IN THE SUPREME COURT OF FLORIDA

CASE NO.: 85-492

2 DCA CASE NO.: 94-01400



DAVID J. ADY, as Personal Representative of the Estate of JANET A. ADY, deceased,

Petitioner,

AMERICAN HONDA FINANCE CORPORATION, a/k/a AHFC a California corporation,

Respondent.
_____/

# RESPONDENT'S AMENDED BRIEF AND APPENDIX IN OPPOSITION TO JURISDICTION

Matthew R. Danahy, Esquire
SHOFI, SMITH, HENNEN, JENKINS,
STANLEY, & GRAMOVOT
P.O. Box 10430
Tampa, FL 33679-0430
(813) 876-7796
Attorneys for Respondent
Florida Bar No. 606693

## TABLE OF CONTENTS

## TABLE OF CITATIONS

## PRELIMINARY STATEMENT

The Petitioner, DAVID J. ADY, as Personal Representative of the Estate of JANET A. ADY, deceased, was the Plaintiff in the trial court and the Appellant in the Second District Court of Appeal. He will be referred to as "ADY" or "Petitioner".

Respondent, AMERICAN HONDA FINANCE CORPORATION was the Defendant in the trial court and the Appellee below. It will be referred to as "AHFC".

The symbol "PB" will be used to refer to Petitioner's Brief on Jurisdiction.

The symbol "A" will refer to the Appendix which accompanies the Petitioner's Brief.

For the purpose of clarity, and to avoid oversight, AHFC has also submitted a supplemental appendix which is attached hereto. Citations to the supplemental appendix will be made using the symbol "SA".

## STATEMENT OF THE CASE AND FACTS

AHFC adopts the Statement Of The Case And Facts which is contained in Petitioner's Jurisdictional Brief.

## SUMMARY OF THE ARGUMENT

This case is not in direct and irreconcilable conflict with the Fourth District Court of Appeal's opinion in Gedert v. Southeast Bank Leasing Company, 637 So.2d 253 (Fla. 4th DCA 1994). Instead, there are significant differences between the policy of insurance at issue in the Gedert decision and the policy at issue in the instant case. Based on the factual differences between the two cases, both courts were correct in reaching the results set forth in their respective decisions.

Further, to the extent any conflict can be said to exist, it exists entirely within the Fourth District Court of Appeal itself, as pointed out by the Second District. The en banc Opinion by the Fourth District in Folmer v. Young, 591 So.2d 220 (Fla. 4th DCA 1991) supports the decision sought to be reviewed. By deciding to follow the rationale of the Folmer decision, the Second District has illustrated the conflict which exists within its sister court. As there is no real, express, direct, or irreconcilable conflict between the Second and Fourth Districts, this court should decline to exercise its discretionary jurisdiction.

## ARGUMENT

The crucial distinction between both the Gedert decision, supra, and the instant case is that Gedert involved what was truly a "contingent liability policy", which did not satisfy the statutory requirements of Florida Statute §324.021(9)(b). In the instant case, no such "contingent liability policy" exists. Although the Second District Court of Appeal in the instant case did apparently disagree with the dicta contained in the Fourth District's opinion in Gedert, supra, this does not present a direct and irreconcilable conflict which this court needs to address. This is illustrated by the fact that the Second District did not certify a direct conflict pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(vi).

The Second District actually recognized the absence of a direct conflict with the Fourth District in the final paragraph of its opinion, when it stated "to the extent that our sister court's decision in **Gedert** would require a different result, we disagree with it."(emphasis added)(A-5) In making this statement, the Second District Court of Appeal clearly recognized that the Fourth District Court of Appeal had previously ruled in a

manner contrary to Gedert, in the decision of Folmer v. Young, 591 So.2d 220 (Fla. 4th DCA 1991). Further, implicit in the quoted statement by the Second District, is the recognition that the Fourth District may well rule in the same way as the Second District if it is ever presented with the same policy and factual circumstances at issue in the instant case. To date, the Fourth District Court of Appeal has not been asked to rule on the same factual scenario or policy language at issue in the instant case, and therefore, absent powers of precognition, there is no way to say precisely what the Fourth District Court of Appeal would hold - particularly in light of the internal conflict within the Fourth District.

