

W 0 0 A

IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,226

SOUTHEASTERN FIDELITY INSURANCE
COMPANY,

Petitioner,

-vs-

MARK COLE and STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY,

Respondents.

FILED
FEB 10 1963

CLERK, SUPREME COURT
By [Signature]
Chief Deputy Clerk

ANSWER BRIEF OF RESPONDENTS,
MARK COLE and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
ON THE MERITS

R. Fred Lewis, Esq.
MAGILL & LEWIS, P.A.
Attorneys for Respondents
Suite 730, Ingraham Building
25 S.E. Second Avenue
Miami, FL 33131
Telephone: (305) 358-7777

TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF CASE AND FACTS	
Introduction	1
Case and Facts	2
SUMMARY OF ARGUMENT	7
POINT INVOLVED ON APPEAL	9
CONCLUSION	17
CERTIFICATE OF SERVICE	17

TABLE OF CITATIONS

	<u>Page</u>
<u>Allstate Ins. Co. v. Fowler,</u> 10 F.L.W. 610 (Fla. Nov. 27, 1985) 1, 5, 7, 10, 12, 13, 15
<u>Insurance Co. of North America v.</u> <u>Avis Rent-A-Car Sys. Inc.,</u> 348 So. 2d 1149 (Fla. 1977) 15
<u>Maryland Cas. Co. v. Reliance Ins. Co.,</u> 10 F.L.W. 612 (Fla. Nov. 27, 1985) 1, 5, 7, 10 12, 13
<u>Metropolitan Property & Life Ins. Co. v.</u> <u>Chicago Ins. Co.,</u> 10 F.L.W. 614 (Fla. Nov. 27, 1985) 1, 5, 7, 10 13
<u>Patton v. Lindo's Rent-A-Car, Inc.,</u> 415 So. 2d 43 (Fla. 2d DCA 1982) 16

IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,226

SOUTHEASTERN FIDELITY INSURANCE
COMPANY,

Petitioner,

-vs-

MARK COLE and STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY,

Respondents.

ANSWER BRIEF OF RESPONDENTS,
MARK COLE and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
ON THE MERITS

STATEMENT OF CASE AND FACTS

Introduction

This case is before the court pursuant to an acceptance of jurisdiction based upon an alleged express and direct conflict. The acceptance of jurisdiction was prior to the rendition of the opinions of this court in Allstate Ins. Co. v. Fowler, 10 F.L.W. 610 (Fla. Nov. 27, 1985); Maryland Cas. Co. v. Reliance Ins. Co., 10 F.L.W. 612 (Fla. Nov. 27, 1985); and Metropolitan Property & Life Ins. Co. v. Chicago Ins. Co., 10 F.L.W. 614 (Fla. Nov. 27, 1985), all of which are consistent with and in accordance with the determination by the district court of appeal below. The very simple proposition of law applicable in this case is that SOUTHEASTERN, which provided primary liability insurance to both the owner of a motor vehicle and any driver under a policy which contained no "other insurance clause" provides primary insurance coverage up to the limits of this policy, and it is not entitled to

indemnification or a limitation upon the amount of coverage because the SOUTHEASTERN policy specifically provides coverage to drivers of the vehicle.

The petitioner, SOUTHEASTERN FIDELITY INSURANCE COMPANY, was the plaintiff in the trial court, the appellee in the district court of appeal, and will be referred to herein as "SOUTHEASTERN". The respondents, MARK COLE and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, were defendants at the trial level, appellants in the district court of appeal, and will be referred to herein as "COLE" and "STATE FARM" respectively.

The following symbols will be used in this brief:

"R" -- Record-on-appeal

"A" -- Appendix filed simultaneously herewith

All emphasis is supplied by counsel unless otherwise indicated.

