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IN THE SUPREME COURT OF FLORIDA

CASE NO. 85,457

DCA Case Nos. 94-746 and 94-1547

Fla. Bar No. 137172

BOBBIE STEVENS and AMERICAN FINANCE ADJUSTERS, INC.,

Petitioners,

vs.

AMERICAN BANKERS INSURANCE COMPANY OF FLORIDA,

Respondent.
_____/

PETITIONERS' BRIEF AND ACCOMPANYING APPENDIX ON THE MERITS

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LIST OF CITATIONS AND AUTHORITIES

I.

INTRODUCTION

A.

THE UNDERLYING LAWSUIT

Petitioner, American Finance Adjusters, Inc., a state licensed (automobile) "repossessor" insured pursuant to state statute under a comprehensive general liability policy issued to it by respondent, American Bankers Insurance Company of Florida, was sued for money damages by (its now co-petitioner), Bobbie Stevens, after an American Finance employee negligently injured Stevens during an attempted repossession of Stevens' vehicle. After proper notice to it by American Finance, and after initially providing a defense, respondent withdrew its defense and denied coverage. Stevens obtained a money judgment against American Finance.

B.

THE SUBJECT LAWSUIT AND THE INSTANT PROCEEDINGS

Post judgment in the underlying lawsuit, both Stevens and American Finance instituted separate actions against respondent. Coverage and tangential damages were sought. The actions were ultimately consolidated and litigation led to judgments for the respondent. Those judgments were appealed to the Third District Court of Appeal. Upon opinion of the Third District Court of Appeal this proceeding was instituted.

The petitioners, Bobbie Stevens and American Finance Adjusters, Inc., a Florida corporation, were the appellants in the Third District and were the plaintiffs in the trial court. The respondent, American Bankers Insurance Company of Florida, was the appellee/defendant. In this brief of petitioners on the merits the parties will be referred to as the plaintiff(s) and the defendant and, where necessary for emphasis or clarification, by name. The symbols "R" and "A" will refer to the record on appeal and the appendix accompanying this brief, respectively. All emphasis has been supplied by counsel unless indicated to the contrary.

II.

STATEMENT OF THE CASE AND FACTS

The facts of this case, being neither complex nor lengthy, may be stated as follows:

A.

Stevens was injured on July 31, 1986, while attempting to prevent Edward Zapetis, an employee of American Finance, from repossessing her automobile (R. 90-96). Zapetis, a state licensed repossessor, was in fact repossessing the automobile on instructions from his (licensed) employer, American Finance Adjusters (R. 1264-1271, 1280).

As a result of Stevens' injury, a lawsuit was filed by Stevens against Zapetis and American Finance (R. 203-268, Exhibit B thereto).

American Finance notified American Bankers of the lawsuit and sought a defense. American Bankers provided an immediate defense under a reservation of rights while it investigated the claim. American Bankers ultimately denied coverage citing as its sole reason the "automobile exclusion" contained in the insurance policy issued (A. 3) and provided a defense for a set period of time until American Finance obtained new counsel.

New counsel was ultimately obtained by American Finance. The Stevens lawsuit continued against Zapetis and American Finance and culminated with a money judgment in favor of Stevens and against both Zapetis and American Finance (R. 158-191, Exhibits C and D thereto).

B.

Petitioners (then) separately sued respondent (R. 2-15; 380-392). Because their individual relationships to the insurer were different, their individual claims for damage differed slightly. However, the essence of each action sought "coverage" for the occurrence which injured Stevens.

The actions were consolidated. American Bankers defended the actions (R. 132-144; 401-404) by contending that coverage did not exist because the comprehensive general liability policy number GL-01000339 issued (by renewal certificates) to American Finance by American Bankers on May 20, 1986 (and which policy was admittedly in effect at the time of the incident), excluded coverage for bodily injury arising out of:

"...the ownership, maintenance, operation, use, loading or unloading of

* * *

(2) any...automobile...operated by any person in the course of his employment by any insured..." (R. 158-191, Exhibit A thereto.)

Simply stated, there would be coverage under this comprehensive general liability policy "but for" the exclusion (A. 3). See: defendant's cross-motion for summary judgment and response to plaintiff's motion for summary judgment (R. 203-268):

> "In sum, the clear and unambiguous language of the American Bankers general liability policy excludes coverage for exactly the kind of injury that Stevens alleged occurred here--bodily injury arising out of the operation of a land motor vehicle, here a pickup truck, which is within the policy definition of 'automobile.' Accordingly, American Bankers is entitled to summary judgment on its declaratory judgment counterclaim holding that, as a matter of law, there is no coverage under the American Bankers policy sued upon." (R. 209)

The trial court granted the defendant's (cross) motion for summary judgment, denied the plaintiffs' motions and ultimately entered judgment for the defendant against the plaintiffs on both the issues of coverage and "duty to defend" (R. 431, 432, 1648, 1649).

C.

The plaintiffs appealed (R. 1645-1647) and in an opinion now reported, see: STEVENS AND AMERICAN FINANCE ADJUSTERS, etc. v. AMERICAN BANKERS INSURANCE COMPANY OF FLORIDA, 651 So. 2d 1219 (Fla. App. 3d 1995), the Third District affirmed:

* * *

"In these consolidated appeals Bobbie Stevens and American Finance Adjusters, Inc., appeal declaratory judgments finding no coverage under a comprehensive general liability policy issued by appellee American Bankers Insurance Company in Florida. We affirm.

