W00A

IN THE SUPREME COURT OF FLORIDA

Case No. 85, 457

BOBBIE STEVENS and AMERICAN FINANCE ADJUSTERS, INC.,

Petitioners,

v.

AMERICAN BANKERS INSURANCE COMPANY OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

SHEILA WOLFSON MOYLAN
Fla. Bar No. 445150
Suite 300, Courthouse Tower
44 West Flagler Street
Miami, FL 33130
(305) 374-8919

Attorney for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

Petitioners' Statement of the Case and Facts is accurate, but incomplete in some significant details. Accordingly, Respondent presents the following supplement to Petitioners' Statement.

In 1988, Petitioner Bobbie Stevens filed suit against Popular Bank of Hialeah, Petitioner American Finance Adjusters, Inc. ("the Repossessor"), and Edward Zapetis. (R. 229-233 and App.[1] 1). Stevens alleged that Popular Bank, which had extended Stevens a car loan, hired the Repossessor to repossess the car. (R. 230). Stevens further alleged that the Repossessor sent Zapetis, driving a 1985 Chevrolet pick-up truck, to Stevens' place of employment to repossess her car. (R. *Id.*). Stevens alleged that she saw Zapetis hook up her car to the pick-up truck and tow it off. (R. *Id.*). Stevens followed Zapetis in another car and when Zapetis stopped to make a telephone call, Stevens caught up with him. (R. *Id.).* When Zapetis saw Stevens approaching her car, he got back in his pick-up truck and drove off. (R. 230-233). In the process, Zapetis' pick-up truck struck Stevens and injured her. (R. *Id.*). Stevens' suit alleged theories of negligence by Zapetis and negligent hiring and supervision by the Repossessor. (R. *Id.*).

For unknown reasons, the Repossessor had no auto liability insurance on the pick-up truck used to repossess Stevens' vehicle. After judgment was entered against the Repossessor and Zapetis, both Stevens and the Repossessor filed suit against American Bankers, the Repossessor's general liability carrier — whose comprehensive general liability policy specifically excluded coverage for injuries arising from the operation or use of automobiles —

---

[1] App. refers to the Appendix hereto.

seeking coverage for Stevens' judgment.

The trial court entered judgment against Petitioners, rejecting the same arguments made herein: (1) that Chapter 493, the statute regulating repossessors, requires automobile liability insurance as well as comprehensive general liability insurance; and (2) that American Bankers had a duty to defend the Repossessor against Stevens' suit, even though its policy excluded coverage for auto-related injuries, because the complaint also alleged theories of negligent hiring and supervision. The Third District affirmed. However, because a recent decision of the Fourth District regarding the duty to defend conflicts with the Third District authority on this issue, this Court has jurisdiction to consider the issues now twice ruled-upon against Petitioners below.

ISSUES PRESENTED

I. WHETHER THE AMERICAN BANKERS COMPREHENSIVE GENERAL LIABILITY POLICY COMPLIES WITH CHAPTER 493, FLORIDA STATUTES

II. WHETHER THE THIRD DISTRICT IS CORRECT IN HOLDING THAT AN INSURER HAS NO DUTY TO DEFEND WHERE THE PLAINTIFF ALLEGES THAT SHE WAS INJURED BY AN AUTOMOBILE AND THE POLICY AT ISSUE EXCLUDES COVERAGE FOR AUTO-RELATED INJURIES, EVEN IF THE PLAINTIFF ADDS A CLAIM AGAINST THE TORTFEASOR'S EMPLOYER FOR NEGLIGENT HIRING OR SUPERVISION, WHERE THE AUTO NEGLIGENCE IS AN ESSENTIAL ELEMENT OF THE NEGLIGENT HIRING OR SUPERVISION CLAIM

SUMMARY OF ARGUMENT

Petitioners, in the guise of "public policy," seek to have this Court judicially legislate insurance coverage different from that presently required by the express statutory language of Chapter 493. Specifically, Petitioners ask this Court to hold that Chapter 493's requirement for comprehensive liability coverage means that automobile liability coverage must be provided as well. Petitioners' argument should be rejected, not only because it asks this Court to usurp the legislative function, but because it is contrary to the express language of Chapter 493; is not supported by the legislative history of Chapter 493; and differs from the interpretation of Chapter 493's insurance requirements by the agency charged with enforcing Chapter 493, the Florida Department of State.

