IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-240

JOHN RANDO, GAIL RANDO,
Appellants,

v.

Lower Tribunal No.: 08-13247-BB

GOVERNMENT EMPLOYEES
INSURANCE COMPANY,

Appellee.

ON CERTIFICATION OF QUESTION
BY THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPELLANTS' REPLY BRIEF

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ARGUMENT IN REPLY

The Insurer argues that its Anti-Stacking Provision is enforceable for three reasons: (1) Section 627.727(1), Florida Statutes (2005) does not apply to the Delaware Policy; (2) persons are free to contract and should be held subject to the terms of their contracts; and (3) Florida's public policy does not invalidate the Anti-Stacking Provision. (Answer Br. 6-7.) The first and third arguments are misplaced because they fail to acknowledge the impact of *Gillen* and the 1987 amendment to the UM statute. *Infra* Argument III. Once it is established that the Anti-Stacking Provision violates Florida's public policy, the Insurer's second argument easily may be dismissed because, in *Gillen* and other cases, this Court has invalidated contractual provisions that contravene public policy, even if the provisions were bargained for by the parties. *Infra* Argument IV. Before addressing these arguments, Plaintiffs first must clarify two points in reply to the answer brief: (i) Plaintiffs neither "insisted on" a Delaware-rated policy nor bargained for Delaware law, and (ii) the importance of the Insurer's knowledge that Plaintiffs, the insured risks, were relocating to Florida. *Infra* Argument I & II.

I. Plaintiffs neither "insisted on" a Delaware-rated policy nor bargained for Delaware law.

The Eleventh Circuit has not asked this Court to determine whether Florida or Delaware law applies. *Rando v. GEICO,* 556 F.3d 1173, 1181 (11th Cir. 2009). It has determined that Florida law governs the Delaware Policy based on the

Insurer's stipulation. *Id.* at 1176 n.5; (Doc. 67, at 3 n.1; Doc. 77, at 3-4). The Insurer stipulated to this after considerable litigation over where the Policy was executed. (*See* Appellants' 11th Cir. Principal Br. 5-8 (describing procedural history of the case).) The Insurer initially tried, albeit unsuccessfully, to prove that the Policy was executed in Delaware. (*Id.*) The Insurer's reason for trying was obvious. Delaware law enforces anti-stacking provisions. (*See* Answer Br. 17.) And, under this Court's *lex loci contractus* rule, a court must presume that the law of the state where a contract is executed is the governing law that was bargained for by the parties.[1] *E.g., State Farm Mut. Auto.e Ins. Co. v. Roach*, 945 So. 2d 1160, 1164 (Fla. 2006).

The Insurer, however, eventually surrendered on the choice-of-law dispute and stipulated that Florida law applied. *Rando*, 556 F.3d at 1176 n. 5; (Doc. 67, at 3 n.1; Doc. 77, at 3-4). Despite this stipulation, the Insurer repeatedly asserts in its answer brief that the Plaintiffs requested or insisted on a Delaware-rated policy, and even suggests that Plaintiffs bargained for a policy governed by Delaware law.

[1] Of course, the *lex loci contractus* rule applies only in the absence of a choice-of-law provision in a contract. *Cf. Mazzoni Farms v. E. I. Dupont De Nemours & Co.*, 761 So. 2d 306, 311 (Fla. 2000). Contrary to the Insurer's suggestion (Answer Br. 16), the Policy contained no choice-of-law provision, and the Insurer has not cited to such a provision in the record.

These numerous, mistaken assertions are set forth in footnote 2 below.[2] The Insurer fails to provide a single supporting citation to the record for any of assertions listed in footnote 2. Indeed, the Insurer's assertions contradict not only its own stipulation before the Eleventh Circuit, but also the record.