"As to the first issue, the Florida Department of State, as the responsible regulatory agency, has determined that the subject insurance policy conforms to the statutory requirements in effect at the time of the accident. See Section 493.31, Fla. Stat. (1985). We see no basis on which to disturb that determination.

* * *

"As to the duty to defend, the judgment is affirmed on authority of Atkins v. Bellefonte Ins. Co., 342 So. 2d 837 (Fla. 3d DCA 1977). But see Smith v. General Accident Ins. Co., 641 So. 2d 123, 126 (Fla. 4th DCA 1994) (expressly disagreeing with Atkins). In view of the ruling on coverage and duty to defend, the trial court correctly dismissed Stevens' remaining claims.

"Affirmed." 651 So. 2d at pages 1219, 1220.

* * *

This proceeding followed.

III.

QUESTIONS PRESENTED

A.

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN GRANTING THE DEFENDANT'S MOTION FOR SUMMARY FINAL (DECLARATORY) JUDGMENT AND IN DETERMINING THE EXISTENCE OF "NO COVERAGE."

B.

ASSUMING THE CORRECTNESS OF THE TRIAL COURT'S RULING ON THE ISSUE OF COVERAGE--DID THE THIRD DISTRICT ERR IN CONCLUDING AMERICAN BANKERS OWED NO DUTY TO DEFEND AMERICAN FINANCE IN THE UNDERLYING LITIGATION.

IV.

SUMMARY OF ARGUMENT

A.

"COVERAGE EXISTS"

When American Finance was sued by Bobbie Stevens, American Bankers denied coverage to American Finance based upon an exclusion in its comprehensive general liability policy (issued to its insured, an automobile "repossessor") which exclusion excluded coverage for bodily injury arising out of the ownership, maintenance, operation, use, loading or unloading of any automobile operated by any person in the course of his employment by any insured. The plaintiffs would suggest to this Court such exclusion was/is contrary to Florida public policy and should be ignored. The plain language of Section 493.31, Florida Statutes (1985) does not allow for any exclusion for bodily injury caused by a licensed employee acting in the scope of his employment. The plain meaning of Section 493.31 is to provide comprehensive insurance coverage for bodily injury, personal injury or death. The statute gave no clear and unequivocal right to the defendant to limit or exclude coverage in any way. This is especially so where, as here, the insurance excludes "damage caused by automobile," the very essence of the "repossessor's" business.

The very purpose of the legislative enactment was to insure that persons injured during the course and scope of a

"repossession" would be protected. To license "repossessors" for a statutorily defined purpose as persons or entities "recovering automobiles," to require as a condition precedent for a license "comprehensive general liability coverage," to require that the insurer certify at all pertinent times the existence of the coverage for bodily injury, personal injury and death, to require that said coverage "shall" insure for the liability of all agency employees licensed and then to allow the insurer to include in the policy an exclusion removing from coverage the very object of the statute is inherently improper.

The fact that the subject "policy" has all its component parts in place and the fact that the Florida Department of State may have given its approval to the form of the policy allowed the Third District to beg the dispositive issue. The issue of "coverage" is a question of law for the court. For the Third District to "duck" the issue by yielding to a regulatory agency that has no authority to construe the policy and which certainly has no right to interpret the policy to ascertain whether or not Florida public policy is being violated is simply wrong. It is totally and completely mystifying how the subject defendant can be allowed to knowingly insure a company that repossesses automobiles and other items of personal property, collect premiums for this coverage, file certificates with the State of Florida demonstrating compliance with the law governing insurance coverage for the public's protection and then deny

coverage and refuse to defend its insured in court when a claim is made. A policy purporting to provide the required statutory coverage but containing exclusions not contemplated by the statute does not provide the required coverage. Because the subject exclusion runs afoul of the statutory scheme and is clearly against public policy, it must be ignored. As the defendant noted below "but for" the exclusion, there is coverage for the subject occurrence!

The opinion of the Third District should be quashed, the summary final judgment appealed should be reversed and the cause remanded to the trial court for further proceedings.

B.

ASSUMING "NO COVERAGE"--THE TRIAL COURT AND THE THIRD DISTRICT ERRED IN CONCLUDING AMERICAN BANKERS OWED NO DUTY TO DEFEND AMERICAN FINANCE IN THE UNDERLYING LITIGATION.

The plaintiffs would suggest to this Court that if this Court agrees with the plaintiffs that the automobile exclusion is invalid, then, of course, this point becomes moot. However, should this Court disagree with the plaintiffs as to the correctness, vel non, of the argument contained in "A," supra, then the plaintiffs would further argue that the Third District erred in concluding American Bankers owed no duty to defend American Finance in the underlying litigation. For the reasons which follow, the opinion of the Third District should be quashed and the cause remanded to the trial court.

Count II of the Stevens complaint alleges that American Finance Adjusters negligently hired and supervised its employee, Zapetis, and, as a result of this, Bobbie Stevens was injured. This allegation compelled the insurer to defend its insured.

First, and foremost, the relationship between the insurer and its insured is contractual in nature and contract law governs. Consistent therewith any doubt about the duty to defend must be resolved in favor of American Finance, the insured.