This case is before this Court because of a conflict between the Third District's decision holding that an insurer has no duty to defend where the plaintiff alleges that she was injured by an automobile and the policy at issue specifically excludes coverage for auto-related injuries, even if the plaintiff asserts an additional theory of negligent hiring against the tortfeasor's employer, and the Fourth District's contrary decision. Respondent respectfully urges this Court to adopt the Third District's decision because it is in accord with long-established Florida law, as well as the majority rule in other jurisdictions, which holds that where the facts alleged show that an automobile is the cause of injury, the plaintiff cannot circumvent an insurance policy's auto exclusion merely by adding a claim for negligent hiring, where an essential element of such a claim is the existence of auto negligence, without which the plaintiff would have suffered no damages. Further, the Third District's decision is better reasoned

because it comports with common sense and logic regarding the legal cause of injury, and discourages pleading misleading and factually unsupported makeweight claims.

ARGUMENT

I. THE AMERICAN BANKERS POLICY PROVIDES THE PRECISE INSURANCE COVERAGE REQUIRED BY CHAPTER 493

A. Comprehensive general liability policies provide general business liability coverage, not automobile liability coverage

Petitioners' claim that Chapter 493 requires a comprehensive general liability policy to provide auto liability coverage reflects a fundamental misunderstanding of the nature and scope of the different types of liability insurance policies. Accordingly, American Bankers offers the following overview of the general liability insurance scheme in order to provide a basis for the correct analysis of Chapter 493's requirements.

In both personal and business liability situations, the two main areas where insurance coverage is needed are: (1) *general* liabilities that the person or business may incur; and (2) liabilities arising out of the use, maintenance, etc. of *automobiles*. The coverages for the two separate types of liabilities are provided under separate types of policies. In the personal sphere, general liabilities are covered by homeowners' policies, and automobile liabilities are covered by personal automobile policies. In the business sphere, general liabilities are covered by comprehensive general liability ("CGL") policies, while automobile liabilities are covered by commercial automobile policies.

Each type of liability policy excludes risks covered under the other types. This general practice is referred to as "dovetailing" coverages.

> This [dovetail] theory simply holds that any one occurrence can only be covered by either the automobile or the homeowner's [or CGL] policy — but not both. That mutually exclusive effect is the result of the exclusionary clause of the homeowner's [or CGL] policy acting as the mirror image of the inclusionary clause of the automobile policy. The two coverages dovetail, the one filling the

gaps created by the other. Automobile-related occurrences are then within the sole province of the automobile policy.[2]

This industry custom of dovetailing coverages has been specifically recognized as a rational practice because "[t]he custom that risks not be insurable under both CGL policies and auto policies allows for greater cost savings to and efficiency for society: without needless dual coverage — for which risks separate premiums would be paid under both policies — an insured may. . .reduce its expenses in obtaining insurance without additional exposure to liability."[3]

With these general coverage principles in mind, it is easy to discern the fallacy in Petitioners' argument that Chapter 493, Florida Statutes, *which expressly requires comprehensive general liability coverage*, means that auto liability coverage is required as well.

B. Chapter 493 requires general liability insurance, not auto insurance

Chapter 493, Florida Statutes, regulates and licenses private investigators, security guards and repossessors, and requires these licensees to carry general liability insurance. The governing statute (1986) at the time of the repossession at issue provided in pertinent part:

---

[2] *Standard Mutual Insurance Co. v. Bailey*, 868 F.2d 893, 898-99 n.7 (7th Cir. 1989), *quoting Pedersen v. Republic Insurance Co.*, 532 A.2d 183, 189 (Md. Ct. Spec. App. 1987). *See also, United States Fidelity and Guarantee Co. v. Employers Casualty Co.*, 672 F. Supp. 939, 941 (E.D. La. 1987), *aff'd*, 857 F.2d 289 (5th Cir. 1988)("It has been the general industry custom not to cover claims under both auto and CGL policies; if a claim is covered under one type of policy, it is not covered under the other type policy."); *Almayor v. State Farm Fire & Casualty Co.*, 613 So. 2d 526, 527 (Fla. 3d DCA 1993)("Homeowner's insurance is expressly designed to protect against. . . individual liability. Conversely, automobile insurance. . .[does] not apply."); Appleman, 7A INSURANCE LAW AND PRACTICE § 4500.04 (Berdal ed. 1979)("Liability insurance is generally written for a specific hazard in order to calculate premiums on some equitable as well as predictable basis. As a result, the hazard to be covered under each policy is carefully defined and other hazards are excluded.").

