In the Supreme Court of Florida

CASE NO. SC04-2313

STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY,

Petitioner,

v.

MARGARET ROACH and THOMAS ROACH,

Respondents.

ON DISCRETIONARY REVIEW FROM THE
SECOND DISTRICT COURT OF APPEAL

PETITIONER'S REPLY BRIEF ON THE MERITS

Respectfully submitted,

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A. REPLY TO RESPONDENTS' STATEMENT OF THE CASE AND FACTS

1. Reply to Respondents' accusations about misrepresentation of the record

Respondents' Answer Brief states that State Farm's Initial Brief has misrepresented the record. Because of the gravity of such an accusation, this Reply Brief begins by addressing that matter. There is full record support for all factual recitations in our Initial Brief, and the Respondents had no basis whatsoever for suggesting otherwise to this Court.

Respondents' Answer Brief states:

> State Farm describes the Hodges' Florida residence as a 'mobile home.' The record references provided for the characterization do not support it, however.

(Answer Brief, page 5 note 1). In fact, State Farm's brief accurately recounted the deposition testimony of Mr. Hodges on this point, with an appropriate supporting record reference. State Farm's Initial Brief states at page 7: "In 1993, [Mr. Hodges] purchased property in Lake Wales, Florida, and he and his wife had a mobile home on the property. (R 513, 521)." Mr. Hodges' referenced testimony stated that he purchased the Lake Wales, Florida property in 1993 (R 513), and that he looked into obtaining homeowner's insurance in Florida from State Farm but could not because "at that time State Farm was not giving it for double-wide mobile homes." (R 521).

Respondents' Answer Brief goes on to say that State Farm "suggests" that the Roaches "may have been 'snowbirds' like the Hodges rather than year-round Florida residents" which "suggestion appears to be supported inferentially by the record." (Answer Brief, page 5 note 1). Respondents go on to assert, however, that the statement in State Farm's Initial Brief that the Roaches "no longer have that Florida property" is "unsupported by the record reference provided for it." (Answer Brief, page 5 note 1). This accusation is also unfounded. State Farm supported the statement with the Roaches' sworn interrogatory answers from 2002, identifying their home addresses as Maryland from 1977 to 1997, and Pennsylvania from "1997 - present" (R 191 and R 206), and with the following uncontradicted deposition testimony of Mr. Hodges:

> Q: Do I understand that the Roaches were your next door neighbors [in Lake Wales, Florida] ?
> A: Yeah.
> Q: Do they still live there?
> A: No.

(R 539).

2. Reply to the remainder of Respondents' Statement of the Facts

Chiding State Farm for telling the Court "much more than it needs to know", Respondents announce that they will provide a 'more succinct' statement of the facts for the Court. Respondents then go on to repeat all of the facts that State Farm set out

in the Initial Brief. The main purpose of the re-telling - including the lengthy quotations from Mr. Hodges' deposition - appears to be repetition of the instances in which the Hodges' sojourns in Florida were loosely described as 'six months.'

As stated in the Initial Brief, Mr. Hodges did round up to 'six months' in his deposition, many times in fact, but his actual testimony as to the time period spent by the Hodges in Florida every year established that the time period was five to five-and-a-half months. Mr. Hodges testified that it was the Hodges' custom to stay in Indiana through Thanksgiving (R 513) - and then they would drive down from Indiana to Florida. (R 513-514). Mr. Hodges testified that they would then stay down in Florida "until usually about the last of April so it would get a chance to warm up back home[.]" (R 514). With Thanksgiving falling in the last two weeks of November and thereafter the drive from Indiana to Florida, Mr. Hodges' specific testimony shows that the stays in Florida were for five to five-and-a-half months. (R 513-514).

B. REPLY TO RESPONDENTS' ARGUMENTS

As noted in our Initial Brief, if, as appears the intent of the decision in *Sturiano v. Brooks*, 523 So. 2d 1126 (Fla. 1988), the rule of lex loci contractus controls in all cases involving automobile insurance contracts, then Indiana law applied here and the Second District decision must be overturned without more. Respondents, however, contend that there are still exceptions to *Sturiano*, relying primarily on this Court's

pre-*Sturiano* decision in *Gillen v. United Services Automobile Association*, 300 So. 2d 3 (Fla. 1974).

We disagree that *Sturiano* is not dispositive, but further disagree that *Gillen* would dictate a contrary result here. As also pointed out in the Initial Brief (reviewing all of the Florida cases that have dealt with such issues), Florida courts apply Florida law to determine UM insurance issues only in cases presenting *primary ties* with Florida, i.e., cases involving either (a) automobiles registered or principally garaged in Florida; or (b) insureds who are permanent Florida residents or in the process of becoming permanent Florida residents.

