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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.
_____/

FILED
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REPLY BRIEF OF PETITIONERS

ARNOLD R. GINSBERG, P.A.
and
JOHN W. VIRGIN, ESQ.
and
FRANCES SCHREIBER, ESQ.
410 Concord Building
Miami, Florida 33130
(305) 358-0427
Attorneys for Petitioners

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AUTHORITIES

I.

INTRODUCTION

In this reply brief of petitioners the parties will be referred to consistent with the references utilized in the petitioners' (plaintiffs) main brief, to wit: as the plaintiff(s) and the defendant and, where necessary for emphasis or clarification, by name. The symbols "R," "A" and "DA" will refer to the record on appeal, the appendix which accompanied the plaintiffs' main brief and the appendix which accompanied defendant's (respondent's) brief on the merits, respectively. All emphasis has been supplied by counsel unless indicated to the contrary.

II.

REPLY 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."

At page 6 of the defendant's brief the defendant states:

> "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."

With all due respect to the defendant's right to defend its position and consistent therewith to present an argument, the plaintiffs must emphasize the non-existence of any

"misunderstanding" regarding the "nature and scope of the different types of liability insurance policies," fundamental or otherwise. What distinctions between the two exist, exist! What is "fundamental" here and what is ignored by the defendant in its brief is that this case presents a basic disagreement over what public policy the Legislature sought to protect in enacting the subject statute! The object of this proceeding is, of course, Section 493.31, Florida Statutes, which, provides:

* * *

> "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."

* * *

Hence, it must be noted that what is "fundamental" here and what is ignored in the defendant's brief are the observations made by the court in REEVES v. MILLER, 418 So. 2d 1050 (Fla. App. 5th 1982) wherein the court observed:

> "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.

At page 8 of the defendant's brief the defendant, after quoting from a portion of Section 493.31, Florida Statutes, states:

> "Notwithstanding the foregoing express language indicating that comprehensive general liability coverage is required for Chapter 493 licenses--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 exclusion is against this public policy."

Plaintiffs comprehend the nature of the two insurances under discussion. What the defendant will not recognize is that given the difference between the two types of insurance, plaintiffs question the validity of the exclusion(s) in the subject policy in light of the statute as written. For example: the defendant argues that Zapetis (the repossessor's employee) was uninsured when he acted and injured Stevens while repossessing her automobile. Yet Section 493.31, Florida Statutes, makes no allowance for an uninsured licensed repossessor while he repossesses. The plain language of Section 493.31 does not allow for any exclusion for bodily injury caused by a licensed employee acting in the scope of his employment. The statute gave

no clear or unequivocal right to the defendant to limit or exclude coverage for the acts which fall within the parameters of what was being licensed (or regulated). As noted in REEVES, supra:

> "...A policy purporting to provide the required statutory coverage but containing exclusions not contemplated by the statute does not provide the required coverage..." 418 So. 2d at page 1051.

In this case the defendant wrote a policy to comply with statutorily required coverage. Defendant certified that policy as being issued pursuant to Section 493, Florida Statutes. The statute specifically contemplates bodily injury coverage for the liability of licensed repossessors in the scope of their employment. In this case Stevens was injured by the negligence of a licensed repossessor in the scope of his employment while repossessing the Stevens automobile. Although the defendant argues that the statute contemplates the exclusion of bodily injury to third parties resulting from a repossessor's use of an automobile, the statute itself provides that "coverage shall insure for the liability of all employees licensed by the department." The plain language of the statute does not allow for any exclusion for bodily injury caused by a licensed employee acting in the scope of his employment. Nothing in Section 493.31 allows for "exclusion" of the <u>cause of the bodily injury</u>. Simply stated, the plain meaning of the statute is to provide comprehensive insurance coverage for bodily injury. Because the statute gives no clear and unequivocal right to the

defendant to limit the coverage in any way, the exclusion must be deemed void.

