IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-2313

STATE FARM MUTUAL AUTO-
MOBILE INSURANCE CO.,

Petitioner,

vs.

MARGARET ROACH and
THOMAS ROACH,

Respondents.
_____/

ON DISCRETIONARY REVIEW OF A CERTIFIED QUESTION
FROM THE DISTRICT COURT OF APPEAL OF FLORIDA,
SECOND DISTRICT

RESPONDENTS' BRIEF ON THE MERITS

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I.
STATEMENT OF THE CASE AND FACTS

In our judgment, because State Farm has confused the separate and quite different concepts of "domicile" and "residence" (a point upon which we will elaborate briefly in our argument), its statement of the case and facts tells the Court much more than it needs to know to decide the issue presented here. Its statement is also somewhat argumentative. We therefore prefer to restate the case and facts in more succinct terms.

Thomas and Margaret Roach, residents of Lake Wales, Florida, since 1992, were next-door neighbors of Ivan and Betty Hodges. On the evening of January 26, 2001, the four of them were driving to the Lake Wales Little Theater to take in a play. Mr. Hodges was driving a 1990 Oldsmobile that he owned, when it suffered a mechanical or electrical problem that caused it to reduce its speed. While Mr. Hodges was looking for a safe place to pull off the highway, the Oldsmobile was rear-ended at high speed by a Ford Explorer owned by Douglas Elmore and driven by his son, Matthew Elmore. The Roaches were seriously injured; Betty Hodges was killed. (Depo. at R3 472, pp. 11-37; R4 706-09; Exh. Q to stip'n at R4 760).

The Roaches filed negligence actions against Mr. Hodges and the Elmores (R1 7-15). Their complaint included a count against State Farm Mutual Automobile Insurance Company seeking underinsured motorists coverage under the policy issued to Mr. Hodges on the 1990 Oldsmobile, which provided underinsured motorists benefits in the amount of 100/300 (Exh. F to stip'n at R4 760). The Roaches subsequently settled with the Elmores for their liability policy limits of 100/300 (R1

188-89; R5 842-43). They also settled with State Farm, in its capacity as liability insurer of Mr. Hodges, for its liability policy limits of 100/300 (Exh. F to stip'n at R4 760; R5 842-43). The action then proceeded against State Farm for underinsured motorists benefits under the policy.

A complete copy of Mr. Hodges' State Farm policy is in the record at R4 572-95. At page 12 of the policy, the term "insured" is defined for purposes of under-insured motorists coverage to include Mr. Hodges, his spouse and relatives, and "any other *person* while *occupying: your car* . . . ," so the Roaches are "insureds" under the policy and are entitled to underinsured motorists benefits under the policy unless coverage is excluded elsewhere. State Farm moved for summary judgment in its favor (R2 275-76), contending that coverage was excluded by the following provision at page 11 of the policy:

> We will pay damages for *bodily injury* an *insured* is legally entitled to collect from the owner or driver of an *under-insured motor vehicle*. The *bodily injury* must be caused by accident arising out of the operation, maintenance or use of an *underinsured motor vehicle*.
>
> . . . .
>
> *Underinsured Motor Vehicle* - means a land motor vehicle:
>
> 1. the ownership, maintenance or use of which is insured or bonded for bodily injury liability at the time of the accident; and
>
> 2. whose limits of liability for bodily injury liabil-ity:

> a. are less than the limits *you* carry for underinsured motor vehicle coverage under this policy; or
>
> b. have been reduced by payments to *persons* other than the *insured* to less than the limits *you* carry for underinsured motor vehicle coverage under this policy.

This provision is permissible under the law of Indiana, the state in which the policy was issued to Mr. Hodges. However, it is both repugnant to the public policy of Florida and impermissible under Florida law, which provides that underinsured motorist coverage must be:

> . . . over and above . . . the benefits available to an insured . . . under any motor vehicle liability insurance coverage . . . and such coverage shall cover the difference, if any, between the sum of such benefits and the damages sustained, up to the maximum amount of such coverage provided under this section. The amount of coverage available under this section shall not be reduced by a setoff against any coverage, including liability insurance. . . .

Section 627.727(1), Fla. Stat. *See Woodard v. Pennsylvania National Mutual Insurance Co.*, 534 So.2d 716 (Fla. 1st DCA 1988), *review dismissed*, 542 So.2d 989 (Fla. 1989).

In other words, the Roaches are entitled to underinsured motorists benefits under State Farm's policy if Florida law applies; they are not entitled to underinsured motorists benefits if Indiana law applies. The trial court ruled that Indiana law applied; it granted State Farm's motion for summary judgment; and it entered a final judgment

in State Farm's favor (R3 842-44, 847-48). Because the Roaches' claim was adjudicated on a motion for summary judgment, we are entitled to have the facts viewed here in a light most favorable to the Roaches, with all conflicts resolved in their favor, and we will state the underlying facts accordingly. *See, e. g., Moore v. Morris*, 475 So.2d 666 (Fla. 1985); *Wills v. Sears, Roebuck & Co.*, 351 So.2d 29 (Fla. 1977).