Second, an insurance company's duty to defend is separate and distinct from its duty to pay and is more extensive! As such, its duty to defend is determined solely by the allegations in the complaint against the insured and not by the insured's version of the facts.

The Third District's opinion in this case ignores each of the above well settled principles. Nothing in the opinion herein sought to be reviewed will lead one to believe that the Third District ever marginally attempted to comply with the precedent of this Court or with the opinions which correctly track Florida law as announced by its sister District Courts.

It is too well settled to need detailed citation of authority that the allegations of the complaint govern the duty of the insured to defend. The duty to defend is distinct from, and is more broad than, the duty to indemnify. If a complaint alleges facts showing two or more grounds for liability, one being within the insurance coverage and the other not, the

insurer is obligated to defend the entire suit. Under Florida law the duty to defend continues even though it may be determined eventually that the alleged cause of action stated is groundless and no liability is found within the policy provisions. Once the duty to defend is assumed, then all claims to the complaint, even those which fall outside the policy's coverage, must be defended.

In her initial pleading Stevens alleged that as a result of American Finance's failure to adequate supervise and/or hire a reasonably prudent driver, she was seriously injured when she attempted to determine why her car was being towed away. The policy provided in the instant cause required the company to defend even if any of the allegations of the suit are groundless, false or fraudulent. The gist of negligent hiring and supervision is that the defendant acted unreasonably in letting another party, to whom he had a duty to control, commit a wrong against the plaintiff.

The Stevens complaint triggered an obligation on the part of the defendant "to defend." Given that Florida law mandates that the allegations of the complaint govern the duty of the insured to defend, it must be concluded that the Third District's reliance upon its prior precedent was misplaced. There existed no authority on the part of the trial court or the District Court to go outside of the Stevens complaint to determine "an evidentiary basis" for coverage. Because they did,

the opinion of the Third District herein sought to be reviewed should be quashed, the summary final judgment entered in favor of American Bankers and against American Finance should be reversed and the cause remanded to the trial court for the entry of judgment in favor of American Finance on the issue of duty to defend.

V.

ARGUMENT

A.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN GRANTING THE DEFENDANT'S MOTION FOR SUMMARY FINAL (DECLARATORY) JUDGMENT AND IN DETERMINING THE EXISTENCE OF "NO COVERAGE."

The plaintiffs would respectfully suggest to this Court that the trial court erred in finding "no coverage" under the facts and circumstances of this case. For the reasons which follow, the opinion of the Third District affirming the trial court should be quashed and the summary final judgment appealed should be reversed.

In 1986, when Bobbie Stevens was injured, Section 493.31, Florida Statutes (1985), provided:

* * *

"493.31 Licensee's insurance.--No agency license shall be issued unless the applicant first files with the department a certificate of insurance evidencing comprehensive general liability coverage for death, bodily injury, and personal injury. The certificate shall provide the state as an additional insured for purposes of all notices of modification or cancellation of such insurance. Coverage shall also include false arrest, detention or imprisonment,

> malicious prosecution, libel, slander, defamation of character, and violation of the right of privacy in the amount of $100,000 per person and $300,000 per occurrence and property damage in the amount of $100,000 per occurrence. The agency license shall be automatically suspended upon the date of cancellation unless evidence of insurance is provided prior to the effective date of cancellation. Coverage shall insure for the liability of all agency employees licensed by the department. The agency shall notify the department of any claim against such insurance arising from any claim of false arrest, detention or imprisonment, malicious prosecution, libel, slander, defamation of character, or violation of the right of privacy."
>
> * * *

Under the statutory scheme, in order for one to lawfully operate as a "repossessor" of automobiles, see: Section 493.30(6), Florida Statutes (1985), one must be insured under a comprehensive general liability policy which, according to statute, insures for:

> "...death, bodily injury and personal injury...Coverage shall also include false arrest, detention or imprisonment, malicious prosecution, libel, slander, defamation of character and violation of the right of privacy..."

At all times pertinent American Finance was so insured (R. 158-191, Exhibit A thereto).

In this case, when American Finance was sued by Bobbie Stevens, the defendant denied coverage to American Finance based upon an exclusion in its comprehensive general liability policy (issued to its insured, an automobile "repossessor") which exclusion excluded coverage (for):

* * *

"...bodily injury or property damage arising out of the ownership, maintenance, operation, use, loading or unloading of

* * *

(2) any...automobile...operated by any person in the course of his employment by any insured." (R. 158-191, Exhibit A thereto.)

The plaintiffs would suggest to this Court such exclusion was/is contrary to public policy and should be ignored. The plain language of Section 493.31, Florida Statutes (1985), does not allow for any exclusion for bodily injury caused by a licensed employee acting in the scope of his employment. The plain meaning of the statute is to provide comprehensive insurance coverage for bodily injury, personal injury or death. The statute gave no clear and unequivocal right to the defendant to limit or exclude coverage in any way. This is especially so where, as here, the insurance excludes "damage caused by automobile," the very essence of the "repossessor's" business. To give efficacy to the exclusion would violate Florida public policy. In REEVES v. MILLER, 418 So. 2d 1050 (Fla. App. 5th 1982), the court stated the accepted Florida rules:

"Insurance provided to comply with a statutory requirement must comply with the statute. A policy purporting to provide the required statutory coverage but containing exclusions not contemplated by the statute does not provide the required coverage. Since the unauthorized exclusions are contrary to public policy as established by the statute, they are deemed inapplicable and disregarded and the policy is enforced as if it were in express compliance with the statutory requirements. (Citations omitted.)" 418 So. 2d at page 1051.