In the case below, AHFC argued that the policy at issue was not a "contingent liability policy" like the policy in Gedert. To illustrate this point, AHFC filed certified copies of the Appellate Briefs and Appendices thereto, including the policy of insurance at issue in Gedert, which were part of the record below (SA1-112). Likewise, a copy of the policy of insurance in the instant case was part of the record below, so the court could compare the two (SA113-149).

Based on a review of those policies, this court will clearly see that the policy at issue in Gedert was significantly different than the policy at issue in the instant case. Specifically, the relevant language from Endorsement No. 2 of the contingent liability policy at issue in Gedert provides in pertinent part:

> **LEASING OR RENTAL CONCERNS - CONTINGENT COVERAGE**
>
> **B. LIABILITY INSURANCE** and any required no-fault coverage and uninsured motorist coverage provided by the policy for a covered auto which is a leased auto applies subject to the following provision:

2. For you [i.e. the named insured, Southeast Bank Leasing Company] your employees or agents the limit of liability for the insurance provided by this endorsement is the lesser of:

   (a) the limits of liability required by the lease agreement or

   (b) $100,000/$300,000 bodily injury, $50,000 property damages as provided for on **Endorsement CA9927** attached to this policy and the minimum limits required for any no-fault and uninsured motorist coverage.

3. For the lessee the limit of our liability for the insurance provided by this endorsement is the minimum limits required by any applicable compulsory or financial responsibility law.

(SA105; emphasis added)

Based on Endorsement No. 2 it is obvious that the contingent liability policy at issue in the Gedert case provided the lessor with the required limits of insurance set forth under Florida Statute §324.021(9)(b), but did not supply that same amount of coverage to the lessee. Rather, the lessee was only provided with the "minimum limits required by any applicable compulsory or financial responsibility law [i.e. $10,000/$20,000/$10,000 per Florida Statute §324.021(7)]." Here, the policy issued by American Insurance actually provided the lessee, Mr. Pelley, with the coverage required by Florida Statute §324.021(9)(b).

Another distinction between the contingent liability policy at issue in the Gedert case, and the policy in the instant case, is the fact that the policy in this case contains a "severability of interest" or "separation of insureds" provision. Specifically, under the terms of the policy at issue, "Section V - Definitions" defines "insured" as follows:

E. Insured means any person or organization qualifying as an

> insured in the Who Is An Insured provision of the applicable coverage. Except with respect to the limit of insurance, the coverage afforded applies separately to each insured who is seeking coverage or against whom a claim or suit is brought.

Further, under "Section II - Liability Coverage", the policy provides in relevant part:

> 1. **WHO IS AN INSURED**
> The following are insureds:
>
> (b) Anyone else while using with your permission a covered auto you own, hire, or borrow...

Based on these provisions, the policy of insurance issued to AHFC provides separate insurance coverage directly to lessees or permissive users of a leased vehicle, under the facts of this case. The policy is, in fact, the leasee's insurance policy under the facts of this case, whereas the policy in Gedert never assumed that important characteristic. See; Shelby Mutual Insurance Company v. Schuitema, 183 So.2d 571 (Fla. 4th DCA 1966); Liberty Mutual Insurance Company v. Century Insurance Company, 288 So.2d 556 (Fla. 2nd DCA 1974); Great Global Assurance Company v. Shoemaker, 599 So.2d 1036 (Fla. 4th DCA 1992); Premier Insurance Company v. Adams, 632 So.2d 1054 (Fla. 5th DCA 1994).

Yet another difference is that the insurance carrier and the long term lessor in Gedert apparently recognized the contingent nature of the insurance coverage at issue at the outset of the policy. Endorsement No. 2 to the Gedert policy is actually entitled "**LEASING OR RENTAL CONCERNS - CONTINGENT COVERAGE**" and reflects the understanding of the parties that such coverage was contingent.