The policy was issued to Mr. Hodges in Indiana, at an Indiana address, by an Indiana agent in 1998, and renewed annually thereafter (depo., at R2 277, pp. 14-15; Exh. F to stip'n at R4 760). Mr. Hodges owned a home in Indiana, and at the time he applied for the policy in 1998, he had a Florida driver's license (R2 277, pp. 28-30; Exh. P to stip'n at R4 760). The Oldsmobile was owned by Mr. Hodges and registered in Indiana (Exh. A to stip'n at R4 760). At the time of the accident in suit, Mr. Hodges had an Indiana driver's license (Exh. D to stip'n at R4 760). The definition of "insured" under the liability coverage (at page 6 of the policy) includes Mr. Hodges' spouse, and Mrs. Hodges is named as an additional driver of the Oldsmobile on the declarations page of the policy (Exh. F to stip'n at R4 760). Mrs. Hodges owned a home in Florida, and from 1998 to the date of the accident in suit, she had a Florida driver's license (Exhs. E & Q to stip'n at R4 760; depo. at R3 472, pp. 42-46).

And here are the four facts upon which the issue before the Court will turn: (1) for the six warm months of the year, Mr. and Mrs. Hodges resided at their home in Indiana; (2) for the six cold months of the year, Mr. and Mrs. Hodges resided at their home in Florida; (3) according to Mr. Hodges, the State Farm agent who had issued

the policy in 1998 and renewed it annually thereafter was fully informed of and aware of the fact that he and his wife "wintered" at their Florida residence; and (4) the Roaches are Florida residents, next-door neighbors of the Hodges, and as noted above, "insureds" under the underinsured motorists coverage of the Hodges' policy (depo. at R3 472, pp. 5, 39-43, 49-55; R4 706-09).[1/]

Because State Farm has done its best to minimize the significance of these key facts, we deem it prudent to reinforce them with the deposition testimony of Mr. Hodges himself:

> Q. Did you spend a bunch of time in Florida?
>
> A. Yeah, six months out of the year.
>
> Q. Did your insurance company -- have you had discussions with them? Had you told them about it?
>
> A. Oh, yes.
>
> Q. Was that before this accident?

[1/] In an apparent effort to minimize the significance of these facts, State Farm describes the Hodges' Florida residence as a "mobile home." The record references provided for the characterization do not support it, however. And, of course, whatever the nature of the physical structure of the residence, the fact remains that the Hodges resided in it six months out of the year -- which is the essential fact relevant to the issue before the Court.

Similarly, State Farm suggests that the Roaches may have been "snowbirds" like the Hodges, rather than year-round Florida residents. This suggestion appears to be supported inferentially by the record, but the fact remains that, at the time of the accident in suit, the Roaches were residing in their Florida home. It is also entirely irrelevant that the Roaches may "no longer have that Florida property" -- a representation which is also unsupported by the record reference provided for it.

A. Yes. In fact --

Q. Go ahead.

A. In fact, I put the car that was in the accident, the year before, was on vacation, it was parked in my garage all year.

Q. Your garage in Florida?

A. In -- garage in Indiana.

. . . .

A. And I talked to the insurance agent about it, you know, they put it on vacation, so that the insurance company knew that I spent my six months out of the year down here.

Q. Who did you talk to at the insurance company for that information, do you remember? Was it your agent?

A. Jim Swain, yes.

Q. His name is Jim Swain?

A. Jim Swain or his wife.

. . . .

Q. And so you told this to Mr. Swain before --

A. I'm sure he knew it.

Q. Okay. And you actually have memories of talking to him about it; is that right?

A. Yeah. Him or his wife.

Q. His wife works in the store too?

A. His wife works in the office also.

Q. And you would send--did you--you pay them for your upcoming premiums and stuff like that?

A. Well, I made arrangements that year, yes. And other years, in past, I've made arrangements, you know, called them on the telephone and just, you know, put the car on vacation.

. . . .

Q. And how long did you live in Indiana.

A. Practically all my life except -- well, for six months out of the year since '93, we spent it here.

Q. So up until '93 when you acquired some property in Florida?

A. Uh-huh.

. . . .

Q. In 1993, did you purchase property in Florida?

A. Yes.

Q. And in what location was that?

. . . .

A. Number 36 Breeze Hill, Lake Wales, Florida.

Q. Now, you've testified that you spend six months a year in Indiana?

A. Approximately.

. . . .

Q. Now, when you were asked some questions earlier in your deposition, you said that you've told State Farm about the fact that you were down here six months a year.

A. Yeah.

Q. Who from State Farm did you tell that to?

A. Jim Swain, Jim Swain's wife, Joanne Swain.

Q. Joanne Swain. She works with him in his agency?

A. Yeah.

Q. Was there anything –

A. Also has a secretary there.

. . . .

Q. Did you ever tell that to the secretary or just to Jim Swain?

A. I've told the secretary also.

. . . .

Q. When did you first tell someone from the Swain agency that you had a winter address down in Florida?

A. I don't remember. I don't know. I just know that they knew that we were -- we wintered in Florida every year. And I know for sure they had our address in '99, '98 and '99.

. . . .