Such is the instant cause.

In REEVES v. MILLER, supra, the court noted that a policy purporting to provide the required statutory coverage but containing exclusions not contemplated by the statute does not provide the required coverage. Given Florida law on the subject matter, one must turn not to the insurer's purported justifications for the exclusions but, rather, to the statute to determine whether or not the exclusions provided by the policy were "contemplated by the statute."

In order for a person (or entity) to lawfully engage in the business of repossessing automobiles, he must be licensed. In order to be licensed, he must be insured under a policy which provides "comprehensive general liability coverage." See: Section 493.31, Florida Statutes (1985). There exists no discretion. It is mandatory. American Bankers, the insurer, knew at all times of American Finance's statutory need. More importantly perhaps is the fact that American Bankers knew of the statute's requirements. See, for example, Exhibit A to the plaintiff's memorandum of law in support of her motion for summary judgment, R. 158-191, the statutorily required "CERTIFICATE OF INSURANCE" for the period May 20, 1986, through May 20, 1987, wherein American Bankers Insurance Company of Florida complied with the requirements of the statute and noted that the insurance requirements under Chapter 493, Florida Statutes, provided coverage for:

> "Death, bodily injury, and personal injury, false arrest, detention or imprisonment, malicious prosecution, libel, slander, defamation of character, and violation of privacy in the amount of $100,000 per person and $300,000 per occurrence and property damage in the amount of $100,000 per occurrence."

The issue date was May 12, 1986, and the "CERTIFICATE OF INSURANCE" does not lead one to believe, intimate or consider in any way that there were any exclusions that would remove from coverage bodily injury caused by the negligence of a licensed repossessor using an automobile.

In this vein these plaintiffs would emphasize to this Court that they did not invent the notion that automobile "repossessors" repossess automobiles. This is recognized and indeed governed by legislative enactment. Automobile repossessors by definition recover motor vehicles. See: Section 493.30(6), Florida Statutes (1985):

> "'Repossessor' means any person who, for compensation, recovers motor vehicles...as a result of default in payment for such motor vehicle."

An object of the statute is automobile repossessors. By definition, therefore, repossessors must maintain, use, operate, load or unload automobiles to recover them. Any exclusion that effectively vitiates coverage under a comprehensive general liability policy mandated by the state as a condition precedent to being licensed in order to conduct one's business must be deemed to be against public policy. Florida law has never allowed such a result.

In MULLIS v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, 252 So. 2d 229 (Fla. 1971), this Court had occasion to discuss Florida law on the subject of policies of insurance being issued as a result of legislative enactments. In addressing the scope and extent of the uninsured motorist statute, this Court stated:

> "The public policy of the uninsured motorist statute...is to provide uniform and specific insurance benefits to members of the public to cover damages for bodily injury caused by the negligence of insolvent or uninsured motorists and such statutorily fixed and prescribed protection is not reducible by insurer's policy exclusions and exceptions any more than are the benefits provided for persons protected by automobile liability insurance secured in compliance with the financial responsibility law.
>
> "Insurers or carriers writing automobile liability insurance and reciprocal uninsured motorist insurance are not permitted by law to insert provisions in the policies they issue that exclude or reduce the liability coverage prescribed by law for the class of persons insured thereunder who are legally entitled to recover damages from owners or operators of motor vehicles because of bodily injury." 252 So. 2d at page 234.

In KENNEDY v. LUMBERMAN'S MUTUAL CASUALTY COMPANY, 264 So. 2d 32 (Fla. App. 3d 1972), the District Court reversed a (declaratory) judgment for an insurer upon appeal by the insured. In that case the evidence showed that the insurer knew the purpose of the insurance being sold and further knew of the insurance requirements. Still, the insurer included in the policy an exclusion that the term "insured automobile" as used therein would not include "an automobile while used as a public

or livery conveyance." The insured in that case was obtaining the insurance specifically for purposes of utilizing the vehicle as a "jitney" (taxicab). In reversing the final judgment appealed the District Court stated:

> "The clause of the policy which provides that an insured automobile cannot include one while used as a public or livery conveyance, as contained in the printed form dealing at length with 'insuring agreements' is a reasonable exclusionary provision to be applied to policies issued on vehicles which therein would be stated to be used for purposes other than 'as a public or livery conveyance.' But in a policy (with premium paid therefor) issued on a livery conveyance vehicle, with its intended use as such known to the insurer and stated in the application therefor, the exclusionary clause referred to cannot reasonably be construed to have the effect of vitiating the very coverage for which the policy expressly was intended and issued. That exclusionary clause is not operative where the stated purpose of the insurance is to insure livery conveyance, for use as such.
>
> "Moreover, if the presence of that exclusionary clause in the policy is regarded as creating an ambiguity (in view of the purpose for which the insurance was issued in this instance) that ambiguity should be resolved in favor of the insured in the circumstances disclosed, as well as for the applicable rule of construction." 264 So. 2d at page 34.