In his supplemental affidavit, Plaintiff John Rando stated, "I requested that [the Insurer] provide coverage for a 1996 Honda that was to be driven by my daughter [] in the State of Delaware." (Doc. 28-1, at 2, ¶ 8.) He did not mention any request for a *Delaware-rated* policy or that *Delaware law* would apply. Moreover, at a deposition, the Insurer's representative who spoke to Mr. Rando was asked whether she and Mr. Rando had discussed whether Florida or Delaware law would apply to the Policy. The representative responded, "I don't recall."

[2] Answer Br. 1 (stating that "[p]ursuant to Plaintiffs' request, [the Insurer] issued a Delaware-rated policy"); Answer Br. 11 (asserting that Plaintiffs "insisted upon maintaining a Delaware Policy to cover the 1996 Honda"); Answer Br. 12 (asserting that Plaintiffs "repudiated [the Insurer's] . . . concerns that the Delaware Policy should be converted to a Florida policy and insisted that the 1996 Honda should remain covered under a Delaware-rated policy"); Answer Br. 13 (asserting that the Delaware Policy was "knowingly and intentionally selected by Plaintiffs"); Answer Br. 15 (asserting that Plaintiffs "requested," and "insisted on purchasing," a "Delaware-rated policy," that Plaintiffs "rejected [the Insurer's] inquiry regarding changing the policy to a Florida policy," and that "execution of an out-of-state . . . policy carries the presumption that the parties bargained for the out-of-state law to apply to the interpretation of the policy"); Answer Br. 16 (stating "the selection of Delaware law through the selection of the Delaware-rated policy written on a Delaware policy form and delivered with an IMPORTANT MESSAGES section identifying Delaware law, governs the contractual choice of law in this case"); Answer Br. 23 (asserting that Plaintiffs rejected a change to a Florida policy and "insisted on keeping the Delaware Policy").

(Chapman Dep. 18 (located at Doc. 57).). No evidence supports the Insurer's assertions that Plaintiffs insisted on a Delaware-rated policy to be governed by Delaware law.

II. The Insurer knew that the insured risks, the Plaintiffs, were relocating to Florida, and this fact distinguishes this case from the cases relied upon by the Insurer.

To its credit, the Insurer does concede one critical fact. The Insurer admits that "Plaintiffs . . . did put [the Insurer] on notice of their move to Florida." (Answer Br. 11.) Indeed, the Insurer's representative conceded in her deposition that, based on her conversation with Plaintiff John Rando, she understood that Mr. Rando was moving to Florida. (Chapman Dep. 17 (located at Doc. 57).) In his own affidavit, Mr. Rando confirmed that he notified the Insurer that he and his wife were moving to Florida and that all their policies should be mailed to their Florida address. (Doc. 28-1, at 2.)

The Insurer, however, fails to acknowledge the importance of this concession. The Insurer asserts that it had "no reason to believe that the policy risk had relocated to Florida." (Answer Br. 11.) But this assertion ignores that, under Florida law, the named insureds, the Plaintiffs themselves, were the insured risks. (*See* Initial Br. 25 (citing *Coleman v. Fla. Ins. Guar. Assoc.*, 517 So. 2d 686, 689 (Fla. 1988) and other cases).) Given that ignorance of the law is not a defense, *e.g.*, *Buscher v. Mangan*, 59 So. 2d 745, 748 (Fla. 1952), the Insurer was charged

with knowing that the insured risks were relocating to Florida once it learned that Plaintiffs were relocating to Florida.

The Insurer further fails to recognize that its concession distinguishes this case from the two principal cases upon which it relies (*Woodward* and *Davella*)[3] and aligns the instant case with the case principally relied upon by Plaintiffs (*Gillen*). *Compare N.J. Mfrs. Ins. Co. v. Woodward*, 456 So. 2d 552 (Fla. 3d DCA 1984) *and State Farm Mut. Auto. Ins. Co. v. Davella*, 450 So. 2d 1202 (Fla. 3d DCA 1984) *with Gillen v. United Servs. Auto-Mobile Assoc.*, 300 So. 2d 3 (Fla. 1974). In *Woodward* and *Davella*, the insureds did not reasonably notify their insurers that they were permanently moving to Florida, whereas in *Gillen*, the insureds did give such reasonable notice to the insurer. *Compare Woodward*, 456 So. 2d at 553-554 *and Davella*, 450 So. 2d at 1203 *with Gillen*, 300 So. 2d at 5. Indeed, *Woodward* expressly distinguished *Gillen* in part on this basis,[4] 456 So. 2d at 553-54, and as the Insurer acknowledges, the *Davella* insured told the insurer