> Q. Well, when you told him you'd been to Florida, did you say I've been to Florida to live for six months or did you say, I visited, or what did you tell him?
>
> A. No. I just told him I lived down here.

(R3 Depo. at 472, pp. 5-6, 39-40, 47, 54-55).

For his part, the agent conceded that, of the 1,400 "households" that were his customers, somewhere between 50 and 100 were "snowbirds" like the Hodges with two homes and two automobiles; he conceded that he was aware that the Hodges were "spending time in Florida"; but he denied that he was aware that the Hodges resided in Florida part of the year (depo. at R2 277, pp. 16-20, 41; R4 569-71).[2/] This conflict was arguably sufficient to prevent entry of a summary judgment in the Roaches' favor on the coverage issue, but for purposes of this appeal Mr. Hodges' testimony must be accepted as true.

It was our position below that, because State Farm knew that the policy it issued in Indiana insured a risk located in Florida six months out of the year (for nine consecutive years), and because the Roaches were Florida residents and "insureds" under the underinsured motorists coverage of the policy, and because the Roaches' underinsured motorists claim arose out of an accident that occurred in Florida, Florida

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[2/] To accommodate Indiana "snowbirds" with two automobiles, like the Hodges, State Farm permitted them to put one automobile on "vacation" in Indiana at a reduced premium while they "wintered" elsewhere with the other automobile, and the Hodges took advantage of this benefit the winter before the accident in suit (depo. at R2 277, pp. 18-24; depo. at R3 472, pp. 5-7, 51-53).

law must be applied in determining the underinsured motorists benefits available to the Roaches.

Following the precedent established by this Court's decision in *Gillen v. United Services Automobile Ass'n*, 300 So.2d 3, 83 A.L.R.3d 313 (Fla. 1974), as well as its progeny, the district court agreed with our position and certified the following question of great public importance to this Court:

> WHEN FLORIDA IS THE FORUM FOR AN ACTION TO OBTAIN UNDERINSURED MOTORIST BENEFITS UNDER AN INSURANCE CONTRACT THAT IS OTHERWISE GOVERNED BY THE LAW OF ANOTHER STATE, MAY AN INSURED INVOKE FLORIDA'S PUBLIC POLICY TO INVALIDATE AN EXCLUSIONARY CLAUSE PROHIBITING THE "STACKING" OF UNDERINSURED MOTORIST BENEFITS WHEN THERE IS A SIGNIFICANT DEGREE OF PERMANENCY IN THE INSURED'S SOJOURN IN FLORIDA AND THE INSURER IS ON REASONABLE NOTICE THAT THE RISK OF THE POLICY IS CENTERED IN FLORIDA AT THE TIME OF THE ACCIDENT THAT OCCURRED IN FLORIDA?

At pages 19-22 of its brief, State Farm quarrels with the district court's formulation of the certified question. Because the quarrel is more semantic than substantive, we will address it here rather than in the argument section of the brief. We agree with State Farm that the district court may have misspoken itself as a technical matter when it described the policy provision in issue here as a "clause prohibiting the 'stacking' of underinsured motorist benefits." The term does have a technical meaning that is more appropriately used in a different context, as State Farm explains.

However, we do not agree with State Farm's contention that it was inappropriate to describe the policy provision in issue here as an "exclusionary clause." The policy expressly provides underinsured motorists' coverage on the one hand, and then takes it away with a definition of "underinsured motor vehicle" that amounts to an "other insurance" clause depriving the Roaches of *any* coverage on the facts in this case. That certainly sounds like an "exclusionary clause" to us, and the fact that the exclusion is disguised as a "definition" limiting coverage extended elsewhere in the policy does not make it any less of an exclusion. In any event, State Farm's quarrel is largely a semantic one which does not go to the substance of the issue before the Court. And if the Court is of a mind to restate the question to satisfy State Farm's complaints, we propose the following:

> When an automobile insurance policy is issued in Indiana with knowledge that it covers a risk centered in Florida six months out of the year, can a limitation of underinsured motorists coverage -- which is valid under Indiana law, but contrary to Florida law -- be enforced against Florida residents who are insureds under the policy and who are injured in an automobile accident in Florida?

II.
ISSUE PRESENTED FOR REVIEW

> WHETHER THE DISTRICT COURT ERRED IN HOLDING THAT FLORIDA'S PUBLIC POLICY INVALIDATES AN EXCLUSION FROM UNDER-INSURED MOTORISTS COVERAGE IN AN INSUR-ANCE CONTRACT, WHERE THE INSURED RESIDES IN FLORIDA WITH A SIGNIFICANT DEGREE OF PERMANENCY AND THE INSURANCE COMPANY IS ON NOTICE THAT THE RISK OF THE POLICY IS

CENTERED IN FLORIDA AT THE TIME OF AN ACCIDENT THAT OCCURRED IN FLORIDA.

III.
SUMMARY OF THE ARGUMENT

Our argument will be brief enough that a summary of it here would amount to little more than mere repetition, at the Court's expense. Respectfully requesting the Court's indulgence, we turn directly to the merits.

