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IN THE SUPREME COURT OF FLORIDA

CASE NO.: 67,226

FILED
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MAR 21 1968
CLERK, SUPREME COURT
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SOUTHEASTERN FIDELITY
INSURANCE COMPANY,

Petitioner,

vs.

MARK COLE and STATE FARM
MUTUAL AUTOMOBILE INSURANCE
COMPANY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

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PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	ii
Issue Presented for Review	1
Preliminary Statement	2
Statement of the Case and Facts	3
Argument:	4
<p>WHERE THE LESSOR'S INSURANCE POLICY IS INCORPORATED IN ITS RENTAL AGREEMENT AND THE RENTAL AGREEMENT SHIFTS RESPON- SIBILITY FOR PRIMARY COVERAGE TO THE LESSEE, THE PARTIES HAVE CONTRACTED BETWEEN THEMSELVES TO MAKE THE LESSEE'S LIABILITY INSURANCE PRIMARY AND THE LESSOR'S LIABILITY INSURANCE SEDONDARY, RESULTING IN THE LESSOR BEING PRIMARILY RESPONSIBLE FOR ONLY THE FIRST \$10,000 OF COVERAGE IN ACCORDANCE WITH FLORIDA'S FINANCIAL RESPONSIBILITY LAW, AND THE LESSEE BEING RESPONSIBLE THEREAFTER TO THE FULL EXTENT OF ITS LIABILITY LIMITS.</p>	
Conclusion	10
Index to Appendix	11
Certificate of Service	12, 13

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Allstate Insurance Company of Canada vs. Value Rent-A-Car of Florida, 463 So. 2d 32 (Fla. 5th DCA 1985)</u>	8
<u>Hurwitz vs. C.G.J. Corp., 168 So. 2d 84 (Fla. 3d DCA)</u>	6
<u>International Ship Repair and Marine Services, Inc. vs. General Portland, Inc. 469 So. 2d 817 (Fla. 2d DCA 1985)</u>	6,7
<u>Maryland Casualty Company vs. Reliance Insurance Company, 10 F.L.W. 612 (Fla. Nov. 27, 1985)</u>	8
<u>Quarngesser vs. Appliance Buyers Credit Corp., 187 So. 2d 662 (Fla. 3d DCA 1966)</u>	6
<u>Suncoast Building of St. Petersburg vs. Russell, 105 So. 2d 809 (Fla. 2d DCA 1958)</u>	7
<u>Tutko vs. Banks, 167 So. 2d 110 (Fla. 3d DCA 1964)</u>	6

ISSUE PRESENTED FOR REVIEW

Petitioner would rephrase respondents' point on appeal as follows:

WHERE THE LESSOR'S INSURANCE POLICY IS INCORPORATED IN ITS RENTAL AGREEMENT AND THE RENTAL AGREEMENT SHIFTS RESPONSIBILITY FOR PRIMARY COVERAGE TO THE LESSEE, HAVE THE PARTIES CONTRACTED BETWEEN THEMSELVES TO MAKE THE LESSEE'S LIABILITY INSURANCE PRIMARY AND THE LESSOR'S LIABILITY INSURANCE SECONDARY, RESULTING IN THE LESSOR BEING PRIMARILY RESPONSIBLE FOR ONLY THE FIRST \$10,000 OF COVERAGE IN ACCORDANCE WITH FLORIDA'S FINANCIAL RESPONSIBILITY LAW, AND THE LESSEE BEING RESPONSIBLE THEREAFTER TO THE FULL EXTENT OF ITS LIABILITY LIMITS.