Case and Facts

In 1980 SOUTHEASTERN had issued and provided an automobile liability insurance policy to Holiday Rent-A-Car (hereinafter "HOLIDAY"), which specifically provided insurance coverage to HOLIDAY as the owner of the motor vehicle, and also insurance coverage to any individual operating one of HOLIDAY'S vehicles. (R. 311)(A. 1). The SOUTHEASTERN policy specifically provided that it was primary insurance coverage and stated that it would be excess coverage only in connection with the operation of vehicles which were not owned by HOLIDAY. (R. 311)(A. 1). It is important to note that a SOUTHEASTERN policy had absolutely no "other insurance clause" which would apply to vehicles which were owned by HOLIDAY.

In September of 1980 HOLIDAY rented a vehicle which it owned

to COLE. (R. 311). At that time COLE had an insurance policy with STATE FARM, which had been issued in Canada, which applied as primary insurance only for vehicles owned by COLE but purely as excess coverage in connection with the operation of vehicles which were not owned by COLE. (R. 311). Thus, the rented vehicle was an owned vehicle as to HOLIDAY and SOUTHEASTERN, but was a non-owned vehicle as to COLE and STATE FARM.

A motor vehicle accident occurred while COLE was operating the motor vehicle owned by HOLIDAY and insured by SOUTHEASTERN. Thereafter, SOUTHEASTERN sued COLE and STATE FARM seeking a declaration that it was STATE FARM which provided primary insurance coverage for this accident. After months of litigation, SOUTHEASTERN finally admitted that the rental agreement involved in the case did not comply with the requirements of Florida Statutes Section 627.7263 in an attempt to shift primary insurance coverage from the owner/lessor carrier (SOUTHEASTERN) to the lessee's carrier (STATE FARM). SOUTHEASTERN then shifted its position and asserted that Florida Statutes Section 627.7263 limited the insurance coverage provided by SOUTHEASTERN to the financial responsibility requirements as a matter of law. Notwithstanding the terms of the SOUTHEASTERN policy and the STATE FARM policy, the trial court agreed with SOUTHEASTERN and entered a summary final judgment in favor of SOUTHEASTERN and against STATE FARM, holding SOUTHEASTERN responsible for primary coverage only to the extent of \$10,000 (the financial responsibility requirements), and STATE FARM responsible for coverage thereafter, even though the terms of the SOUTHEASTERN policy stated that the SOUTHEASTERN policy was primary and speci-

fically provided insurance coverage to COLE, while the STATE FARM policy applied only as excess coverage under Canadian law. The trial court simply ignored the terms of the respective insurance policies with regard to their application for the facts involved in this case.

COLE and STATE FARM filed their appeal in the District Court of Appeal, Third District of Florida, which reversed the summary final judgment and held that SOUTHEASTERN was responsible and required to provide primary liability insurance coverage in accordance with the specific terms of its policy. SOUTHEASTERN could not seek to avoid operation of its specific policy terms because COLE was an insured under the policy. The court held that Florida Statutes Section 627.7263 did not limit SOUTHEASTERN'S primary coverage and when the terms of the SOUTHEASTERN policy and the STATE FARM policy were applied, SOUTHEASTERN provided primary coverage with STATE FARM providing only excess coverage. Further, the court recognized that SOUTHEASTERN could not limit its responsibility through the concept of indemnification because COLE was specifically an insured under the SOUTHEASTERN policy. It is clear that the District Court of Appeal, Third District, rendered an opinion in total conformity with the recent opinions of this court concerning the concepts of indemnification, policy language, operators as insureds, and active versus vicarious liability concepts.

SOUTHEASTERN filed its petition seeking review in this court, asserting that the decision of the District Court of Appeal, Third District, was in express and direct conflict with decisions which held that the lessor of a rental vehicle is obligated to provide

primary coverage only to the extent of the Florida financial responsibility laws pursuant to Florida Statutes Section 627.7263. This court accepted jurisdiction prior to the rendition of the opinions in Allstate Ins. Co. v. Fowler, 10 F.L.W. 610 (Fla. Nov. 27, 1985); Maryland Cas. Co. v. Reliance Ins. Co., 10 F.L.W. 612 (Fla. Nov. 27, 1985); and Metropolitan Property & Life Ins. Co. v. Chicago Ins. Co., 10 F.L.W. 614 (Fla. Nov. 27, 1985), all of which address different factual situations, but resulted in holdings totally consistent with the decision of the District Court of Appeal, Third District, in this case.