IV.
ARGUMENT

THE DISTRICT COURT DID NOT ERR IN HOLDING THAT FLORIDA'S PUBLIC POLICY INVALIDATES AN EXCLUSION FROM UNDER-INSURED MOTORISTS COVERAGE IN AN INSUR-ANCE CONTRACT, WHERE THE INSURED RE-SIDES IN FLORIDA WITH A SIGNIFICANT DEGREE OF PERMANENCY AND THE INSUR-ANCE COMPANY IS ON NOTICE THAT THE RISK OF THE POLICY IS CENTERED IN FLORIDA AT THE TIME OF AN ACCIDENT THAT OCCURRED IN FLORIDA.

A. The insureds' position.

It is safe to say that the centerpiece of State Farm's argument is *Sturiano v. Brooks*, 523 So.2d 1126 (Fla. 1988). According to State Farm, *Sturiano* establishes an "inflexible" bright-line rule that is entirely insensitive to the actual location of the risk being insured, notwithstanding that the single most important fact governing the underwriting of an automobile insurance policy and the rating of its premiums is the

location of the risk being insured. We disagree that *Sturiano* controls the issue presented here. The controlling decision, in our judgment, is *Gillen v. United Services Automobile Ass'n*, 300 So.2d 3, 83 A.L.R.3d 313 (Fla. 1974).

In that case, an insurance company issued an automobile insurance policy to its insured while he was residing in New Hampshire. The policy's uninsured motorist coverage contained an "other insurance" clause not unlike the policy issued by State Farm in this case. Six months after the policy was issued and delivered in New Hampshire, the insured moved to Florida and notified the insurance company of his change of residence. Two months later, the insured was killed in Florida in an automobile accident caused by the negligence of an uninsured motorist. Invoking the "other insurance" clause in the policy because equal coverage was available under a separate policy issued to the insured on a second automobile, the insurance company denied the insured's estate's claim for uninsured motorist benefits. The issue before the Court was, with minor variations on the facts, nearly identical to the issue presented here.

The Court rejected the insurance company's contention that New Hampshire law should control the coverage question because the policy was issued and delivered there. Noting that it had declared "other insurance" clauses violative of Florida's public policy in *Sellers v. United States Fidelity & Guaranty Co.*, 185 So.2d 689 (Fla. 1966), it held that Florida law would govern the coverage question for the following reasons:

> (1) The covered vehicles were garaged in Florida at the time of the accident, with appropriate notice having been given to United;
>
> (2) The Gillens had taken affirmative steps to establish residence in Florida;
>
> (3) *The risk of the policy was centered in Florida* and only minimal contact with New Hampshire existed in terms of actual risk.
>
> . . . .
>
> . . . Here, the substantial interest of Florida in protecting its citizens from the use of 'other insurance' clauses rises to a level above New Hampshire's interest in permitting them. Public policy requires this Court to assert Florida's paramount interest in protecting its own from inequitable insurance arrangements.

300 So.2d at 6-7 (emphasis supplied).

The language emphasized above -- "[t]he risk of the policy was centered in Florida" -- is the key phrase, of course. And, in our judgment, it was a perfectly sensible fact upon which to rest the result reached by the Court because, as noted previously, the location of the risk is the principal factor considered in underwriting and rating the premiums on an automobile insurance policy. The "location of the risk" is also the key factor that has determined the results in the several post-*Gillen* decisions that have confronted the issue on widely varying facts. Unfortunately, although the facts in the instant case are neither complicated nor unusual, given the substantial number of elderly "snowbirds" who spend their winter months at homes

they own in Florida, there is no clear answer to the question presented here in the decisional law.[3/] The "bookends" are fairly well delineated, however.

It is settled (at least in the Third District), on the one hand, that when an automobile insurance policy issued in another state for a risk centered in that state contains limited UM coverage repugnant to the broader coverage required by §627.727, the policy provisions will not be displaced by Florida law simply because the coverage claim arises out of an accident that occurred during a *transitory* excursion into Florida. That is the teaching of the Third District decisions upon which State Farm has relied here: *Aetna Casualty & Surety Co. v. Diamond*, 472 So.2d 1312 (Fla. 3d DCA 1985); *Allstate Insurance Co. v. Pierce*, 468 So.2d 536 (Fla. 3d DCA 1985); *New Jersey Manufacturers Ins. Co. v. Woodward*, 456 So.2d 552 (Fla. 3d DCA 1984); *State Farm Mutual Automobile Ins. Co. v. Davella*, 450 So.2d 1202 (Fla. 3d DCA 1984); *Aetna Casualty & Surety Co. v. Enright*, 258 So.2d 472 (Fla. 3d DCA 1972).[4/]

[3/] The absence of an answer is somewhat surprising given the considerable numbers involved. On November 23, 2004, in an article headlined "UF study profiles Florida snowbirds," The Miami Herald reported the results of recent research by the University of Florida's Bureau of Economic and Business Research, which determined that Florida is home to 920,000 "snowbirds" like the Hodges. The question presented here is therefore of obvious public importance. The article can be found in the archives at www.miami.com. The Bureau's research paper can be accessed at www.bebr.ufl.edu/Articles/Temp_Residents_2004.pdf.