The above principles apply to the facts and circumstances of this case. It should not be successfully contended here that the exclusion contained in the commercial general liability policy which exclusion eliminates coverage for damages occasioned as a result of the use of an automobile is valid. The very purpose of the legislative enactment was to insure that persons injured during the course and scope of a "repossession" would be

protected. To license "repossessors" for a statutorily defined purpose as persons or entities "recovering automobiles," to require as a condition precedent for a license "comprehensive general liability coverage," to require that the insurer certify at all pertinent times the existence of the coverage for bodily injury, personal injury and death, to require that said coverage "shall" insure for the liability of all agency employees licensed and then to allow the insurer to include in the policy an exclusion removing from coverage the very object of the statute is inherently improper. True, there can be presented a laundry list of circumstances wherein a comprehensive general liability policy would otherwise provide coverage. Indeed, that is its very nature. However, where such policy is required by the Legislature and where the very business being licensed "centers on" the recovery of "automobiles," any exclusion in that policy which would vitiate coverage for one of the objects of the statute should be held for naught.

The Third District affirmed the trial court by stating:

> "...The Florida Department of State, as the responsible regulatory agency, has determined that the subject insurance policy conforms to the statutory requirements in effect at the time of the accident. See Section 493.31, Fla. Stat. (1985). We see no basis on which to disturb that determination." 651 So. 2d at page 1219.

With all due respect to the Third District, the fact that the "policy" has all its component parts in place and the fact that the Florida Department of State may have given its approval to

the form of the policy begs the dispositive issue. The issue of "coverage" is a question of law for the court. This basic principle is so well settled as to need no citation of authority. For the Third District to "duck" the issue by yielding to a regulatory agency that has no authority to construe the policy and which certainly has no right to interpret the policy to ascertain whether or not public policy is being violated is simply wrong. See, for example: MULLIS v. STATE FARM, supra, and REEVES v. MILLER, supra:

> "A policy purporting to provide the required statutory coverage but containing exclusions not contemplated by the statute does not provide the required coverage. Since the unauthorized exclusions are contrary to public policy as established by the statute, they are deemed inapplicable and disregarded and the policy is enforced as if it were in express compliance with the statutory requirements (citations omitted)." 418 So. 2d at pages 1050 and 1051.

In concluding their argument on this point the plaintiffs need to deal with the practical effects of the instant subject matter. It is totally and completely mystifying how the subject defendant can be allowed to knowingly insure a company that repossesses automobiles and other items of personal property, collect premiums for this coverage, file certificates with the State of Florida demonstrating compliance with the law governing insurance coverage for the public's protection and then deny coverage and refuse to defend its insured in court when a claim is made! In this case it now appears to be that premiums were being paid to the insurance company, not for required insurance

coverage which would protect an innocent party from the possibility of injury without a concomitant financial responsibility but merely to gain a state license. In this case the defendant has become an extension of the state licensing process. It provides insurance as a condition precedent to any application for a license, yet remains insulated from responsibility for any damages sustained by the public occasioned as a result of a repossessor's negligence in the repossessing of automobiles when an automobile is being utilized. This is as mystifying as it is absurd! A policy purporting to provide the required statutory coverage but containing exclusions <u>not contemplated by the statute</u> does not provide the required coverage. See: REEVES v. MILLER, supra. Because the exclusion herein involved runs afoul of the statutory scheme, cannot be deemed "contemplated by the statute" and is against public policy, it must be ignored. As the defendant noted below "but for" the exclusion, there is coverage for the subject occurrence. The opinion of the Third District should be quashed, the summary final judgment appealed should be reversed and the cause remanded to the trial court for further proceedings.

B.

ASSUMING THE CORRECTNESS OF THE TRIAL COURT'S RULING ON THE ISSUE OF COVERAGE--THE TRIAL COURT AND THE THIRD DISTRICT ERRED IN CONCLUDING AMERICAN BANKERS OWED NO DUTY TO DEFEND AMERICAN FINANCE IN THE UNDERLYING LITIGATION.

The plaintiffs would suggest to this Court that if this Court agrees with the plaintiffs that the automobile exclusion is invalid, then, of course, this point becomes moot. Given the existence of coverage, there would have been a concomitant duty on the part of the defendant to provide a defense for its insured. However, should this Court disagree with the plaintiffs as to the correctness, vel non, of the argument contained in "A," supra, then the plaintiffs would further argue that the Third District erred in concluding American Bankers owed no duty to defend American Finance in the underlying litigation. For the reasons which follow, the opinion of the Third District should be quashed and the cause remanded to the trial court.

When Stevens sued American Finance, the complaint was forwarded to defendant. As herein pertinent the complaint alleged:

* * *

"COUNT II--NEGLIGENCE OF AMERICAN FINANCE ADJUSTERS

* * *

"35. As a result of the defendant, Adjusters, failure to adequately supervise and/or hire a reasonably and prudent driver, the plaintiff, Bobbie Jean Stevens, was seriously injured when she attempted to determine why her car was being towed away." (See: R. 203-268, Exhibit B therein.)

* * *

Count II of the Stevens complaint alleges that American Finance Adjusters negligently hired and supervised its employee, Zapetis, and, as a result of this, Bobbie Stevens was injured. This allegation compelled the insurer to defend its insured.