The statement contained in paragraph three of SOUTHEASTERN'S statement of case and facts, which appears on page two of its brief, must be corrected. SOUTHEASTERN attempts to convey an impression that a provision of the rental agreement set forth the insurance coverage which "would be provided". Such statement is false and review of the paragraph clearly reveals that the insurance clause referred to was an attempt to describe an insurance policy. The clause specifically stated that the vehicle was covered by an automobile liability insurance policy and a copy was available at the main offices of HOLIDAY. The paragraph incorrectly described the coverage in such policy. The paragraph stated that the policy "provides coverage in limits of liability" at least equal to the liability coverage and limits of liability required of the operator to satisfy this state's financial responsibility motor vehicle laws, but only under certain conditions. The paragraph which attempts to describe the SOUTHEASTERN policy is false and does not, in fact, describe the coverage. It is clear that the SOUTHEASTERN

policy was not in any way limited and did not in any way contain an "other insurance" clause. The lease was not the insurance policy and it was the insurance policy which set forth the obligations of SOUTHEASTERN.

SUMMARY OF ARGUMENT

The decision under review is in full conformity with the recent decisions of this court in Allstate Ins. Co. v. Fowler, 10 F.L.W. 610 (Fla. Nov. 27, 1985); Maryland Cas. Co. v. Reliance Ins. Co., 10 F.L.W. 612 (Fla. Nov. 27, 1985); and Metropolitan Property & Life Ins. Co. v. Chicago Ins. Co., 10 F.L.W. 614 (Fla. Nov. 27, 1985). The recent decisions of this court establish that the rights and obligations of insurance companies in the owner-lessor/separate driver factual situation must be determined based upon considerations as to whether the operator of a motor vehicle is an additional insured under the insurance policy issued to the owner of the motor vehicle. If the operator of a motor vehicle is in fact an additional insured under a policy issued to the owner of the motor vehicle, the insurer of the owner is not entitled to indemnification and, thus, one must look to the terms of the respective insurance policies to determine their application. As specifically determined by this court in Metropolitan Property & Life Ins. Co. v. Chicago Ins. Co., the policy language will control all situations in which the insurance company for the owner of a motor vehicle is not entitled to indemnification from the operator of such motor vehicle.

The present case clearly demonstrates that SOUTHEASTERN provided an insurance policy to an owner-lessor, and such policy provided primary insurance coverage. The policy issued by SOUTHEASTERN also provided coverage to any operator of a motor vehicle owned by the lessor. Thus, the insurer of the owner of the motor vehicle, SOUTHEASTERN, was not entitled to indemnification from an operator of such motor vehicle who was an additional insured.

Therefore, the policy language was controlling as to the application of coverage.

On the other hand, STATE FARM issued a policy to MARK COLE, who was operating a motor vehicle owned by HOLIDAY and insured by SOUTHEASTERN. The STATE FARM policy provided primary coverage only for vehicles owned by MARK COLE, and provided only excess coverage for vehicles which were not owned by COLE. Based upon the decisions of this court that SOUTHEASTERN was not entitled to indemnification from either COLE or STATE FARM when COLE operated a motor vehicle insured by SOUTHEASTERN, the language of the insurance policies are controlling. It is clear that the language of the policies mesh perfectly and require that SOUTHEASTERN provide primary insurance coverage for the incident in question, and STATE FARM provided only excess coverage.