[4/] For an elaboration on the *Enright* decision, *see* fn. 5, *infra*.

It is settled, on the other hand, that when an automobile insurance policy issued in another state for a risk centered in Florida contains limited UM coverage repugnant to the broader coverage required by §627.727, the policy provisions *will* be displaced by Florida law when the coverage claim arises out of an accident that occurred in Florida:

Gillen v. United Services Automobile Ass'n, 300 So.2d 3, 83 A.L.R.3d 313 (Fla. 1974) (policy issued in New Hampshire to residents of New Hampshire; insureds moved to Florida and notified insurer of move; center of risk shifted to Florida; accident occurred in Florida; Florida UM law applied).

Strochak v. Federal Insurance Co., 717 So.2d 453 (Fla. 1998) (policy issued in New Jersey to New Jersey resident; insured moved to Florida, registered automobile in Florida, and insurer was aware of move; accident occurred in Florida; Florida UM law applied; distinguishing *Sturiano v. Brooks*, 523 So.2d 1126 (Fla. 1988), on the ground that the insurer in that case was unaware of insured's move and "connection" to Florida).

Johnson v. Auto-Owners Insurance Co., 289 So.2d 748 (Fla. 1st DCA 1974) (policy issued in Alabama; insured traveled to and worked in Florida, and insurer was aware of this fact; accident occurred in Florida; Florida UM law applied).[5/]

[5/] State Farm notes that the "reasoning in *Enright* [*supra*, p. 15] was cited with approval by this Court in *H.S. Equities, Inc. v. Hartford Acc. & Indemnity Co.*, 334 So.2d 573, 576 (Fla. 1976)" (petitioner's brief, p. 31). It is worth noting here in turn that the Court also cited *Johnson* with approval in *H.S. Equities*:

> *Johnson v. Auto-Owners Ins. Co.*, 289 So.2d 748 (1st

Petrik v. New Hampshire Ins. Co., 379 So.2d 1287 (Fla. 1st DCA 1979) (policy issued in California to California residents insuring automobile driven by residents' son; son located automobile in Florida most of the year; insurer was aware that the risk was principally in Florida; accident occurred in Florida; Florida UM law applied), *cert. denied*, 400 So.2d 8 (Fla. 1981).

Decker v. Great American Insurance Co., 392 So.2d 965 (Fla. 2d DCA) (policy issued in Georgia to Georgia employer; automobile was assigned to company's traveling salesman, a Florida resident, for use in Florida; risk of policy centered in Florida; accident occurred in Florida; Florida UM law applied), *review denied*, 399 So.2d 1143 (Fla. 1981).

Safeco Insurance Co. of America v. Ware, 424 So.2d 907 (Fla. 4th DCA 1982) (policy issued in New Jersey to New Jersey employer; automobile assigned to Florida

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> D.C.A. Fla. 1974), involved uninsured motorist coverage in an automobile liability policy issued by an Alabama agency to a client who listed his home address on the application form as 'Route 1, Century, Escambia, Florida 32535 (In Alabama)' and the location of his employment as Pensacola, Florida. The [insurer] was licensed to do business in Florida and the accident itself occurred in Florida. The court found that Florida had ample contacts with the insured to apply its law, which voided an exclusionary clause on which the insurer sought to rely. . . . In *Johnson*, there was a specific risk which must have been foreseen by the parties and willingly accepted by the insurer in return for premiums paid by the insured. . . .

H.S. Equities, supra, 334 So.2d at 576. The concluding observation is equally applicable to the dual-state risk insured by State Farm in the instant case.

resident for use in Florida for part of year; insurer was on notice "of the exposure to a Florida risk"; "risk of the policy as to the vehicle concerned, was centered in Florida"; accident occurred in Florida; Florida UM law applied).

Safeco Insurance Co. v. Centennial Insurance Co., 572 So.2d 5 (Fla. 3d DCA 1990) ("There being no bona fide dispute on this record that the insured, at the time he applied for an automobile insurance policy in Colorado, notified the issuing company that he was a resident of the State of Florida, we affirm the trial court's summary judgment, which refused to enforce as contrary to Florida law the 'other insurance clause of the contract' pursuant to *Gillen* . . . .").

Although State Farm has cited *Amarnick v. Automobile Ins. Co. of Hartford, Connecticut*, 643 So.2d 1130 (Fla. 3d DCA 1994), as supportive of its position, the decision is actually consistent with the progeny of *Gillen* parsed above -- and a more elaborate explanation than we have given for the others is required. In *Amarnick*, decided six years after *Sturiano*, the Third District held that an excess policy issued and delivered in California by Aetna and a primary policy issued and delivered in New York by AIC provided uninsured motorists coverage under Florida law because the policies were written to cover risks that the insurers knew were located in Florida. Although it probably would have been sufficient for the court simply to have cited *Gillen* as authority for this conclusion, it reached the conclusion by a different and somewhat roundabout route:

> . . . Since AIC knew that the Jaguar was garaged in Florida, the policy was written to cover risks that would occur in Florida. Therefore, under the analysis of *Aperm of Florida*

> *v. Trans-Coastal Maintenance Co.*, 505 So.2d 459 (Fla. 4th DCA), *rev. denied*, 515 So.2d 229 (Fla. 1987), it follows that the policy was issued for delivery in Florida. *See also East Coast Ins. Co. v. Cooper*, 415 So.2d 1323 (Fla. 3d DCA 1982). Because the AIC policy covered a vehicle principally garaged in Florida and was issued for delivery in Florida, it must comply with Florida law and provide uninsured motorist coverage.