[3] *Woodward* can be further distinguished because it was not a stacking case, but rather concerns UM coverage limits. (Initial Br. 26.) *Davella* also can be distinguished on this exact same ground. 450 So. 2d at 1203 (noting dispute concerned UM coverage limits). In addition, *Davella* can be further distinguished because unlike in this case, in *Davella*, the policy was delivered to another state and the insured rejected a Florida policy. *Id.*

[4] Admittedly, *Woodward* also mentions the insureds' failure to notify the insurer that their vehicles had been moved to Florida. 456 So. 2d at 553-54. But, given that, under Florida UM law, the named insureds are the insured risks (Initial Br. 25), this fact should not matter.

there that her move to Florida may be temporary (Answer Br. 14 (quoting 450 So. 2d at 1203)). In contrast, in *Gillen* and this case, the insureds reasonably notified the insurer of their move to Florida. 300 So. 2d at 5; (Initial Br. 27; Doc. 67, at 2-4; Chapman Dep. 17 (located at Doc. 57); Doc. 28-1, at 2.)

In *Woodward* and *Davella*, perhaps it may not have been fair to require an insurer to comply with Florida law when the insurers did not have notice that the insured risks were relocating to Florida. But, just as in *Gillen*, it is fair in this case to require the Insurer to comply with Florida law because the Insurer knew that the insured risks, the Plaintiffs, were moving to Florida. Accordingly, if the Insurer wanted to enforce its Anti-Stacking Provision, it easily could have complied with Florida's informed consent requirements, as mandated by the Legislature in its 1987 amendment to the UM statute. The Insurer, however, argues that it may disregard the Legislature's informed consent requirements. This argument is wrong, as contended immediately below.

III. The Insurer is not excused from complying with the Legislature's 1987 amendment and the Judiciary's pro-stacking policy.

Having stipulated that Florida law applies, the Insurer must abide by all of Florida's laws. Under Florida law, before an insurer may enforce an anti-stacking provision in a UM policy, it first must comply with the informed consent requirements mandated by the Legislature in its 1987 amendment to the UM statute. (Initial Br. 14-19); § 627.727(9), Fla. Stat. (2005); *GEICO v. Douglas*, 654

So. 2d 118, 120 (Fla. 1995). The Insurer does not deny that this is required by the 1987 amendment, which was codified at subsection (9) of the UM statute, § 627.727, Fla. Stat. Instead, the Insurer argues that it is excused from complying with the Legislature's mandate because of another subsection of the UM statute, subsection (1). (Answer Br. 9-12.)

The Insurer, however, also does not deny that subsection (1) says nothing at all with regards to stacking or combining of coverages. (*See* Initial Br. 20-22.) By its plain language, subsection (1) simply means that the Insurer was not required to sell UM coverage to Plaintiffs in the first place because the insured vehicle was not principally garaged or registered in Florida. (Initial Br. 21); § 627.727(1), Fla. Stat. (2005). Equally plain in its language is the 1987 amendment, codified at subsection (9). § 627.727(9), Fla. Stat. (2005). In contrast to subsection (1), subsection (9) plainly does not limit its application solely to policies that: (i) are delivered or issued for delivery in Florida or (ii) cover motor vehicles registered or principally garaged in Florida. *Compare* § 627.727(9), Fla. Stat. (2005) *with* § 627.727(1), Fla. Stat. (2005).