POINT INVOLVED ON APPEAL

The issue as phrased by SOUTHEASTERN is totally incomplete because it fails to include or incorporate reference to or mention of the critical operative factors as to whether the operator of the vehicle, COLE, was an insured under the policy issued by SOUTHEASTERN. The rights of the respective parties cannot be determined, nor can an issue be properly phrased without reference to whether the operator of a motor vehicle is insured under the policy issued to the owner. It is submitted that the issue in this case involves:

WHETHER AN INSURANCE COMPANY WHICH PROVIDES COVERAGE TO BOTH THE OWNER AND AN OPERATOR OF A MOTOR VEHICLE AFFORDS INSURANCE COVERAGE ON A PRIMARY BASIS, AS SPECIFICALLY STATED IN ITS POLICY, WHEN THE INSURANCE POLICY ISSUED TO THE OPERATOR OF SUCH MOTOR VEHICLE APPLIES ONLY AS EXCESS COVERAGE?

The issues involved in this case have clearly been determined adversely to SOUTHEASTERN by this court in the three recent decisions which address the issue of insurance coverage in the owner/operator context. The result in this case is that SOUTHEASTERN provides primary insurance coverage to the extent of its policy limits because the SOUTHEASTERN policy was issued as a primary insurance policy, SOUTHEASTERN was not entitled to indemnification from either STATE FARM or the operator of the vehicle because the operator of the vehicle was specifically insured under the SOUTHEASTERN policy, and the policy issued by STATE FARM to the operator of the motor vehicle applied only as excess coverage when the policy issued by SOUTHEASTERN specifically stated that it applied as primary insurance. This court, in rendering its opinions in the three recent decisions, has determined all controlling issues

adversely to SOUTHEASTERN.

The analysis in this case begins with consideration of the interrelated concepts of insurance law, indemnification, and statutory considerations. It is clear that the rights and obligations of insurance companies are dependent upon the terms of the policies which they write and issue to the public unless the insurance policies are modified by statutes. Thus, one must review the specific language of the two insurance policies involved, determine whether Florida Statutes Section 627.7263 mandates coverage contrary to the specific terms of the policies, and, finally, determine whether Florida indemnification concepts alter the rights of the respective parties. It is clear that the conflict which had developed and previously existed among the district courts of appeal with regard to the application and priority of insurance policies in the motor vehicle owner/separate driver tort situation has now been resolved and the decision under review in this case and its operative effect are fully consistent with the interrelated concepts of Florida law as set forth in Allstate Ins. Co. v. Fowler, 10 F.L.W. 610 (Fla. Nov. 27, 1985); Maryland Cas. Co. v. Reliance Ins. Co., 10 F.L.W. 612 (Fla. Nov. 27, 1985); Metropolitan Property & Life Ins. Co. v. Chicago Ins. Co., 10 F.L.W. 614 (Fla. Nov. 27, 1985).

The Allstate v. Fowler decision recognized, reaffirmed, and applied three basic principles in providing the outline for levels of insurance coverage under the circumstances presented in this case. First, if the driver does not own the vehicle, the first layer

of insurance coverage is provided by the owner of the vehicle. The only exception is where a lessor/owner has properly shifted the burden of insurance coverage pursuant to Florida Statutes Section 627.7263. This first principle is not in dispute or at issue in this case and SOUTHEASTERN finally admitted, after months of litigation, that it was responsible for at least the financial responsibility requirements.

As to the next layer of coverage, if an insurer has provided a policy to an owner only vicariously liable, and such insurer is also entitled to indemnity from a negligent operator, any "other insurance" clauses in the operator's insurance policy will be disregarded and the insurer of the owner will follow the insurer of the driver in the application of coverage. The key and controlling factor is whether the insurer of the vicariously liable owner is entitled to indemnity from the driver. Indemnity does not exist if the owner's insurer provides coverage to the operator as an additional insured. An insurance company simply cannot sue its own insured for indemnity. SOUTHEASTERN has clearly admitted in this litigation that the driver, COLE, of the motor vehicle owned by HOLIDAY and insured by SOUTHEASTERN, was an additional insured under the SOUTHEASTERN policy. The SOUTHEASTERN policy clearly states:

II. PERSONS INSURED

Each of the following is an insured under this insurance to the extent set forth below:

- (c) any other person while using an owned automobile or a hired automobile with the permission of the named insured... (A. 1)

There is no other provision in the entire insurance policy which alters, modifies, or changes in any way the status of COLE as an insured under the SOUTHEASTERN policy.