643 So.2d at 1132.

Both *Aperm of Florida* and *Cooper* conclude that a policy issued and physically delivered in another state to insure risks located in Florida must be considered to have been "issued for delivery in Florida," and that the mandatory insurance requirements contained in Chapter 627, Fla. Stat., will therefore govern any coverage questions that arise from Florida risks under the policy. While this notion of "constructive delivery" makes eminently good sense to us and is certainly helpful to our position here, it seems to complicate unnecessarily the simpler point that *Gillen* establishes -- that, when an automobile insurer knows that the risk it is insuring is located in Florida, Florida law will prevail over provisions in the policy that violate the paramount public policy embodied in §627.727, Fla. Stat. In any event, its protestations to the contrary notwithstanding, State Farm cannot find support for its position here in *Amarnick*.

The sum and substance of these many decisions is fairly straightforward. When an automobile insurance policy issued in another state for a risk centered in that state contains limited UM coverage repugnant to the broader coverage required by §627.727, the policy provisions will not be displaced by Florida law simply because the coverage claim arises out of an accident that occurred during a transitory excursion

into Florida. On the other hand, when an automobile insurance policy issued in another state for a risk centered in Florida (with knowledge that the risk is centered there) contains limited UM coverage repugnant to the broader coverage required by §627.727, the policy provisions *will* be displaced by Florida law when the coverage claim arises out of an accident that occurred in Florida. And because State Farm was aware that the risk it insured in the instant case was centered in Florida six months of the year, this case deserves to be added to the many decisions upon which we have relied, not the handful upon which State Farm has staked its case here.

It is also worth reminding the Court that it is not the Hodges who are claiming UM coverage here. It is the Roaches, who are next-door neighbors of the Hodges when they live in Florida six months of the year -- and if this case presents a close question, that should make all the difference here, because the Roaches are expressly defined in State Farm's policy as additional "insureds" for the purposes of underinsured motorists coverage. Section 627.727 is not designed to protect only the Hodges; it is designed to protect Florida residents, like the Roaches, as well -- and Florida residents, like the Roaches, should not be denied the benefit of Florida law simply because the insurance policy providing their underinsured motorists coverage was issued in Indiana on an automobile that spent six months of the year traveling Florida's roads or parked in their next-door neighbors' Florida garage. The district court's decision is supported by ample precedent; it is correct; and it should be approved.

B. The insurer's position.

It remains for us to address the several arguments that State Farm and its amicus have made in pursuit of a contrary result. Their principal argument appears to be that an insurer's knowledge of the location of the risk it insures is no longer relevant and *Gillen* is no longer good law -- that *Gillen* was overruled by *Sturiano v. Brooks*, 523 So.2d 1126 (Fla. 1988), and replaced with an *inflexible* rule that mandates application of Indiana law notwithstanding that it is repugnant to a paramount public policy of Florida. The identical argument was made and rejected by this Court in *Strochak v. Federal Insurance Co.*, 717 So.2d 453, 454-55 (Fla. 1998):

> FIC argues that Florida law does not apply because under Florida choice of law rules, a contract for automobile insurance is controlled by the law of the jurisdiction where the contract was executed, and Strochak's policy was executed in New Jersey. FIC relies on *Sturiano v. Brooks* . . . .
>
> . . . .
>
> . . . In *Sturiano*, this court concluded that New York law applied because the insurance contract was executed there, but we noted that the insurance company did not know of the insured's move or connection to Florida.
>
> In the instant case, FIC knew of Rita Strochak's move and connection to Florida . . . . Under these circumstances, we must presume that the parties to this contract bargained for, or at least expected, Florida law to apply. . . .

It is therefore clear that *Sturiano* did *not* overrule *Gillen*. *See also Gordon v. Russell*, 561 So.2d 603 (Fla. 3d DCA) (concluding that *Sturiano* did not overrule *Gillen*), *review dismissed*, 570 So.2d 1304 (Fla. 1990); *Barnier v. Rainey*, 890 So.2d 357 (Fla.

1st DCA 2004) (similar); *In re Estate of Nicole Santos*, 648 So.2d 277 (Fla. 4th DCA 1995) (similar).[6/]

There is also, in our judgment, little to recommend a rule of law that is so *inflexible* that it requires the judiciary to ignore reality in favor of a fiction that is undeniably contrary to the expectations of *all* parties to an automobile insurance contract. Certainly, automobile insurers expect to be compensated with premiums calculated to cover the risk to which they are exposed, and the location of that risk, rather than the address to which the policy is mailed, is therefore the principal consideration in calculating those premiums. Similarly, insureds reasonably expect to be governed by and obtain the benefits of the law in the state where the risk is located, not the law of a state a thousand miles away. Location of the risk is therefore the only sensible pivot upon which the issue presented here should turn, as it did in *Gillen*.