The Insurer is attempting to engraft the two conditions from subsection (1) into the language of the 1987 amendment, codified at subsection (9). Granted, this argument has some appeal given that this Court has cited subsection (1) as the predicate for its pro-stacking judicial policy. (Initial Br. 10 (citing *Sellers v. U.S.*

Fid. & Guar. Co., 185 So. 2d 689, 692 (Fla. 1966)).) But this argument fails because *Gillen* made clear that satisfaction of the conditions in subsection (1) was not a prerequisite for the application of the Judiciary's pro-stacking policy and because *Gillen* was the law when the Legislature enacted the 1987 amendment. (Initial Br. 12, 22-25.)

With the 1987 amendment, the Legislature excused insurers from complying with the Judiciary's pro-stacking policy if insurers complied with certain informed consent requirements. (Initial Br. 15-19.) Had the Legislature also wanted to excuse insurers from complying with the Judiciary's pro-stacking policy when the conditions in subsection (1) were not satisfied, it could have expressly said so in the 1987 amendment and thus overturned *Gillen*. But the Legislature did not do this in 1987. And, because the 1987 Legislature is presumed to have known of *Gillen* and because it failed to overturn *Gillen*, *Gillen* has been legislatively endorsed and should continue to be followed by this Court. (*See* Initial Br. 9-10 (citing *Essex Ins. Co. v. Zota*, 985 So. 2d 1036, 1042 (Fla. 2008)).)

The Insurer attempts to distinguish *Gillen* on the ground that the subsection (1) condition not satisfied in *Gillen* (delivery of the policy to Florida) is different than the subsection (1) condition not satisfied in this case (a motor vehicle garaged or registered in Florida). The initial brief already explains why that distinction should not matter. (Initial Br. 24-25.) Most importantly, the Insurer here knew

that Plaintiffs were becoming Florida permanent residents. *Supra* Argument II. Thus, the Insurer should be required to follow Florida laws, like its pro-stacking laws, that are designed to protect Florida citizens, like the Plaintiffs.

Finally, if the Insurer's position on this appeal is accepted, it means that no state's UM insurance law will govern the Delaware Policy. Even though this Court's rule of *lex loci contractus* rule mandates that Florida law governs the Delaware Policy (as the Insurer concedes), the Insurer contends that subsection (1) of the UM statute excuses it from complying with a Florida law (the 1987 amendment) that specifically regulates contracts for UM insurance policies. Presumably, under the Insurer's theory, subsection (1) also frees the Insurer from any Florida law regulating contracts for UM policies. Taking the Insurer's argument to its natural conclusion, the Insurer must be free of any UM insurance regulation by any of the States because, under the *lex loci contractus* rule, Delaware law does not apply and, under the Insurer's theory, it need not comply with Florida UM law. This is illogical and cannot be the case.

IV. This Court routinely has invalidated contractual provisions that violate Florida's public policy.

The Insurer devotes a section of its initial brief arguing that the Delaware Policy should be enforced as written because of "principles of freedom of contracts." (Answer Br. 12-18.) But, as the Insurer itself concedes, these principles extend only "to the extent [the contract] does not offend Florida public

policy." (Answer Br. 12.) This Court routinely has invalidated, and refused to enforce, contractual provisions that violate public policy. *See, e.g., Chandris v. Yanakakis*, 668 So. 2d 180, 181 (Fla. 1995) (declaring certain types of contingency fee agreements void for public policy). That is what this Court did in *Gillen* when an insurer attempted to enforce an anti-stacking clause. 300 So. 2d at 3-7. That is what this Court should do again in this case.

CONCLUSION

This Court should answer the Eleventh Circuit's certified question in the negative.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to **Angela C. Flowers**, Kubicki Draper (Counsel for Appellee), 2303 SE 17th Street, Ste. 201, Ocala, FL 34471, by U.S. mail, this _____ day of June, 2009.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief is in Times New Roman 14-point font and complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

_____
Attorney