In SMITH v. GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA, 641 So. 2d 123 (Fla. App. 4th 1994), Beverly Smith (plaintiff) was involved in a rear-end collision with a taxi and sued the taxi's owner, Captain's Cab, Inc. (Captain's), and the taxi driver (Hunnicutt). Count I of plaintiff's complaint was an automobile negligence claim against Captain's and Hunnicutt. Count II was a negligent hiring claim against Captain's. At the time of the accident, Captain's had a general business liability policy in effect with insurer, but did not have an automobile policy that covered the specific taxi involved. The general liability policy contained a car accident exclusion. Relying on that exclusion, the insurer refused to defend any of the claims against Captain's and Hunnicutt. Plaintiff filed a declaratory judgment action against insurer alleging that the general liability policy gave rise to a duty to defend Captain's. Because Count II of plaintiff's original complaint alleged negligent hiring, plaintiff asserted that the cause of action for negligent hiring fell under that specific language of the policy covering bodily injury caused by "an occurrence." In its answer the insurer asserted the car accident exclusion as an affirmative defense. The trial court granted the insurer's motion for summary judgment and denied the plaintiff's motion for summary judgment holding that the general liability insurance policy did not give rise to a duty to defend the

plaintiff's allegations of negligent operation of a motor vehicle or the negligent hiring claim.

On appeal to the Fourth District that court affirmed that portion of the summary judgment finding that the insurer had no duty to defend the automobile negligence claim. The Fourth District, however, reversed that portion of the trial court's order granting the insurer's motion for summary judgment and ruling that the allegations in the plaintiff's complaint did not give rise to a duty to defend the negligent hiring claim. The court directed the trial court to vacate the order denying plaintiff's motion for summary judgment and enter a summary judgment in favor of plaintiff on the issue of the insurer's duty to defend Captain's Cab on the negligent hiring claim!

In reaching the conclusion it did, the District Court recognized:

> "An insurance company's duty to defend is separate and more extensive than its duty to pay...The duty to defend is determined solely by the allegations in the complaint against the insured, not by the insured's defenses...If the allegations in the complaint state facts bringing the injury within the policy's coverage, the insurer must defend regardless of the merit of the lawsuit...Any doubt about the duty to defend must be resolved in favor of the insured (citations omitted)." 641 So. 2d at page 124.

After analyzing Florida case law on the subject the District Court stated:

> "...The alleged negligent hiring of that employee, who directly and negligently caused the injury to the plaintiff, gives rise to the insurer's

duty to defend under the general business liability policy." 641 So. 2d at page 126.

The Fourth District Court disagreed with the Third District's opinion in ATKINS v. BELLEFONTE INSURANCE CO., 342 So. 2d 837 (Fla. App. 3d 1977) and acknowledged conflict. The plaintiffs would suggest to this Court that SMITH is the more well reasoned decision and, for the reasons which follow, should be approved by this Court as the law in the State of Florida.

First, and foremost, the relationship between the insurer and its insured is contractual in nature and contract law governs. Consistent therewith any doubt about the duty to defend must be resolved in favor of American Finance, the insured. See: SMITH, supra, and MARR INVESTMENTS v. GRECO, 621 So. 2d 447 (Fla. App. 4th 1993).

Second, an insurance company's duty to defend is separate and distinct from its duty to pay and is more extensive! As such, its duty to defend is determined solely by the allegations in the complaint against the insured and not by (either) the insured's version of the facts (or, the Third District's)! See: KLAESEN BROTHERS, INC. v. HARBOR INSURANCE COMPANY, 410 So. 2d 611 (Fla. App. 4th 1982).

It cannot be over-emphasized that the Third District's opinion in ATKINS, supra, ignores each of the above well settled principles. As a consequence application by that court of the ATKINS rationale to the facts and circumstances of this case

creates two cases totally out of harmony with existing Florida law. Perforce, ATKINS must be disapproved and the opinion herein sought to be reviewed quashed. Nothing in the opinion herein sought to be reviewed will lead one to believe that the Third District ever marginally attempted to comply with the precedent of this Court or with the opinions which correctly track Florida law as announced by its sister District Courts. This, however, presents nothing particularly new as to this subject matter.

In NATIONAL UNION FIRE INSURANCE COMPANY v. LENOX LIQUORS, INC., 358 So. 2d 533 (Fla. 1978), this Court had occasion to review on conflict grounds, two decisions rendered by the Third District on the same subject matter. At the time the Florida Constitution allowed for such review. In harmonizing the conflict this Court squarely held:

> "The allegations of the complaint govern the duty of the insurer to defend." 358 So. 2d at page 536.

This was the law in the State of Florida then. This is the law in the State of Florida now. The opinion herein sought to be reviewed must be quashed. ATKINS v. BELLEFONTE INSURANCE CO., is out of harmony with well settled Florida authority on the subject matter. In ATKINS the court held that the duty to defend is independent of the duty to indemnify. However, the court determined the existence, vel non, of the duty to defend <u>after considering facts which the court decided were the producing cause of the plaintiff's injuries</u>. The court determined that

because the court's analysis of the facts of the accident did not fall within the coverage under the policy, there was no duty to defend. The court's holding and the court's analysis are simply wrong.

