comprehensive general liability insurance policy for the injuries Bobbie Stevens incurred when she attempted to stop the repossession of her automobile and was struck by the repossessor's tow truck; and second, whether American Bankers had a *duty to defend* its insured, the repossessor, based on the allegations in Stevens' complaint. (A.1). The trial court had issued a declaratory judgment finding no coverage and no duty to defend. The Third District's affirmance of the no-coverage finding is not in conflict with any other Florida District Court's decision; it is only the finding of no duty to defend, which the Third District affirmed based on its existing authority of *Atkins v. Bellefonte Ins. Co.*, 342 So.2d 837 (Fla. 3d DCA 1977), that conflicts with the Fourth District's decision in *Smith v. General Accident Ins. Co.*, 641 So.2d 123 (Fla. 4th DCA 1994).

Petitioners erroneously state that the Third District Court of Appeal has stated that an insurance carrier's duty to defend is equal to its duty to pay. That statement cannot be found anywhere in the Third District's opinion, nor is it implicit in the holding. Rather, the Third

District relied on *Atkins*, which held that a general liability carrier had no duty to defend where its policy excluded coverage for auto-related injuries and the plaintiff's complaint alleged she was injured by a negligently driven automobile, even if the complaint also alleged that the insured employer of the automobile driver negligently hired or supervised that driver.

SUMMARY OF ARGUMENT

The Third District's opinion holds that a general liability carrier whose policy has an exclusion for auto-related injuries has no duty to defend where the complaint against the insured alleges facts showing that the plaintiff was injured by an automobile, even if the plaintiff's pleads a legal theory of negligent hiring or supervision of the automobile driver by the insured. This opinion conflicts with the Fourth District's contrary conclusion in *Smith v. General Accident Ins. Co.*, 641 So.2d 123 (Fla. 4th DCA 1994).

ARGUMENT

EXPRESS AND DIRECT CONFLICT EXISTS WITH A DECISION OF THE FOURTH DISTRICT COURT OF APPEAL

In the instant case, as in *Atkins* and *Smith, supra,* the complaints against the insured alleged injury to the plaintiff inflicted by an automobile operated by the insured's employee, and also alleged negligent hiring or supervision of the employee by the insured. (A. 2). In all three cases, the issue was whether an insurer should be compelled to defend based on the legal theory asserted against the insured — negligent hiring or supervision — where the allegations show that it was an *automobile* that actually injured the plaintiff, and automobile-related injuries are excluded from coverage. In *Atkins* and the instant case, the Third District held the carrier did not have a duty to defend; while in *Smith* the Fourth District —

held the carrier did not have a duty to defend; while in *Smith* the Fourth District — acknowledging conflict with *Atkins* — found there was a duty to defend.

The reasoning in *Atkins* was that the plaintiff's damages resulted from and could not have occurred without the use of an automobile and, regardless of the legal theory asserted — negligent hiring or supervision — these negligent acts, by themselves, would not form the basis for a cause of action by the plaintiff, who would have suffered no damage but for the negligence of the automobile driver. Thus, each of these additional causes of action is *completely dependent upon* the occurrence of an automobile accident — an occurrence that is excluded from coverage.

The Fourth District's holding in the *Smith* case was based on its decision in *Klaesen Bros., Inc. v. Harbor Ins. Co.*, 410 So.2d 611 (Fla. 4th DCA 1982), which found a duty to defend based on negligent hiring allegations; however, *Klaesen* did not involve an automobile injury or a policy exclusion. Further, the *Smith* decision appears to conflict with the Fourth District's decision in *Dalrymple v. Ihnen Pool Service & Supply, Inc.*, 498 So.2d 646 (Fla. 4th DCA 1986), which did involve an automobile injury exclusion, and which rejected the argument that negligent hiring and retention was a concurring cause of the plaintiff's injury that was not excluded from coverage. *Dalrymple* cited *Cesarini v. American Druggist Insurance Co.*, 463 So. 2d 451 (Fla. 2d DCA 1985), where the Second District held that the negligent hiring and supervision of a school bus driver was *not* an independent act of negligence that caused the accident, and therefore the auto exclusion precluded coverage under a general liability policy. The *Dalrymple* court stated that *Cesarini* "was correctly decided and. . .is consistent with other decisions expressing the law in this State."

CONCLUSION

Respondent acknowledges that the Third District's decision with respect to the duty to defend in the instant case, which followed the Third District's decision in *Atkins*, together with the Second District's decision in *Cesarini,* and the Fourth District's decision in *Dalrymple*, expressly and directly conflict with the Fourth District's decision in *Smith,* and this Court therefore has jurisdiction to resolve the conflict.

Respectfully submitted,

Sheila W. Moylan
Fla. Bar No. 445150
Attorney for Respondent
Suite 300, Courthouse Tower
44 West Flagler Street
Miami, FL 33130
(305) 374-8919

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed on May 5, 1995 to: Arnold Ginsberg, P.A., Attorney for Petitioner Bobbie Stevens, Suite 410 Concord Building, 66 West Flagler Street, Miami, FL 33130, and Jerry B. Schreiber, C. A., Attorney for Petitioner American Finance Adjusters, Inc., 19 West Flagler Street, Suite 207, Miami, Florida 33130.