[3] *United States Fidelity and Guarantee Co. v. Employers Casualty Co., supra,* 672 F. Supp. at 944.

493.31 Licensee's insurance.

* * *

> Coverage shall provide for a combined single limit policy in the amount of $300,000, which policy shall cover *comprehensive general liability coverage* for death, bodily injury, property damage, personal injury, false arrest, detention or imprisonment, malicious prosecution, libel, slander, defamation of character, and violation of the right of privacy.

Notwithstanding the foregoing express language indicating that comprehensive general liability coverage is required for Chapter 493 licensees — a particular type of liability insurance that always *excludes* coverage for auto-related injuries — Petitioners nonetheless argue that this court should interpret Chapter 493 to require auto liability coverage as well. Petitioners claim that the public policy underlying Chapter 493 is to provide coverage for repossessors engaged in recovery of automobiles, and that the CGL policy's auto exclusion is against this public policy.

Petitioners' argument is flawed not only because it ignores the basic difference between a CGL policy and an auto liability policy — a difference that the legislature certainly understood[4] — but also because it rests on a skewed interpretation of Chapter 493, focusing only on the statute's application to *one* category of licensee — repossessors — and to *one* activity of repossessors — recovering automobiles — when, in fact, the statute has a much broader application and must, accordingly, be read in that context. Both the express language and legislative history of the statute, set forth in detail below, amply evidence the real public policy

---

[4] The legislature knows how to require maintenance of automobile insurance when it intends to do so. *See, e.g.* § 627.733, Fla. Stat.; and § 627.7415, Fla. Stat.

behind Chapter 493, which is fully implemented by a comprehensive general liability policy such as the one issued to the Repossessor by American Bankers.

1. Legislative history of Chapter 493's insurance requirement

Petitioners' argument that because Chapter 493 requires liability insurance coverage for repossessors, it must mandate auto liability coverage, rests on the flawed assumption that this statutory insurance requirement is tailored to auto repossessors' activities. In fact, the legislative history reveals that requiring liability coverage for repossessors — and indeed the repossessors themselves — was a legislative afterthought. The legislature's real concern in enacting the liability insurance requirement was the private security guard industry.[5]

When Chapter 493's insurance requirement was first imposed in 1975, it applied *only* to private investigators and security agencies, not repossessors, who were not at that time subject to this statute's licensing requirements.[6] Repossessors were first specifically included in Chapter 493 licensing — but not insurance — requirements in 1981.[7] It was not until 1986 that the statute was amended to extend the insurance requirement to repossessors.[8] Significantly, however, *there was no change in the description of the insurance coverage required* — comprehensive general liability, *not* auto liability.[9] Thus, the legislature did not intend to require any *different* coverage for repossessors than was already required for other licensees such as

---

[5] *See* preamble to Chapter 75-230, Laws of Florida, 493.09(2)(App. at 2).

[6] *Id.*, Sec. 493.09(2)(App. at 2).

[7] *See* Secs. 493.304, 493.31, Fla. Stat. (1981)(App. at 3).

[8] *See* §493.304(7), requiring a license for repossession, and §493.31, imposing an insurance requirement for Class "E" (repossessor) licenses. (App. at 4).

[9] *Compare* §493.31 (1981) and (1986) in App. 3 and 4.

security guards or private investigators, who may — or may not — use automobiles in their business operations.

Even repossessors' operations, of course, do not always involve automobiles. The statutory definition of repossession is "the recovery of a motor vehicle . . . *or mobile home...or motorboat,*"[10] and, of course, the latter two types of repossession do not necessarily involve use of an automobile. Thus, Petitioners' attempt to enlarge the statutory coverage by arguing that "public policy" requires that it include automobile coverage fails because it is based on flawed factual assumptions.