PRELIMINARY STATEMENT

Petitioner, SOUTHEASTERN FIDELITY INSURANCE COMPANY, was plaintiff in the trial court and appellee on appeal. Respondents, MARK COLE and STATE FARM MUTUAL INSURANCE COMPANY, were defendants in the trial court and appellants on appeal. Parties will be referred to in this brief as they appear before this Court. The symbol "A" followed by a number will constitute a page reference to the appendix being filed with this brief, said appendix consisting of: the rental agreement entered into by HOLIDAY RENT-A-CAR and MARK COLE (A.1-3); an excerpt from the SOUTHEASTERN automobile liability insurance policy issued to Interamerican Car Rental, Inc. (A.4). All emphasis supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

In the final paragraph of respondents' Statement of the Case and Facts (pages 5 and 6 of the answer brief), respondents aver that petitioner has incorrectly stated in its brief that paragraph five of the rental agreement entered into between MARK COLE and HOLIDAY RENT-A-CAR describes the insurance coverage that would be provided COLE only if no other valid and collectible insurance, whether primary, excess or contingent is available to COLE. Respondents declare that this provision of the rental agreement is "false" and only an "attempt" to describe the SOUTHEASTERN insurance policy. Respondents further declare that the SOUTHEASTERN policy "was not in any way limited and did not in any way contain an 'other insurance' clause."

Petitioner submits that it has not misstated the meaning of the aforementioned provision of the rental agreement. The meaning is clear: Paragraph five of the rental agreement contains an "escape clause" which is incorporated in the SOUTHEASTERN insurance policy.

The policy is thereby limited by this "escape clause", and consequently does not cover the active tortfeasor, MARK COLE.

ARGUMENT

WHERE THE LESSOR'S INSURANCE POLICY IS INCORPORATED IN ITS RENTAL AGREEMENT AND THE RENTAL AGREEMENT SHIFTS RESPONSIBILITY FOR PRIMARY COVERAGE TO THE LESSEE, THE PARTIES HAVE CONTRACTED BETWEEN THEMSELVES TO MAKE THE LESSEE'S LIABILITY INSURANCE PRIMARY AND THE LESSOR'S LIABILITY INSURANCE SECONDARY, RESULTING IN THE LESSOR BEING PRIMARILY RESPONSIBLE FOR ONLY THE FIRST \$10,000 OF COVERAGE IN ACCORDANCE WITH FLORIDA'S FINANCIAL RESPONSIBILITY LAW, AND THE LESSEE BEING RESPONSIBLE THEREAFTER TO THE FULL EXTENT OF ITS LIABILITY LIMITS.

The lessee, MARK COLE, entered into a written lease agreement with HOLIDAY RENT-A-CAR. (A.1-3) His signature, as well as the signature of the authorized HOLIDAY RENT-A-CAR system representative, appear on the rental agreement beneath the following paragraph:

"In consideration of the mutual promises herein contained Holiday Rent-A-Car System leases to the undersigned renter the vehicle described above and the renter agrees by his signature hereon to lease said vehicle subject to the terms and conditions on the reverse side hereof which the renter acknowledges to have read and which provisions by reference hereto are incorporated into this contract."

Thus, by his signature, MARK COLE had acknowledged that he had read the provisions of the rental agreement and agreed to lease the vehicle subject to those terms and conditions.

One of the terms and conditions to which Mr. COLE agreed is contained in paragraph five of the rental agreement. It

provides in pertinent part:

- "5. INSURANCE: Vehicle is covered by an automobile liability insurance policy a copy of which is available for inspection at the main offices of Holiday Rent-A-Car System. Said policy provides coverage and 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 if no other valid and collectible insurance, whether primary, excess or contingent, is available to Renter. Renter, being an assured under said policy, agrees to comply with and to be bound by all the terms, conditions, limitations and restrictions of said policy, which are hereby incorporated by reference herein and made a part of the rental agreement as if set forth in length including those terms, conditions, limitations and restrictions of which no specific mention is made herein...".

(A.2)

Paragraph five plainly states that the vehicle is covered by an automobile liability insurance policy, and that COLE, as renter of the vehicle, is also covered under the policy. The policy is obviously the SOUTHEASTERN automobile liability insurance policy. Respondents' argument at Page 15 of their brief that "paragraph five is merely an attempt to describe a policy which is non-existent" is clearly absurd. COLE agreed to be bound by all the conditions of the SOUTHEASTERN policy. As stated

in paragraph five, the policy is incorporated by reference and "made a part of the rental agreement as if set forth in length ...".