It is for precisely these reasons why the defendant's arguments which trace the legislative history of the subject statute must fail. The defendant's argument that the Legislature did not affirmatively require "automobile insurance" does not address the Florida public policy concerns as found in cases such as MULLIS v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, 252 So. 2d 229 (Fla. 1971), wherein it was stated:

> "Insurers or carriers writing automobile liability 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..." 252 So. 2d at page 234.

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, the defendant has presented in its brief a laundry list of circumstances establishing wherein a comprehensive general liability policy

would otherwise provide coverage. That is not at issue. What is at issue, however, is that where the policy is required by the Legislature and where the very business being licensed "centers on" the recovery of "automobiles," any exclusion in the policy which would vitiate coverage for one of the objects of the statute should be held for naught.

At page 12 of its brief defendant argues:

> "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. This agency's Legal Opinion No. 93-40 confirms that Chapter 493 requires comprehensive general liability coverage, not auto liability coverage--just as the express statutory language states. Great weight is accorded to such opinions as a regulatory agency's interpretation of a statute it is charged with administering..."

Although "great weight" is to be accorded--the rule is not absolute. In FLORIDA INDUSTRIAL COMMISSION v. MANPOWER, INC. OF MIAMI, 91 So. 2d 197 (Fla. 1956), this Court recognized the general rule as noted above but further recognized:

> "...It is now a settled principle of statutory construction that...a Legislature in legislating with regard to an industry or activity, must be regarded as having had in mind the actual conditions to which the act will apply, that is, the needs and usages of such activity (citation omitted)." 91 So. 2d at page 199.

The above was stated in the context of an appeal from a sued for declaratory decree of rights under the licensing and regulation of employment agencies pursuant to Section 449.01, Florida Statutes. Using the language found in the above cited case, one may ask here "what evils" were intended to be corrected (or even regulated) by the subject legislation or perhaps more to the

point--what are the actual conditions to which the act will apply! There exists one, only one, answer: the day to day activities of repossessing automobiles. Hence, it follows that a repossessor's liability policy should not exclude coverage for injury caused by a repossessor while repossessing no matter how reasonable the exclusionary language of the insurance policy may otherwise be. This Court's statement of Florida law in both FLORIDA INDUSTRIAL COMMISSION, 91 So. 2d at page 199, supra, and this Court's observations in MULLIS, 252 So. 2d at page 234, regarding limitation by policy exclusion of compulsory insurance coverage apply to, and control, this case. As the defendant noted below, "but for" the exclusion there is coverage for the subject occurrence. The exclusion herein involved runs afoul of the statutory scheme. Because it cannot be deemed "contemplated by the statute," it is against public policy. 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 DEFENDANT AMERICAN FINANCE IN THE UNDERLYING LITIGATION.

The plaintiffs would suggest to this Court that all five Florida Courts of Appeal as well as this Court are uniform in the holding that the duty to defend is separate, distinct and more extensive than the duty to indemnify. See: NATIONAL UNION

FIRE INSURANCE CO. v. LENOX LIQUORS, INC., 358 So. 2d 533 (Fla. 1977). See also, GRISSOM v. COMMERCIAL UNION INSURANCE CO., 610 So. 2d 1299 (Fla. App. 1st 1992) and cases cited therein. Likewise, Florida law is settled in its recognition that:

1. If the 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. BARON OIL CO. v. NATIONWIDE MUTUAL FIRE INSURANCE, 470 So. 2d 810 (Fla. App. 1st 1985).

2. 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. NEW AMSTERDAM CASUALTY CO. v. KNOWLES, 95 So. 2d 413 (Fla. 1957) and GRISSOM, supra.

3. If the allegations of the complaint leave any doubt regarding the duty to defend, it must be resolved in favor of the insured requiring the insurer to defend. NEW AMSTERDAM CASUALTY CO. v. KNOWLES, supra, and GRISSOM, supra.