Respondents' Answer Brief suggests that Florida public policy should apply even in the *absence* of primary ties between Florida and the insureds or the insured automobile. Respondents propose an ill-defined alternative that seems to be based in part on consideration of where the risk is 'centered', and in part on the insurer's (or agent's) 'awareness' of where the risk is 'centered.' Thus, under Respondents' view, if a risk is 'centered' in Florida and the insurer or agent is aware that the risk is 'centered' in Florida, Florida public policy may be invoked to rewrite provisions of an out-of-state automobile policy.

We respond by noting that Respondent's use of the term 'centered', when examined, really means '*temporarily* centered', without Respondents providing any

limits on the temporal aspect of their test. Tellingly, however, Respondents then refer throughout their arguments to the Hodges' "six-month" stay down here, seeking to create the impression of at least a 'fifty-fifty' situation.

In fact, Respondents are advocating application of Florida law to risks that are 'centered' *less* than half of the time in Florida, i.e., automobiles that are not 'principally garaged' in Florida and insureds who are not permanent Florida residents and not in the process of becoming permanent Florida residents. And therein, we submit, lies the fatal flaw in Respondents's argument under Florida law. Respondents want Florida public policy to be applied to automobiles and insureds with *secondary* ties to Florida, when Florida law - quite sensibly and with due regard for comity - has always required *primary* ties to Florida to activate Florida public policy, as demonstrated not least by the very cases Respondents cite in 'support' of their position.

As discussed next, in all of Respondents' cases, the decision to apply Florida law or public policy turned on the presence of one of the requisite *primary* ties to Florida. We initially note, however, that Respondents have nowhere addressed the point made in our Initial Brief that Florida clearly does not even *have* a 'paramount' public policy interest in affording Florida UM benefits, as illustrated by the wording of the Florida UM statute itself and by the many Florida court decisions applying another state's law even though it means that the claimant/insured will receive no UM benefits at all -

Sturiano being just one of the many examples we cited. That noted, we review Respondents' cases to show that in every one a primary tie to Florida was the basis for application of Florida law or public policy.

In *Johnson v. Auto-Owners Insurance Co.*, 289 So. 2d 748 (Fla. 1st DCA 1974), for example, the insurance policy was issued to the insured ***as a Florida resident***, with the *Johnson* court observing: "The policy itself lists the appellant's address to be 'Route 1, Century, Florida 32535." 289 So. 2d at 749. Similarly, in *Decker v. Great American Insurance Co.*, 392 So. 2d 965 (Fla. 2d DCA 1980), *rev. denied*, 399 So. 2d 1143 (Fla. 1981), the court stated that the purpose of the Florida uninsured motorist statute was " to extend protection to persons who are insured under a policy covering a motor vehicle ***registered or principally garaged in Florida***." 392 So. 2d at 968. The fact that ***"the car was exclusively garaged in Florida"*** was the basis of the *Decker* court's decision that Florida's UM law applied to an automobile assigned by a company for use by its salesman who was a "permanent resident of Florida." 392 So. 2d at 966.

In *Safeco Ins. Co. v. Centennial Ins. Co.*, 572 So. 2d 5 (Fla. 3d DCA 1990), the application of Florida law to deny enforcement of an "other insurance" clause was specifically premised on the fact 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." 572 So. 2d at 5.

And, the court in *Petrick v. New Hampshire Ins. Co.*, 379 So. 2d 1287 (Fla. 1st DCA 1979) (an automobile liability insurance case inaccurately characterized by Respondents as a UM case holding that "Florida UM law applied" - Answer Brief at page 17) held that Florida law would be applied based on the fact that the car was principally garaged in Florida, and the insured in question resided in Florida: "***The car was garaged in Florida, as it had been for 46 weeks in the prior year; [and] the owner and operator of the car resided in Florida***[.]" 379 So. 2d at 1290.

Similarly, in *Gillen v. United Services Automobile Association,* 300 So. 2d 3 (Fla. 1974), the insureds had notified their insurer of their move to Florida, had been issued a new policy after their move acknowledging their change of domicile, and had effectively become permanent residents of Florida. The Court determined that the Gillens should be treated as citizens of Florida due to their move to Florida and their actions in establishing themselves as permanent residents:

> ***Concerning protection of one's citizenry***, it should be noted that the ***Gillens had purchased automobile tags, drivers' licenses, mortgaged their home in Florida and entered their children in local schools. They were in the process of establishing themselves as permanent residents of this State, and as such are proper subject of this Court's protection from injustice or injury.***

300 So. 2d at 6. The Court pointed out that "(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." 300 So. 2d at 6-7. The Gillens were thus deemed entitled to the protections afforded by Florida law because they were 'Florida's own': "Public policy requires this Court to assert Florida's paramount interest ***in protecting its own*** from inequitable insurance arrangements. 300 So. 2d at 7.