Inasmuch as the SOUTHEASTERN insurance policy is made part of the rental agreement, it follows, a fortiori, that the rental agreement is made part of the insurance policy. The insurance policy and the rental agreement must, therefore, be construed as a single document and read together. See, Quarngesser vs. Appliance Buyers Credit Corporation, 187 So. 2d 662 (Fla. 3d DCA 1966); Hurwitz vs. C.G.J. Corporation, 168 So. 2d 84 (Fla. 3d DCA 1964); Tutko vs. Banks, 167 So. 2d 110 (Fla. 3d DCA 1964).

The SOUTHEASTERN insurance policy does include as additional insureds those persons using the lessor's automobile with the permission of the lessor. (A.4). However, the rental agreement specifically states that the insurance policy provides coverage "only if no other valid and collectible insurance, whether primary, excess or contingent, is available to Renter." (A.2). This specific provision of the rental agreement, which Mr. COLE acknowledged to have read, and agreed to, takes precedence over and supercedes the general provision of the insurance policy relating to additional insureds. International Ship Repair and

Marine Services, Inc. vs. General Portland, Inc., 469 So. 2d 817 (Fla. 2d DCA 1985); Suncoast Building of St. Petersburg vs. Russell, 105 So. 2d 809 (Fla. 2d DCA 1958).

Thus, respondents are incorrect in their assertion that "(t)here 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." (Answer brief, Page 12). As part of the insurance policy, paragraph five of the rental agreement does change the status of COLE. Because of paragraph five, COLE is not insured by SOUTHEASTERN (beyond the \$10,000 minimum required by Florida's financial responsibility law) since the "escape clause" contained in paragraph five relieves SOUTHEASTERN of liability and thereby mandates that COLE's insurer, STATE FARM, be the primary insurer to the full extent of its liability limits.

That COLE is not insured by SOUTHEASTERN is supported by the indemnity agreement found in paragraph six of the rental agreement. The indemnity provision provides in pertinent part:

"6. INDEMNITY: ... Renter shall defend, indemnify, and hold harmless Lessor from and against any and all losses, liabilities, damages, costs, and expenses arising out of the use or possession of the Vehicle ...".

The indemnity agreement entered into by MARK COLE is valid because, in accordance with the escape clause contained

in paragraph five, the SOUTHEASTERN policy covering the lessor does not cover COLE as an additional insured since COLE, the active tortfeasor, has his own insurance. Thus, the lessor, SOUTHEASTERN, is entitled to indemnity from the lessee.

In Maryland Casualty Co. vs. Reliance Insurance Co., 10 F.L.W. 612 (Fla. Nov. 27, 1985), this Court gave full effect to the escape clause contained in the lessor's insurance policy, and found that the policy did not cover the active tortfeasor/lessee.

Moreover, in Allstate Insurance Company of Canada vs. Value Rent-A-Car of Florida, 463 So. 2d 320 (Fla. 5th DCA 1985), the District Court gave full effect to an escape clause contained only in the rental agreement. In Allstate, the lessor's insurance policy "contained no provisions intended to reduce the limits provided for the lessee's benefit." Id at 323. However, the lessor in its rental agreement with lessee did attempt to shift responsibility for primary coverage to the lessee by means of an escape clause and indemnity provision quite similar to those contained in the rental agreement sub judice. The Fifth District found the provisions of the rental agreement sufficient to show that the parties had contracted between themselves and that the

lessee would be primarily responsible once the statutory financial requirements were satisfied. Petitioner submits that an identical shifting of responsibility to the lessee has occurred in the instant case.

It is clear that SOUTHEASTERN insures only the lessor, the vicariously liable party, and does not insure the lessee, the active tortfeasor. By the terms of the rental agreement, the parties have contracted to shift primary responsibility to the lessee. State Farm, the lessee's carrier, is primarily liable to the full extent of its liability limits.

CONCLUSION

Based upon the foregoing reasons and citations of authority, petitioner respectfully requests this Court to quash the decision of the Third District Court of Appeal, and to reinstate the judgment of the trial court.

Respectfully submitted,

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