It is also worth noting that, with respect to part-time Florida residents like the Hodges at least, the *inflexible* rule that State Farm advocates here will likely amount to a windfall to insurers, at considerable economic expense to Florida's 920,000

[6/] This Court's post-*Sturiano* decision in *Lumbermens Mutual Casualty Co. v. August*, 530 So.2d 293 (Fla. 1988), is not inconsistent with *Gillen*, as State Farm claims. In that case, a Massachusetts resident covered by a Massachusetts insurance policy was injured "while travelling in the State of Florida." 530 So.2d at 294. The Court described the location of the accident as a "fortuity." *Id.* at 296. And the victim sought UM coverage in accordance with Massachusetts law, not Florida law, as State Farm claims. The issue presented was which state's statute of limitations should apply. No contention was made that the coverage provisions in the Massachusetts policy were violative of the paramount public policy of Florida embodied in §627.727.

"snowbirds." State Farm and its amicus are most probably wrong in suggesting that the district court's decision, if approved, will increase insurance premiums to Florida's "snowbirds." The opposite will more likely be true. Surely, insurance premiums are considerably higher in cities that are typically home to "snowbirds" -- like Chicago, Indianapolis, Cleveland, Detroit, Philadelphia, New York, Boston, and the like -- than they are in small central Florida retirement communities like Lake Wales, so it is probable that the Hodges were paying far more for their various coverages (such as liability, theft, collision, and the like) than their actual risk presented to State Farm. A public policy requiring recognition of the *reality* of where the risk is centered will therefore likely have the salutary effect of reducing the cost of insurance to Florida's "snowbirds," not the other way around.

Neither will approval of the district court's decision present insurers with an "impossible burden," as State Farm and its amicus claim. Insurance quotations can be obtained within minutes over the telephone today; the answers to a few standard questions (including, of course, the location of the risk) are simply typed into a computer, and the appropriate rates for the risk involved are available within seconds. Armed with the knowledge that the Hodges resided six months in Anderson, Indiana, and six months in Lake Wales, Florida, State Farm (which is licensed to do business nationwide, including Florida) could readily have calculated a blended premium that would have protected it against the projected risks at both locations -- a premium that would most likely be far fairer to the Hodges than the inflated premium that they probably paid. It could also have issued a six-month policy rather than an annual

policy, as many insurers do. Or it could have issued separate policies complying with the laws of each state during the Hodges' period of residence in each state. And in any event, the administrative convenience of insurance companies ought to be a far less weighty consideration here than "Florida's paramount interest in protecting its own from inequitable insurance arrangements." *Gillen, supra*, 300 So.2d at 7.

State Farm also contends that §627.727 represents Florida's public policy *only* where an automobile insurance policy is delivered to or issued for delivery in Florida or provides coverage for an automobile registered or principally garaged in Florida, and that it therefore had no duty to offer the Hodges the UM coverage required by the statute. As the district court correctly recognized, however, the issue presented here is not whether State Farm had a duty to offer UM coverage that complied with the statute. The issue is whether a Florida court will enforce a provision in State Farm's policy that is repugnant to a paramount public policy of Florida -- enforce it against Florida residents who are insureds under the policy and who are injured in an automobile accident in Florida -- when the policy was issued with knowledge that it covered a risk centered in Florida six months of the year, and when the accident occurred during that six-month period. That, of course, is quite a different issue than the one State Farm has chosen to argue here.

Moreover, as *Gillen* and all of the remaining decisions upon which we have relied make clear, the fact that the Hodges' policy was delivered to or issued for delivery in a state other than Florida is simply irrelevant to the question of whether a Florida court will enforce a policy provision repugnant to Florida public policy on

facts like those in the instant case -- because, in each of them, Florida law was applied where the insurer was aware that the risk it insured was centered in Florida, notwithstanding that the policy was issued and delivered elsewhere.[7/]

Neither are we required to demonstrate that the Hodges' 1990 Oldsmobile was "registered" or "principally garaged" in Florida, because we are not contending that State Farm had a duty to offer UM coverage that complied with §627.727. As the decisions upon which we have relied demonstrate, the issue of whether a Florida court will enforce a policy provision repugnant to the public policy of this state in an action brought by Florida insureds for injuries suffered in a Florida accident turns upon the insurer's knowledge or lack of knowledge that the risk it insures is centered in Florida -- not upon where the insured automobile is "registered" or "principally garaged" (and it is worth noting that these two terms appear in the statute in the disjunctive).