The duty to defend is distinct from, and is more broad than, the duty to indemnify. If the complaint filed alleges facts showing two or more grounds for liability, one being within the insurance coverage and the other not, the insurer is obligated to defend the entire suit. BARON OIL CO. v. NATIONWIDE MUTUAL FIRE INSURANCE CO., 470 So. 2d 810 (Fla. App. 1st 1985) and GRISSOM v. COMMERCIAL UNION INSURANCE CO., 610 So. 2d 1299 (Fla. App. 1st 1992). Under Florida law the duty to defend continues even though it may be determined eventually that the alleged cause of action stated is groundless and no liability is found within the policy provisions. Once the duty to defend is assumed, then all claims of the complaint, even those which fall outside the policy's coverage, must be defended. TIRE KINGDOM, INC. v. FIRST SOUTHERN INS. CO., 573 So. 2d 885 (Fla. App. 3d 1991).

In her initial pleading Stevens alleged that as a result of American Finance's failure to adequately supervise and/or hire a reasonably prudent driver, she was seriously injured when she attempted to determine why her car was being towed away (R. 203-268, Exhibit B thereto). The policy provided in the instant cause required the company to defend:

"...even if any of the allegations of the suit are groundless, false or fraudulent..."

The gist of negligent hiring and supervision is that the defendant acted unreasonably in letting another party, to whom he had a duty to control, commit a wrong against the plaintiff. See: SMITH v. GENERAL ACCIDENT INSURANCE CO. OF AMERICA, supra, 641 So. 2d at page 124.

The Stevens complaint triggered an obligation on the part of the defendant "to defend." Whether or not there ultimately existed coverage under the policy was irrelevant. Whether or not American Bankers was correct when it "denied coverage," it was incorrect when it "pulled its defense" and required its insured to obtain counsel. Given that Florida law mandates that the allegations of the complaint govern the duty of the insured to defend, it must be concluded that the Third District's reliance upon ATKINS was misplaced. There existed no authority on the part of the trial court or the District Court to go outside of the Stevens complaint to determine "an evidentiary basis" for coverage. Because they did, the opinion of the Third District herein sought to be reviewed should be quashed, the summary final judgment entered in favor of American Bankers and against American Finance should be reversed and the cause remanded to the trial court for the entry of judgment in favor of American Finance on the issue of "duty to defend."

VI.

CONCLUSION

Based upon the foregoing reasons and citations of authority, the plaintiffs respectfully urge this Honorable Court to quash the opinion herein sought to be reviewed, to reverse the summary final judgment appealed with directions to the trial court to enter judgment for the plaintiffs on the issue of "coverage." Consistent therewith, American Finance is entitled to a judgment in its favor on the issue of "duty to defend."

Assuming this Court chooses to disagree with the plaintiffs on the issue of "coverage," it must still be held that the District Court of Appeal, Third District, was in error in affirming the summary final judgment which found "no duty to defend." In that regard the opinion of the Third District should be quashed, the opinion of the Fourth District Court of Appeal in SMITH should be approved as presenting a correct analysis of the law in the State of Florida, the summary final judgment appealed should be reversed with directions to the trial court to deny the defendant's motion and to enter judgment for American Finance on the issue of "duty to defend."

Respectfully submitted,

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Attorneys for Petitioners

By: _____
Arnold R. Ginsberg

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true copy of the foregoing Brief and Accompanying Appendix of Petitioners was mailed to the following counsel of record this 18th day of August, 1995.

SHEILA MOYLAN, ESQ.
44 West Flagler Street #300
Miami, Florida 33130

_____
Arnold R. Ginsberg

APPENDIX

INDEX

l competent evidence of amount of res-
n; state failed to introduce receipts or
ori[illegible] items.

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es Marion Moorman, Public Defender,
nthia J. Dodge, Asst. Public Defender,
v, for appellant.

ert A. Butterworth, Atty. Gen., Talla-
, and William I. Munsey, Asst. Atty.
Tampa, for appellee.

t CURIAM.

ellant, Edward Taylon Smith, chal-
his conviction and sentence for grand
nd dealing in stolen property. After
viction, the trial judge "merged" the
theft conviction with the charge of
in stolen property, adjudicated appel-
ilty and sentenced appellant to twelve
n prison as a habitual offender. We
merit in the issues he raises regard-
conviction for stealing and selling
achines.

lo, however, find merit in appellant's
nt that he should not have been sen-
as a habitual offender since the trial
ailed to make the required specific
p[illegible]nt to section 775.084(3)(d),
Statutes (1991). Appellant also con-
at he was on community control for a
82 conviction in which adjudication of
s withheld. As such, he argues that
iction should not have been consid-
purposes of habitualization since he
on probation as specified in section
2).

We agree that the trial court failed to
e required findings to sentence ap-
as a habitual offender. After the
sented evidence of appellant's prior
ns, the trial court merely stated that
qualified as a habitual offender.
s not satisfy the statutory require-
specific findings. *See Livernois v.*
5 So.2d 973 (Fla. 2d DCA 1993).

he trial court also found that the
the habitual offender statute is that
and community control are to be
synonymously. In *Overstreet v.*
) So.2d 125 (Fla.1993), the supreme
ted that penal statutes are to be

strictly construed in favor of the accused. The court also stated that the plain language of the statute includes only those offenses occurring while on probation, and that the court would decline to add words to a statute where the language is clear and unambiguous. Therefore, we agree that the trial court should not have considered appellant's 1982 conviction since he was on community control and not probation when the instant offense was committed. Upon remand, the trial court may sentence appellant as a habitual offender after making the requisite findings if such factors are present.