Furthermore, there is evidence that the legislature knew exactly how to define the coverage it was requiring in the statutory language specifying that the comprehensive general liability coverage include personal injury protection, a particular coverage that not all CGL policies include,[11] for certain common liabilities associated with all the occupations regulated by Chapter 493 — detention or false imprisonment, defamation of character, and invasion of privacy. As this very specific coverage description indicates, If the legislature had wanted to

---

[10] Sec. 493.6101 (22), Fla. Stat. (1993).

[11] All CGL policies provide "bodily injury" coverage for physical injuries arising from an "occurrence"/accident. "Personal injury" coverage, on the other hand covers injuries to the "person," whether economic, emotional or physical, arising out of certain specifically enumerated "offenses." These enumerated offenses constitute three traditional families of common law torts: (1) false arrest and malicious prosecution; (2) libel, slander and defamation; and (3) wrongful eviction. *See Lindsey v. Admiral Insurance Co.*, 804 F. Supp. 47, 51 (N.D. Cal. 1992). *See generally, Ladas v. Aetna Insurance Co.*, 416 So. 2d 21, 23 n.2 (Fla. 3d DCA 1982).

include auto liability coverage in the insurance requirements, it certainly understood how to do so.

Finally, Petitioners ignore the very significant kinds of coverage that the mandated CGL policy does provide for repossessors. Common situations from which claims against a repossessor arise — and for which a general liability policy with personal injury protection provides coverage — include the following. A claim for *false imprisonment* could arise where the debtor refuses to leave her car when repossession is attempted and the repossessor drives off with the debtor still in the car. A claim for *defamation* could easily arise from a repossessor's actions or statements concerning the "deadbeat" to third persons such as neighbors or an employer. Similarly, many repossessions might generate a claim of *wrongful entry* or *violation of an individual's right of privacy* from the repossessor's entry onto the debtor's property. A claim for *property damage* could arise from a repossessor's damage to a fence or a gate in gaining access to an enclosed boat or car. A *bodily injury* claim could arise from the all-too-common situation where an attempted repossession enrages the debtor, and the repossessor, in defending himself, inflicts some bodily injury on the debtor. Private investigators and security guards, the other types of Chapter 493 licensees, obviously encounter quite similar situations.

In sum, Petitioners' "public policy" argument to enlarge coverage is legally flawed and factually erroneous. It is well understood — except perhaps by Petitioners — that a comprehensive general liability policy provides general liability coverage, not auto liability coverage. Further, a CGL policy with personal injury coverage provides coverage for the most common situations in which claims against Chapter 493 licensees arise, and which claims were the subject of the legislature's concern. Petitioners' argument that public policy requires more

is not only contrary to the express statutory language of Chapter 493, but is not supported by the statute's legislative history. As will now be shown, Petitioners' interpretation also conflicts with the interpretation of Chapter 493's insurance requirements by the State agency that licenses repossessors, the Florida Department of State, and for this reason, too, should be rejected.

2. The Department of State interprets Chapter 493 to require comprehensive general liability coverage, not auto coverage

To confirm the insurance requirements imposed by Chapter 493, American Bankers requested a legal opinion from the State licensing agency for repossessors, the Florida Department of State.[12] This agency's legal opinion # 93-40 confirms that Chapter 493 requires comprehensive general liability coverage, *not* auto liability coverage — just as the express statutory language states.[13] Great weight is accorded to such opinions as a regulatory agency's interpretation of a statute it is charged with administering.[14] Thus, the Third District's recognition of the weight to be given to the Department of State's interpretation is entirely appropriate and is not, as Petitioners contend, an abdication of the court's duty to construe the statute.

In sum, there is absolutely no basis for Petitioners' contention that Chapter 493 requires automobile coverage. The statute's plain language requires "comprehensive general

---

[12] R. 258 and App. 5.

[13] *See* R. 256-257 and App. 5.

[14] *See Daniel v. Florida State Turnpike Authority*, 213 So. 2d 585 (Fla. 1968)(construction given a statute by the administrative agency charged with its enforcement and interpretation is entitled to great weight and a court will not depart therefrom except for the most cogent reasons and unless clearly erroneous). *See also, Public Employees Relations Commission v. Dade County Police Benevolent Association*, 467 So. 2d 987 (Fla. 1985)(a reviewing court must defer to an agency's interpretation of an operable statute as long as that interpretation is consistent with legislative intent and is supported by substantial competent evidence).

liability coverage;" the legislative history of Chapter 493 indicates that the statute requires the *identical type* of insurance, regardless of whether the licensee uses an automobile in his business operations; and finally, the legal opinion of the State agency charged with enforcing the insurance requirements confirms that Chapter 493 requires comprehensive general liability coverage, *not* auto coverage.