And even if we were required to demonstrate that the Hodges' 1990 Oldsmobile was "principally garaged" in Florida, nothing in the decisional law suggests that that

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[7/] State Farm recognizes that coverages and premiums are generally based on the location of the risk, but argues that, despite its knowledge of the location of the risk, it was not its responsibility to anticipate that a UM claim might arise out of a Florida accident while its insureds were residing in Florida. Rather, it contends that, if the Hodges wanted UM coverage complying with Florida law while residing in Florida, they should have obtained the coverage from a Florida State Farm agent. The Hodges could have done that, of course, since they were residents of Florida for half the year, but then the problem presented here would simply have been reversed if the Hodges had had an accident in Indiana during the warm months of the year. The fairer solution for *all* parties -- both insureds and insurers -- is to ensure that policy terms and policy premiums are based realistically on the location of the risks insured. And that, we suggest, is essentially the message that this Court intended to send to the insurance industry in *Gillen*.

determination must be made by counting the days in which the automobile was garaged in Indiana and the days in which it was garaged in Florida; comparing the two numbers as a percentage of a 365-day year; and then awarding State Farm the benefit of Indiana law simply because the automobile may have been garaged in Indiana slightly more than 50% of the year. On the facts in this case, it is simply undeniable that the Hodges' automobile was "principally garaged" in Indiana for six months of the year and "principally garaged" in Florida for six months of the year -- so, if the location of the automobile's "principal garage" is a requirement for application of Florida's public policy, as State Farm claims, that requirement has plainly been met.[8/] Most respectfully, resolution of the issue presented here must turn on the reality of the location of the insured risk, not upon the address to which the policy was mailed.

State Farm also attempts to exclude Florida's 920,000 "snowbirds" from the paramount public policy embodied in §627.727 by arguing that the policy should only apply to "permanent residents" of Florida. It contends that the Hodges must be considered "permanent residents" of Indiana because they voted there, paid state taxes

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[8/] In what amounts to a simple arithmetical game, State Farm points out that the 1990 Oldsmobile was placed on "vacation" and remained in Indiana in the winter preceding the accident in suit -- and it contends that this reinforces its position that the automobile was "principally garaged" in Indiana. This argument misses the point as well. State Farm's policy insured *two* automobiles, a 1990 Oldsmobile and a 1996 Cadillac, and the Cadillac was usually driven to the Hodges' home in Florida for the winter (Exh. F to stip'n at R4 760; depo. at R3 472, pp. 8, 13, 51-52, 86-88). The Oldsmobile was driven to Florida during the winter of 2000-2001 because the Hodges' son was trying to sell the Cadillac for them in Indiana (Depo. at R3 472, pp. 51-52). State Farm was therefore aware that the risk it insured was centered in Florida six months of the year, whichever automobile was utilized for the trip.

there, and had a homestead exemption there -- and that the Roaches are not entitled to the protection provided by the statute as a result. Actually, the term "permanent resident" has no real legal significance, except as a loose synonym for the legal concept of "domicile."[9/] State Farm may very well be correct that the Hodges were "domiciled" in Indiana, notwithstanding that they resided six months of the year in Florida -- but "domicile" and "residence" are two entirely different things.

Domicile is not synonymous with residence. A person can have only one domicile, but he may have a domicile in one place and reside in another place (or in many places). *See Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48, 109 S. Ct. 1597, 104 L. Ed.2d 29 (1989); *District of Columbia v. Murphy*, 314 U.S. 441, 62 S. Ct. 303, 86 L. Ed. 329 (1941); *Williamson v. Osenton*, 232 U.S. 619, 625, 34 S. Ct. 442, 58 L. Ed. 758 (1914). Florida law is the same, as explained in Judge Altenbernd's thorough explanation of the point in *Maldonado v. Allstate Insurance Co.*, 789 So.2d 464 (Fla. 2d DCA 2001). In addition, *see Robinson v. Fix*, 113 Fla. 151, 151 So. 512, 513 (1933) (" . . . one may be a resident of one jurisdiction although having a domicile in another"); *quoting Warren v. Warren*, 73 Fla. 764, 75 So. 35, 42 (1917).

If we are correct that application of Florida law depends upon the location of the risk, as *Gillen* holds, then the relevant concept here is residence, not domicile. At the time of the accident in suit, both the Hodges and the Roaches resided at their

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[9/] The terms "permanent resident" and "domicile" are used interchangeably in the Florida Statutes. *Compare* §196.012(18) *with* §222.17.

homes in Lake Wales; the risk insured by State Farm's policy was located in Florida as a result; and unless *Gillen* is to be overruled and replaced by the *inflexible* rule of *Sturiano* for the administrative convenience of the insurance industry, the district court's decision should be approved.

V.
CONCLUSION

It is respectfully submitted that the district court's decision is correct. The certified question should be answered in the affirmative and the district court's decision should be approved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 28th day of February, 2005, to: Thomas F. Neal, Esq., Drage, de Beaubien, Knight, Simmons, Mantzaris & Neal, LLP, 332 N. Magnolia Avenue, P.O. Box 87, Orlando, FL 32801; Charles W. Hall, Esq., Fowler White Boggs Banker, P.A., P.O. Box 210, St. Petersburg, FL 33731; and to Elizabeth K. Russo, Esq., Russo Appellate Firm, P.A., 6101 S.W. 76th Street, Miami, FL 33143.

CERTIFICATE OF COMPLIANCE

I hereby certify that the type style utilized in this brief is 14 point Times New Roman proportionally spaced.

BY:_____
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