Finally, "other insurance" provisions or concepts, and the language contained in an insurance policy issued to a driver of a motor vehicle will be applied and fully enforced. The only time and the "narrow range" when "other insurance" provisions and concepts may be disregarded is only when the insurance policy issued to a vicariously liable owner does not cover a negligent operator as an additional insured.

The facts in Allstate v. Fowler are not the same as those presented in this case simply because the dispute was between a pure excess policy issued by Travelers to an owner which did not provide coverage to a different driver of the owner's vehicle on one hand, and the insurer (Allstate) of the driver on the other. However, the legal principles set forth are easily applied in this case and lead to the inescapable conclusion that the result in the decision below is in full conformity with the principles expressed by this court.

Next, the Maryland Cas. Co. v. Reliance Ins. Co. decision adds one additional principle to the owner-lessor/separate driver confrontation while applying the Allstate v. Fowler principles. The additional factor addressed in Maryland Casualty is the operative effect of Florida Statutes Section 627.7263. This court clearly held that Florida Statutes Section 627.7263 is purely the imposition of an initial minimum level or layer of insurance coverage. After the initial level or layer is satisfied, in accordance with the statute, the principles set forth in Allstate v. Fowler are to

be applied to determine the manner in which policies apply thereafter. In the Maryland Casualty decision the insurance policy issued to the owner of the vehicle by Reliance did not provide coverage for the driver. Therefore, the Reliance policy, after imposition of the statutory minimum coverage, applied only after the Maryland Casualty policy was exhausted because Reliance was entitled to indemnification from the operator of the motor vehicle because he was not insured under the Reliance policy.

The final case in the trilogy, Metropolitan Property & Life Ins. Co. v. Chicago Ins. Co., demonstrates the last principle of law which must be applied in this case. After application of the statutory minimum levels of coverage mandated by Florida Statutes Section 627.7263 and application of the Allstate v. Fowler principles, it is determined that an insurer has provided a policy to an owner only vicariously liable, and such insurer also provides coverage to a negligent operator as an additional insured, one must analyze the language contained in the policy issued to the owner and the language in the policy issued to the driver, to determine the levels of coverage. As stated by this court in Metropolitan, "policy language will control all situations in which the right to indemnity does not lie".

Thus, as required by the Metropolitan decision, the "other insurance" concepts must be applied in this case to determine whether SOUTHEASTERN provides coverage prior to STATE FARM. As recognized by the District Court of Appeal, Third District, the SOUTHEASTERN policy provided primary coverage for owned automobiles, and excess coverage for non-owned automobiles. On the other

hand, and in a similar manner, the STATE FARM policy provided primary coverage for owned automobiles, but only excess coverage for non-owned vehicles. Thus, as recognized by the District Court of Appeal, Third District, the policies issued by SOUTHEASTERN and STATE FARM mesh perfectly because the vehicle in this accident was an owned vehicle for which SOUTHEASTERN provided primary coverage and as to COLE was a non-owned vehicle for which STATE FARM merely provided excess coverage.

An analysis of SOUTHEASTERN'S position demonstrates that it attempts to ignore the terms of its own policy and then refers to a private document to which neither SOUTHEASTERN nor STATE FARM is a party. SOUTHEASTERN then makes statements, without any authority, that the SOUTHEASTERN insurance policy, which is totally different than the policy described in paragraph five on the back of the lease document, is incorporated into the lease and the incorrect description of the SOUTHEASTERN policy in some manner changes the terms of the policy. It is submitted that the rights and obligations of both SOUTHEASTERN and STATE FARM are controlled and determined by their contracts, documents and agreements to which they are direct parties. The obligations of both SOUTHEASTERN and STATE FARM are set forth in their respective insurance policies. The insurance contracts contain the agreements of the insurance companies and the premiums are paid based upon the terms, conditions and exposures contained in the particular policy. It would be both interesting and comical to watch SOUTHEASTERN scream, shout, and change its tune if the words in paragraph five on the back of the document had described an insurance policy in terms more expansive