II. THE THIRD DISTRICT'S HOLDING THAT THERE IS NO DUTY TO DEFEND WHERE THE COMPLAINT'S ALLEGATIONS SHOW THAT THE CAUSE OF INJURY WAS AN AUTOMOBILE, AND AUTO-RELATED INJURIES ARE EXCLUDED FROM COVERAGE, IS NOT ONLY BETTER REASONED THAN THE FOURTH DISTRICT'S CONTRARY DECISION, BUT IS IN ACCORD WITH ESTABLISHED FLORIDA LAW AND WITH THE MAJORITY RULE IN OTHER JURISDICTIONS

This case is before this Court because of a conflict between the Third District's decision herein finding that American Bankers had no duty to defend the Repossessor against Stevens' suit, which was based on longstanding Third District authority,[15] and a recent Fourth District decision, *Smith v. General Accident Insurance Co.*[16] Petitioners assert that the Fourth District's decision is better reasoned and that the Third District failed to adhere to Florida law holding that the duty to defend is determined solely by the allegations in the complaint against the insured.[17] As we will show, neither assertion is accurate. The Third District's decision in fact is consistent with well-established Florida law — to which *Smith* is the aberration — and

---

[15] *Atkins v. Bellefonte Insurance Co.*, 342 So.2d 837 (Fla. 3d DCA 1977)(automobile exclusion barred coverage and duty to defend even though plaintiff alleged school's general operational negligence because plaintiff's damages resulted from and could not have occurred without the use of the school's motor vehicle).

[16] 641 So.2d 123 (Fla. 4th DCA 1994).

[17] *E.g., National Union Fire Insurance Co. v. Lenox Liquors, Inc.*, 358 So.2d 533 (Fla. 1977).

that law is founded on much sounder reasoning than the *Smith* decision. Furthermore, the Third District's decision fully comports with the rule that the complaint's allegations alone determine the duty to defend.

When a potential plaintiff has been injured by an automobile, but the defendant has no automobile insurance, aggressive plaintiff's lawyers frequently attempt to circumvent the auto exclusion in a homeowners or CGL policy by pleading a theory such as negligent entrustment or negligent hiring, in addition to simple auto negligence. Because of Florida law requiring an insurer to defend the entire complaint if any allegations fall within coverage,[18] the hope is that the allegations of negligent entrustment or negligent hiring will compel the insurer to provide a defense and, in order to avoid this expense, the insurer will offer a settlement to the plaintiff, even though there is no coverage under the policy.[19]

Florida courts, however — with the sole exception of the *Smith* court — as well as a majority of courts in other jurisdictions, have rejected such attempts to impose liability upon an insurer for a risk it never contemplated.[20] These courts have recognized — correctly — that

---

[18] *E.g., Tire Kingdom, Inc. v. First Southern Ins. Co.*, 573 So.2d 885 (Fla. 3d DCA 1990).

[19] The same deep pocket motivation underlies other instances of strained pleading that are not supported by the facts. For example, in a declaratory action brought by a murderer's insurer asking the court to declare there was no coverage for an intentional shooting, Judge Griffin pointed out that "absent considerations of insurance (the intentional act exclusion) it would never occur to a lawyer to plead this plainly intentional tort as negligence." *Allstate Ins. Co. v. Conde*, 595 So.2d 1005, 1008-09 (Fla. 5th DCA 1992).