4. The duty to defend is separate and apart from the duty to indemnify and the insurer is required to defend the suit even if the true facts later show there is no coverage. KLAESEN BROTHERS, INC. v. HARBOR INSURANCE CO., 410 So. 2d 611 (Fla. App. 4th 1982).

5. As long as the complaint alleges facts that create <u>potential coverage</u> under the policy, the insurer must defend the suit. See: GRISSOM, supra, 610 So. 2d at page 1307.

Given the above well settled principles, the defendant, in an attempt to end-run their significance, and in an obvious attempt to justify the Third District's holding in this case, presents an argument the essence of which asserts--where there is found "no coverage," there is no duty to defend! Hence, where it can be shown there is no coverage, there was never a duty to defend. The plaintiffs would respectfully disagree. The flaw in the defendant's argument is that the cases relied upon include cases such as GARGANO v. LIBERTY MUTUAL INSURANCE CO., 384 So. 2d 220 (Fla. App. 3d 1980), a summary judgment case which found no coverage on the facts and which did not deal with "duty to defend." It is precisely for this reason why all of the cases found at footnote 20, pages 14 and 15 of the defendant's brief need not be discussed in any detail. The cases decided issues of coverage, not considerations regarding duty to defend. In point of fact the defendant's invitation to this Court to see cases from other jurisdictions:

> "...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...'"

should be declined as the cases involved a factual assessment of the issue of coverage and not a pleading determination of the duty to defend. "Coverage" is not the issue in this point on appeal. If one is to review cases "out of jurisdiction," plaintiff would invite this Court to review cases such as SEABOARD SURETY CO. v. GILLETTE CO., 476 N.E. 2d 272 (N.Y.

1994), FIRST WYOMING BANK v. CONTINENTAL INSURANCE CO., 860 P. 2d 1064 (Wyo. 1993), BROWN v. LUMBERMENS MUTUAL CASUALTY CO., 390 S.E. 2d 150 (N.C. 1990), and SENTINEL INSURANCE v. FIRST INSURANCE OF HAWAII, 875 P. 2d 894 (Hawaii 1994), wherein the court recognized that under CGL policies the obligation to defend is much broader than the duty to pay claims and arises wherever there is the mere potential for coverage. In truth the law throughout the country regarding "duty to defend" is as uniform there as it is in this state.

In this case the defendant issued a policy which required the company to defend:

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

Under the terms of its own contract with American Finance Adjusters, American Bankers agreed to defend its insured based, not upon the true facts learned through its investigation of the accident or the verdict of the jury (see: page 17, footnote 27, in the defendant's brief suggesting that the verdict be examined and be considered in the analysis of the subject issue), but upon the allegations of the suit filed against its insured.

At this point in time the plaintiffs would remind this Court that the case relied upon and cited by the Third District in the opinion herein sought to be reviewed is ATKINS v. BELLEFONTE INSURANCE CO., 342 So. 2d 837 (Fla. App. 3d 1977), a case which was decided some ten months before this Court rendered its opinion in NATIONAL UNION FIRE INSURANCE COMPANY v. LENOX LIQUORS, INC., 358 So. 2d 533 (Fla. 1978). In NATIONAL

UNION FIRE INSURANCE COMPANY this Court had occasion to review on conflict grounds, two decisions rendered by the Third District on the same subject matter. 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.

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. Where, as here, the complaint provided a basis upon which the defendant had to defend, its subsequent decision to pull its defense should be deemed to be wrongful. 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."

III.

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 and to reverse the summary final judgment appealed with directions to the trial court to enter judgment for the plaintiffs on all issues.

Respectfully submitted,

ARNOLD R. GINSBERG,P.A.
and
JOHN W. VIRGIN, ESQ.
and
FRANCES SCHREIBER, ESQ.
410 Concord Building
Miami, Florida 33130
(305) 358-0427
Attorneys for Petitioners

By: _____
Arnold R. Ginsberg

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Petitioners was mailed to the following counsel of record this 13th day of November, 1995.

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

_____
Arnold R. Ginsberg