As the quoted portions of the cases indicate, Florida courts require *primary ties* to Florida to activate Florida public policy concerns in UM cases - again, either (a) an insured automobile that is registered or principally garaged in Florida, or (b) insureds who are, or are in the process of becoming, permanent Florida residents. Respondents' argument, taking the *Gillen* decision's phrase "risk was centered in Florida" out of context and in isolation, advocates allowing *secondary ties* to Florida to activate Florida public policy. But, neither *Gillen* nor any of the other cases cited by Respondents would countenance such a result.

Respondents' selective discussion of *Strochak v. Federal Insurance Co.*, 717 So. 2d 453 (Fla. 1998) serves as a perfect final illustration that *primary ties* to Florida must be present before Florida courts will apply Florida public policy. In quoting the *Strochak* Court's explanation of why Florida law was being held applicable "under

these circumstances", Respondents omit any reference to the very circumstances that the Court found to be critical - to wit, the primary ties to Florida. Thus, Respondents' Answer Brief provides only the following truncated excerpt from *Strochak*:

> 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. . .

(Answer Brief, page 10). The true basis of the application of Florida law in *Strochak*, however, was that the automobile was *registered and principally garaged in Florida* and that *a new Florida insurance policy had been issued* to the insured at his Florida residence. The unabridged version of the *Strochak* Court's reasoning is:

> In the instant case, FIC knew of Rita Strochak's move and connection to Florida: **the Lincoln was registered in Florida, principally garaged in Florida, and added to the Masterpiece policy in June 1990; the 1990 Masterpiece policy contained Florida policy terms and Florida signatures and was mailed to Strochak's Florida residence. Further, when compared to the 1985 policy, the 1990 policy was issued in the name of a different insured, contained a different policy number and provided different coverage.**
>
> **We therefore conclude that the 1990 Masterpiece policy that provided excess liability coverage for the 1984 Lincoln was not the same policy that was issued and delivered in New Jersey in 1985. The 1990 policy was issued and delivered in Florida, renewed in June 1992, and was in effect at the time of the accident.** Under these circumstances, we must presume that the parties to this contract bargained for, or at least expected, Florida law to apply. ***See Sturiano,* 523 So. 2d at 1130**.

Strochak, supra, 717 So. 2d at 455. The concluding reference to *Sturiano* (also omitted from Respondents' excerpt) is significant because it reflects the fact that the Court in *Strochak* ***was*** applying the lex loci contractus rule, not, as Respondents suggest, creating a post-*Sturiano* exception to the rule.

Respondents also discuss an insurer's (or agent's) 'awareness' of an insured's secondary ties to, e.g., Florida, as part of their test for imposing Florida's statutory UM requirements on a policy issued by the insurer or agent in the insured's home state. In this regard, Respondents ignore the fact - pointed out in our Initial Brief - that insurers and insurance agents are regulated on a state by state basis, in a manner over which they have no control. Thus, an insurer or insurance agent in Indiana, for example, can *only* write UM coverage that complies with Indiana's own statutory scheme. Indiana Code §§ 27-7-5-4, 27-7-5-5.

Whatever secondary ties an insured may have to another state - and whatever 'awareness' an insurer or agent may have of such ties - the immutable fact is that, while engaging in the business of insurance in a state, insurers and agents must comply with the insurance laws of that state, sell coverage as required and permitted by that state, use policy forms approved by that state, and charge the premiums permitted by that state for the coverage sold. An insured's *secondary ties* to another state do not change the obligations of insurers and agents operating in the insured's primary state.

Perhaps in recognition that there is at least *some* problem with their suggestion that Florida public policy should apply to insureds and/or automobiles with no primary or principal ties to Florida, Respondents turn to a contention that "it is simply undeniable" that the Hodges' automobile in this case was "*principally* garaged" in *both* Florida and Indiana, relying on their six months in Florida/six months in Indiana gloss. In addition to the absence of factual underpinnings for such a "fifty-fifty" argument (which, we suspect, would also be absent in most 'snowbird' cases), the logic defeats itself. Under the reasoning that an automobile is 'principally garaged' at its current location, an automobile would always be 'principally' garaged in its garage of the moment, be it a restaurant's valet parking garage, a friend's garage for an evening, or one of its 'principal' residence garages.