[3] Finally, we agree that the state failed to present sufficient, competent evidence of the amount of restitution. The state failed to introduce receipts or inventories for the items and simply stated that the amount of restitution was stated in the PSI. This is not sufficient and requires reversal of the restitution order. The trial court may hold another hearing where the state can present competent evidence of the victims' loss. *See Winborn v. State*, 625 So.2d 977 (Fla. 2d DCA 1993).

Appellant's convictions are affirmed, but his sentences are reversed and remanded for treatment consistent herewith.

CAMPBELL, A.C.J., and ALTENBERND and QUINCE, JJ., concur.

Bobbie STEVENS and American Finance Adjustors, Inc., a Florida corporation, Appellants,

v.

AMERICAN BANKERS INSURANCE COMPANY OF FLORIDA, Appellee.

Nos. 94-746, 94-1547.

District Court of Appeal of Florida, Third District.

March 1, 1995.

Appeals were taken from declaratory judgments of the Circuit Court, Dade County, Jon I. Gordon, J., finding no coverage under comprehensive general liability insurance policy. The District Court of Appeal held that tow truck was not "mobile equipment" covered by comprehensive general liability insurance policy.

Affirmed.

Insurance ⇐435.2(1)

Tow truck was not "mobile equipment" covered by comprehensive general liability insurance policy; policy's definition of "mobile equipment," which included machinery designed to afford mobility to equipment such as power crane, referred to land vehicle which transported crane to site at which it was to perform work, rather than tow truck lifting apparatus.

See publication Words and Phrases for other judicial constructions and definitions.

H. Virgin & Son and John Virgin, Thomas P. Murphy, Jerry B. Schreiber, Miami, for appellants.

Sheila W. Moylan, Coconut Grove, for appellee.

Before BASKIN, COPE and GREEN, JJ.

PER CURIAM.

In these consolidated appeals Bobbie Stevens and American Finance Adjustors, Inc., appeal declaratory judgments finding no coverage under a comprehensive general liability policy issued by appellee American Bankers Insurance Company in Florida. We affirm.

As to the first issue, the Florida Department of State, as the responsible regulatory agency, has determined that the subject insurance policy conforms to the statutory requirements in effect at the time of the accident. *See* § 493.31, Fla.Stat. (1985). We see no basis on which to disturb that determination.

A.1

As to the second issue, appellants contend that there should be coverage for the tow truck involved in the present case. They reason that the tow truck qualifies as "mobile equipment"; mobile equipment is covered under the policy. Insofar as pertinent here, the policy definition states:

> "mobile equipment" means a land vehicle (including any machinery or apparatus attached thereto), whether or not self-propelled, ... (4) *designed or maintained for the sole purpose of affording mobility to equipment of the following types forming an integral part of or permanently attached to such vehicle: power cranes....*

(Emphasis added).

In our view this terminology refers to a land vehicle which transports a crane to the site or sites at which it is to perform its work. We do not think it applies to a tow truck lifting apparatus where, after it is engaged, the tow truck is then employed to transport the towed vehicle to the intended destination. *See Williams v. Galliano*, 601 So.2d 769 (La.Ct.App.), *writ denied*, 604 So.2d 1306 (La.1992); *Truck Ins. Exchange v. Transamerica Ins. Co.*, 28 Cal.App.3d 787, 104 Cal.Rptr. 893 (1972).

As to the duty to defend, the judgment is affirmed on authority of *Atkins v. Bellefonte Ins. Co.*, 342 So.2d 837 (Fla. 3d DCA 1977). *But see Smith v. General Accident Ins. Co.*, 641 So.2d 123, 126 (Fla. 4th DCA 1994) (expressly disagreeing with *Atkins*). In view of the ruling on coverage and duty to defend, the trial court correctly dismissed Stevens' remaining claims.

Affirmed.

HARTFORD INSURANCE COMPANY OF THE SOUTHEAST, a Florida corporation, Appellant,

v.

Gerard BLACKMORE and Teresa Blackmore, his wife, and Robert B. Teater, Lauri Olavi Lehtinen, Springer Motor Company, Inc., a Florida corporation, Appellees.

No. 94-1652.

District Court of Appeal of Florida, Fourth District.

March 1, 1995.

Order Denying Rehearing April 13, 1995.

Appeal of a non-final order from the Circuit Court for Broward County; George A. Brescher, Judge.

Richard A. Sherman and Rosemary B. Wilder of Law Offices of Richard A. Sherman, P.A., Fort Lauderdale, and Jeffrey B. Tutan of Law Offices of Alan L. Landsberg, Hollywood, for appellant.

Paula R. Revene and W. Kent Brown of Heinrich, Gordon, Batchelder, Hargrove & Weihe, Fort Lauderdale, for appellee Springer Motor Co.

PER CURIAM.

Affirmed on authority of *Dania Jai-Alai Palace v. Sykes*, 495 So.2d 859 (Fla. 4th DCA 1986).

HERSEY, POLEN and PARIENTE, JJ., concur.

ORDER DENYING REHEARING

ORDERED that appellant's motion filed March 15, 1995, for rehearing based on recent case holding § 627.727(6) unconstitutional is hereby denied; further,

ORDERED that appellant's reply filed April 3, 1995, to appellee's response in opposition to motion for rehearing is hereby stricken as unauthorized; further,

ORDERED that appellee's motion filed April 5, 1995, to strike appellant's reply is

A.2