[20] *See, e.g., Gargano v. Liberty Mutual Insurance Co.*, 384 So.2d 220 (Fla. 3d DCA 1980)(cause of action of negligent entrustment of motor vehicle necessarily arises from the ownership, operation or use of said vehicle and therefore auto exclusion bars coverage); *Cesarini v. American Druggist Insurance Co.*, 463 So. 2d 451 (Fla. 2d DCA 1985)(negligent hiring and supervision of school bus driver was not an independent act of negligence that caused the accident; auto exclusion precluded coverage under general liability policy); *Dalrymple v. Ihnen*

where, as here, the allegations against the insured show that it was an *automobile* that actually injured the plaintiff, regardless of the legal theory asserted — negligent hiring and supervision, negligent entrustment, etc. — these negligent acts, by themselves, would not form the basis for a cause of action by the plaintiff, who would have suffered no damage without the negligence of the automobile driver.[21] Thus, each of these additional causes of action is *completely dependent upon* the occurrence[22] of an automobile accident — an occurrence that is excluded from coverage.[23]

The Third District's decision in this case, based on *Atkins v. Bellefonte Insurance Co.*, is thus consistent with the weight of Florida authority and the majority rule in other

---

Pool Service & Supply, Inc., 498 So.2d 646 (Fla. 4th DCA 1986)(rejecting argument that negligent hiring and retention was a concurring cause of injury that was not excluded from coverage and following *Cesarini* which "was correctly decided and. . .is consistent with other decisions expressing the law in this State."). For cases from other jurisdictions *see Standard Mutual Insurance Co. v. Bailey*, 868 F.2d 893, 898 (7th Cir. 1989), collecting nationwide cases and rejecting a negligent entrustment of the motor vehicle theory as a basis for coverage because "liability on the part of the entrustor is not triggered until the entrustee acts in a negligent manner while operating the motor vehicle."; *Marrero v. Corporacion de Renovacion Urbana y Vivienda,* 658 F.Supp. 443, 446 (D.P.R. 1987), also collecting nationwide cases and reaching the same conclusion. "Negligence of the entruster by itself does not trigger coverage. Were it not for the entrustee's negligence [in operating the motor vehicle] no liability ensues to the entruster." While many of the cases consider only coverage and do not address the duty to defend, they are nonetheless relevant because if there is no coverage, there is no duty to defend.

[21] Even the *Smith* court recognized that the employee/driver who hit the plaintiff in that case "directly and negligently caused the injury to the plaintiff." 641 So.2d at 126.

[22] It is an *occurrence* that triggers coverage. The policy provides coverage for "all sums which the insured shall become legally obligated to pay as **damages** because of . . .bodily injury or. . .property damage. . .**caused by an occurrence.**" Occurrence is defined as "an **accident.**" (R. 204-268, Tab A, pp. 3-5).

[23] Where the allegations of the complaint against the insured show that an exclusion from coverage is applicable, the insurer, of course, has no duty to defend. *National Union Fire Insurance Co. v Lenox Liquors, Inc., supra.*

jurisdictions on this issue, while the Fourth District's decision in *Smith* — which did not even discuss any of the foregoing authority, other than noting conflict with *Atkins* — is not. The *Smith* court relied primarily on a non-automobile injury case, *Klaesen Brothers, Inc. v. Harbor Insurance Co.*,[24] in which, although it was a wrongful death action based on a drunken barroom brawl at 3 a.m., the complaint alleged no details of the incident, but only that the death occurred while the tortfeasor was acting as an employee or agent of a carnival. The carnival was not even open at the time of the killing, but it did have general liability insurance. The *Klaesen* court, although acknowledging that the actual facts — an intentional criminal act not related to the carnival business — would not be covered, nevertheless found a duty to defend because the complaint did not allege these facts.[25]

While the *Klaesen* decision is correct because the complaint did not allege the actual facts, which would have shown that there was no coverage and therefore no duty to defend, the *Smith* court should not have found *Klaesen* governing authority because in *Smith*, the actual facts *were* alleged, and these facts showed that the plaintiff was injured in an auto accident that was excluded from coverage. The *Smith* court not only failed to recognize this critical distinction from *Klaesen*, but also demonstrated its lack of familiarity with insurance law by holding that the insurer had no duty to defend the count alleging auto negligence, but did have a duty to defend the negligent hiring count. This holding is contrary to the longstanding rule of

---

[24] 410 So.2d 611 (Fla. 4th DCA 1982).