Respondents' Answer Brief next goes on to provide their counsel's speculations about the economic effects of the Second District's decision and his musings about the insurance needs of 'snowbirds' and how the insurance industry could be revamped to accommodate them (and thus also accommodate Respondents' position in this case). Counsel speculates that the lex loci contractus doctrine "will likely amount to a windfall for insurers," and that State Farm is "most probably wrong" that the effect of the Second District's decision would be to increase premiums. Counsel also offers his entirely *dehors*-the-record guess that insurance premiums are

"considerably higher" in northern cities where 'snowbirds' "typically" live than in "small central Florida communities like Lake Wales" (no guesses are provided about large Florida cities, and neither is there a showing that premium rating differs within a state based on the size of the insured's city or town), and therefore "probable" that the Hodges were paying more for their overall non-automobile insurance coverages "than their actual risk." (Answer Brief, page 22.)

Counsel also postulates a reworking of the process of writing UM insurance under which, by posing a few questions to the insured, an insurer could simply enter the information in a computer and calculate what counsel has dubbed a "blended premium" policy that will provide shifting coverages to insure the risk as it moves from location to location. Counsel posits that one possible way for implementing his 'blended premium' scheme of insurance is through the issuance of single "blended premium" policies with UM coverage that, chameleon-like, change to meet the varying (and often conflicting) UM laws and policies of the states through which the 'risk' may happen to travel. Counsel does not, however, address any of the obvious questions about how the premium for such a policy would be calculated. To recite but a few, should it be based on the highest rate of any state where the automobile may travel to make sure that no loss is being insured without a corresponding premium being collected? should the 'blended' rate be based on the amount of time the insured is

thinking of staying in each state? does the rate take into account potential changes in the insured's plans and travels? would the 'blended' rate premium be permissible under the law of the state of issuance ?

Counsel alternatively posits that his 'blended premium' plan for issuing UM coverage could possibly be implemented by issuance of separate policies under the laws of the different states. Using the Hodges as an example, Respondents state, referring to State Farm as **'it'**: "Or it could have issued separate policies complying with the laws of each state during the Hodges' period of residency in each state." (Answer Brief, p 23). This cavalier suggestion disregards the state-by-state regulation that controls every aspect of the insurance industry. As indicated above, the Indiana agent who issued the Hodges' UM policy was forbidden by Indiana statute from issuing a policy that did not comply with Indiana statutory UM requirements. And, neither State Farm nor any other insurer is a protean "it" that may operate freely on a 'national' basis outside the boundaries of the various states and the particular laws, regulations and public policies of each of those states.

Counsel's speculative surmisings are, in short, at odds with the realities of insurance regulation. They are also not based on any type of evidence made of record in this case. (R *passim*). They were not raised in any form before the trial court, and thus have no place at all in this appeal. *See, e.g., Thornber v. City of Fort Walton*

Beach, 534 So. 2d 754 (Fla. 1st DCA 1988)(it is inappropriate to interject matters into appellate proceedings that were not before the trial court); *Rosenberg v. Rosenberg*, 511 So. 2d 593 (Fla. 3d DCA 1987)(appellate review is limited to the record as made before the trial court).

Respondents conclude their Answer Brief with a less than entirely clear section on the difference between 'domicile' and 'residence' - a subject that was "confused" by State Farm, Respondents had advised at the beginning of their brief. (Answer Brief, page 1). As best we can tell from the Respondents' discussion, Respondents would like the Court to know that there are authorities that stand for the proposition that a person can have only one domicile but more than one residence. And, that Respondents believe that residence is the important concept here. So, the Respondents believe, the Roaches' and Hodges' Florida homes should be considered residences. Therefore, they conclude, the risk was located in Florida and Florida public policy should apply.

Whatever the legal significance of distinctions between 'domicile' and 'residence' in other contexts, we agree that people can own more than one house in more than one locale. Florida law will still look to the primary nature of the ties to Florida before applying Florida public policy to override another state's law or an out-of-state contract.

CONCLUSION

Based on the foregoing facts and authorities and those set forth in the Initial Brief, Petitioner State Farm respectfully submits that the decision of the Second District Court of Appeal should be reversed and the case remanded for reinstatement of the trial court's final summary judgment in favor of Petitioner.

Respectfully submitted,

By:_____

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the Petitioner's Reply Brief on the Merits was sent by U.S. mail this 28th day of March, 2005 to: Weldon Earl Brennan, Esquire, Wagner, Vaughan & McLaughlin, 601 Bayshore Boulevard, Suite 910, Tampa, Florida 33606; and Joel D. Eaton, Esquire, Podhurst Orseck, P.A., 25 West Flagler Street, Suite 800, Miami, Florida 33130.

_____

CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

Undersigned counsel hereby respectfully certifies that the foregoing Reply Brief on the Merits complies with Fla. R. App. P. 9.210 and has been typed in Times New Roman, 14 Point.

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