than the coverage set forth in SOUTHEASTERN'S actual policy. It is clear that the fine print in paragraph five on the back of the form cannot alter or change the rights of anyone not a party to the document, particularly when paragraph five is merely an attempt to describe a policy which is non-existent. There can be no doubt that paragraph five is merely an attempt at a description of insurance coverage under an existing insurance policy and such description is incorrect as a matter of law. SOUTHEASTERN fails to recognize that if its position is correct, that the SOUTHEASTERN policy is incorporated into the lease, then the lease provides primary insurance coverage because the SOUTHEASTERN policy clearly states that it provides primary insurance coverage for anyone using the motor vehicle. There is not one word in the SOUTHEASTERN policy which would alter, modify, or change SOUTHEASTERN'S agreement to provide primary insurance coverage for anyone using a motor vehicle owned by HOLIDAY.

SOUTHEASTERN'S reliance upon Ins. Co. of North America v. Avis Rent-A-Car Sys. Inc., 348 So. 2d 1149 (Fla. 1977), is most puzzling because such decision was fully considered, analyzed, and described in the recent Allstate v. Fowler opinion. This court, in Allstate v. Fowler, clearly set forth that the INA decision is in full conformity with the present decisions of this court. This court noted in Allstate v. Fowler that the INA decision required an insurance policy issued to an operator of a motor vehicle to precede the coverage provided by an excess insurance policy issued to the owner of the vehicle because the excess policy issued to the owner covered only the owner of the vehicle and did not provide coverage

for operators of the vehicle. It is submitted that SOUTHEASTERN'S indemnification argument is totally contrary to existing law in that under Florida law it is clear that indemnification, whether commonlaw or contractual, is prohibited in favor of an insurance company against a person insured by such insurance company. There is no reason to purchase insurance if an insurance company can obtain indemnification from one the company has agreed to insure.

Finally, SOUTHEASTERN'S reliance upon Patton v. Lindo's Rent-A-Car, Inc., 415 So. 2d 43 (Fla. 2d DCA 1982), is totally misplaced. The one critical factor in Patton was that the insurance company which had provided a policy to the owner of the motor vehicle, which specifically included an escape clause. The court noted:

American Southern's policy contained what is commonly known as an escape clause. Patton at 45.

SOUTHEASTERN would ignore this very important factor because the SOUTHEASTERN policy does not contain any type of escape or excess insurance clause and is written as a primary insurance policy.

CONCLUSION

Based upon the arguments, authorities and reasoning set forth herein, the decision of the District Court of Appeal, Third District, simply is not in conflict with the principles of law recently announced by this court, and the petition for certiorari should be either discharged or the decision of the District Court of Appeal, Third District, approved.

Respectfully submitted,



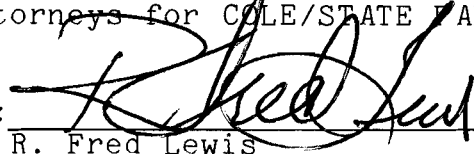
R. Fred Lewis
MAGILL & LEWIS, P.A.
Attorneys for Respondents
Suite 730, Ingraham Building
25 S.E. Second Avenue
Miami, FL 33131
Telephone: (305) 358-7777

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed this 3rd day of February, 1986, to Susan Minor, Esq., THOMPSON AND ASSOCIATES LTD., Attorneys for Petitioner, Suite 516, Ingraham Building, 25 S.E. Second Avenue, Miami, FL 33131; and to Richard Baron, Esq., LAW OFFICES OF RICHARD BARON, Attorneys for INTERAMERICAN CAR RENTAL, INC., Suite 350, 1125 N.E. 125th Street, North Miami, FL 33161.

MAGILL & LEWIS, P.A.
Attorneys for COLE/STATE FARM

By:



R. Fred Lewis