[25] This is, of course, another example of the distorted pleading decried by Judge Griffin in *Conde, supra.*

Florida law that where there are any allegations in a complaint requiring the insurer to defend, it must defend the *entire* suit.[26]

Thus, far from being better-reasoned than *Atkins*, *Smith* is flawed because it reflects the court's lack of understanding of insurance law; ignores the court's own prior authority on this issue (*Dalrymple, supra);* and relies on an inapposite case. Furthermore, the *Smith* decision is contrary to the well-reasoned and well-established authority in Florida and the majority of other jurisdictions holding that, where the plaintiff alleges an auto injury, theories of negligent hiring and negligent entrustment should be rejected as a basis for defense and coverage where these additional theories are all completely dependent upon the existence of auto negligence, and auto negligence is excluded from coverage. Respondent respectfully suggests that *Atkins* is also the better-reasoned decision, which this Court should adopt, because it accords with common sense and logic which tell us that auto negligence, not negligent hiring, is the legal cause of the plaintiff's injury in a case such as *Atkins*, and because *Atkins* discourages pleading misleading and factually unsupported makeweight claims.[27]

---

[26] *See, e.g., Tire Kingdom, Inc. v. First Southern Ins. Co.*, 573 So.2d 885 (Fla. 3d DCA 1990). The *Smith* court also misread *Marr Investments, Inc. v. Greco.*, 621 So.2d 447 (Fla. 4th DCA 1993) as involving both an intentional tort claim and a negligence claim. In fact, the pleading in *Marr* "alleges negligence and makes no allusion to any intentional tort fact or theory." 621 So.2d at 449. Once again, the pleading in *Marr* was not in accord with the facts, which reflected an assault and battery. Once again, the reason for this disingenuous pleading was "solely to reach the 'deep pocket' of the insurance company. . ., as there is a clear exclusion in the policy for assault and battery. . . ." *Id.*

[27] Interestingly, the jury in Stevens' suit found that both Zapetis and Stevens were negligent, but not the Repossessor, thus rejecting the negligent hiring and supervision claim. (R. 127-128). Nevertheless, judgment was entered against *both* Zapetis and the Repossessor because the Repossessor was vicariously liable as Zapetis' employer for his negligence. Thus, the negligent hiring and supervision claims can be seen for what they are — completely unnecessary makeweight claims whose only purpose is to try and gain an (unwarranted) insurance settlement.

Finally, Petitioners' contention that *Atkins* ignores the Florida rule of law that the allegations of the complaint govern the duty to defend is erroneous. Petitioners focus only on the allegations in the complaint of negligent hiring and supervision; however, the complaint here[28] plainly alleges that Stevens was injured when she was struck by the Repossessor's pick-up truck as she attempted to prevent her car's repossession. Thus, the real cause of Stevens' injuries is readily apparent from these allegations. While negligent hiring and supervision are additional theories that are pled, it is plain *from the face of the complaint* that this negligence, on its own, did not produce Stevens' injury; rather, it was Zapetis' negligent driving — together with Stevens' negligence in attempting to prevent the repossession — that combined to cause Stevens' injury.[29]

CONCLUSION

Based on the foregoing argument and citation of authority, Respondent American Bankers Insurance Company respectfully requests that this Court affirm (1) the trial court's declaration that the American Bankers' insurance policy provided no coverage for the claims alleged in Petitioner Stevens' complaint against the Repossessor; and (2) the Third District's

---

[28] App. at 5.

[29] Similarly, in *Atkins* the Third District examined the allegations of the complaint against the insured, which revealed that the plaintiff's damages resulted from the use of a motor vehicle. "Not only was the plaintiff's damage a primary consequence of the School's use of the motor vehicle, but also it could not have occurred without the use of the School's motor vehicle. The events which brought the motor vehicle to that time and place were not legal causes of the collision." *Atkins,* 342 So.2d at 838.

affirmance, based on *Atkins*, of the trial court's declaration that American Bankers had no duty to defend the Repossessor.

Respectfully submitted,

SHEILA WOLFSON 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 October 12, 1995 to: Arnold R. Ginsberg, P.A., John W. Virgin, and Frances Schreiber, Attorneys for Petitioners, Suite 410 Concord Building, 66 West Flagler Street, Miami, FL 33130.

IN THE SUPREME COURT OF FLORIDA

Case No. 85, 457

AMERICAN FINANCE ADJUSTERS, INC.
and BOBBIE STEVENS,

Petitioners,

v.

AMERICAN BANKERS INSURANCE
COMPANY OF FLORIDA,

Respondent.
_____/

RESPONDENT'S APPENDIX