As a result of the distinction between the contingent liability policy in Gedert, and

the policy at issue in this case, it appears that the Gedert court was correct in reversing the Summary Judgment entered on behalf of the lessor. That is not only because the amount of coverage available to the lessee under the policy did not meet the requirements of Florida Statute §324.021(9)(b), but because the lessee was not an insured under the policy by virtue of a severability of interest clause. Here, the policy of insurance was the lessee's policy.

In Petitioner's Brief, he makes the claim that the Second District Court of Appeal found that the policy at issue constituted a "contingent liability policy". (PB4) However, a reading of the District Court's opinion in this case clearly indicates that the District Court of Appeal did not consider this policy to be contingent in any way and never made the finding suggested by Ady. To the contrary, the Second District stated:

> "In this case the vehicle involved was insured to the limits required by the statute. The lessee, Mr. Pelley, was insured according to those limits and AHFC was, accordingly, exempt from liability. The fact that Mr. Pelley did not purchase or pay for the insurance called for under the lease, does not change our decision." (A4)

There is no real, express, direct or irreconcilable conflict between the Fourth District Court of Appeal and the Second District Court of Appeal. This is because each district court addressed a completely separate insurance policy and set of facts in reaching their opinions.

Further, the decision for which review is sought specifically points out conflict within the Fourth District Court of Appeal itself. This internal conflict within the Fourth District is apparent when the decision in Gedert, supra is reviewed in light of the Fourth

District's en banc decision of Folmer v. Young, 591 So.2d 220 (Fla. 4th DCA 1991). As observed by the Second District:

> In Gedert, our sister court held that section 324.021(9)(b) clearly requires the lessee to have valid insurance on a leased automobile at the time of an accident; otherwise, liability under the dangerous instrumentality doctrine reverts to the lessor. The court held further that the statute contained no exception to the requirement that the lessee have insurance in effect at the time of the accident, and therefore, a lessor's contingent liability policy providing the required benefits could not fulfill the statutory requirement. The court apparently focused on insurance of the lessee rather on insurance covering the vehicle. The same court, however, in Folmer v. Young, 591 So.2d 220 (Fla. 4th DCA 1991), considered the statute in a situation involving two lessees. The Folmer court rejected a contention that the coverage referred to in the statute was per lessee and not per vehicle. The court concluded in an en banc decision that the plain meaning of the statute is that each lease agreement requires insurance in the stated minimum amounts. The court stated that it found no language indicating that each lessee must secure separate insurance coverage. According to that opinion, the owner of the vehicle is exempt from liability even if one of the lessees does not have the insurance required by the lease.

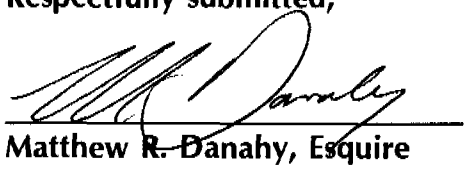
(A4; emphasis added)

## CONCLUSION

If any conflict can be said to exist in this case, it exists within the Fourth District Court of Appeal itself. The Second District has logically followed the better reasoning in the Folmer decision supra, and rejected any portions of the Gedert decision to the extent those are inconsistent with Folmer. Furthermore, it seems obvious that the decision by an en banc panel of the Fourth District should have more weight and authority that a three person panel of that same court, and therefore the Second District was further

justified in following Folmer. It is now for the Fourth District to resolve the internal conflict which exists within it before it can truly be said that a conflict exists between different District Courts.

Respectfully submitted,



Matthew R. Danahy, Esquire
SHOFI, SMITH, HENNEN, JENKINS,
STANLEY & GRAMOVOT, P.A.
Post Office Box 10430
Tampa, Florida 33679
(813) 876-7796
FBN 606693
Attorneys for Respondent

## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that a true and correct copy of the foregoing Brief and Appendix has been mailed to the following counsel of record this 8 day of ~~April~~ May, 1995:

ARNOLD R. GINSBERG, P.A.
and NANCE, CACCIATORE, SISERSON
& DURYEA, P.A.
410 Concord Building
Miami, Florida 33130

Matthew R. Danahy, Esquire

3007.8953/njc-10