

IN THE SUPREME COURT OF FLORIDA

CASE NO. 68,569

5th District - No. 85-319

RENE L. SPENCE,

Petitioner,

vs.

DAVID O. HUGHES and
IMPERIAL FOOD PRODUCTS, INC.,

Respondents.

FILED

SID J. WHITE

MAY 5 1986

CLERK, SUPREME COURT

By 
Chief Deputy Clerk

INITIAL BRIEF OF PETITIONER

KEITH R. MITNIK, ESQUIRE
ROBERTSON, WILLIAMS,
DUANE & LEWIS, P.A.
538 East Washington Street
Orlando, Florida 32801
(305) 425-1606
Attorneys for Appellant

TABLE OF CONTENTS

	PAGE
TABLE OF CITATIONS	ii,iii
STATEMENT OF THE FACTS	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	5
ARGUMENT:	
I ARE NON-RESIDENTS WHO VOLUNTARI- LY OBTAIN PIP COVERAGE CONFORMING TO FLORIDA'S NO FAULT LAW (§627.730 - 627.7405, FLA. STAT.) EXEMPT FROM TORT LIABILITY UNDER §627.737, FLORIDA STATUTES, TO THE SAME EX- TENT AS RESIDENTS WHO OBTAIN THE SAME COVERAGE BECAUSE THEY ARE RE- QUIRED BY STATUTE TO DO SO?	8
CONCLUSION	21
CERTIFICATE OF SERVICE	22

TABLE OF CITATIONS

	<u>PAGE</u>
<u>Aluminum Co. of America v. Central Lincoln Peoples' Utility Dist.,</u> 81 L.Ed.2d 301, 104 S.Ct. 2472, (U.S. 1984)	13
<u>Carlile v. Game and Fresh Water Fish Comm.,</u> 354 So.2d 362 (Fla. 1977)	8
<u>Daniels v. O'Connor,</u> 243 So.2d 144 (Fla. 1971)	15
<u>Deal Motors, Inc. v. Carrington,</u> 305 So.2d 811 (Fla. 3d DCA 1974)	6,14
<u>Greyhound Lines, Inc., Greyhound Lines- East Div. v. Yarborough,</u> 275 So.2d 1 (Fla. 1973)	13
<u>Heftler Construction Co. and Sub. v. Depart. of Rev.,</u> 334 So.2d 129 (Fla. 3d DCA 1976)	13
<u>Julien v. Johnson,</u> 438 So.2d 503 (Fla. 5th DCA 1983)	6,13
<u>Lasky v. State Farm Insurance Co.,</u> 296 So.2d 9 (Fla. 1974)	15,16, 17,18
<u>Silver Blue Lake Apartments v. Silver Blue Lake Home Owners Assn.,</u> 225 So.2d 557 (Fla. 3d DCA 1969)	15
<u>State v. Egan,</u> 287 So.2d 1 (Fla. 1973)	8

FLORIDA STATUES

Section 320.38 Fla. Stat. (1982)	12
Section 627.731 Fla. Stat. (1982)	14
Section 627.732 Fla. Stat. (1972)	10
Section 627.732 Fla. Stat. (1978)	10,14,19
Section 627.732 Fla. Stat. (1982)	5,9,10
Section 627.733 Fla. Stat. (1982)	10
Section 627.737 Fla. Stat. (1982)	2,3,4,5 6,8,11 17,20

MISCELLANEOUS

Fla. Admin. Code Rule 4-27.09(1)	12
Fla. Admin. Code Rule 4-27.09(2)	6,11

STATEMENT OF THE FACTS

On July 21, 1983, Respondent/Defendant, DAVID O. HUGHES (hereinafter referred to as HUGHES), a Pennsylvania resident, was driving a vehicle owned by Respondent/Defendant, IMPERIAL FOOD PRODUCTS, INC. (hereinafter referred to as IMPERIAL), in a westerly direction on State Road 400 in Orlando, Orange County, Florida. Petitioner/Plaintiff, RENE L. SPENCE (hereinafter referred to as SPENCE), a Florida resident, was driving a vehicle owned by Carl Watts, a Florida resident, in a westerly direction on State Road 400 in Orlando, Orange County, Florida. HUGHES and SPENCE were operating their respective vehicles with the knowledge and consent of the vehicles' owners. At the aforementioned time and place, the vehicle driven by HUGHES collided with the rear end of the vehicle driven by SPENCE, causing SPENCE injuries which were of a non-permanent nature.

The vehicle which was owned by IMPERIAL and being driven by HUGHES, was not designed or required to be licensed for use on the highways of the State of Florida. The PIP coverage provided by the non-resident Respondents, HUGHES and IMPERIAL, purportedly is equivalent to that which residents of the State of Florida are required to obtain by the Florida Motor Vehicle No Fault Act, hereinafter referred to as the No Fault Act.

STATEMENT OF THE CASE

On July 3, 1984, Petitioner, SPENCE, filed a Complaint against Respondents, HUGHES and IMPERIAL, seeking damages in tort for pain, suffering, mental anguish and inconvenience because of bodily injury. On August 23, 1984, a Default was entered against the Respondents, however, this Default was vacated on October 10, 1984. Subsequently, on October 10, 1984, HUGHES and IMPERIAL, filed an Answer to the Complaint admitting negligence, but denying liability based upon the exemption from tort liability expressed in §627.737, Florida Statutes. HUGHES and IMPERIAL claimed by Affirmative Defense, that the tort exemption applies to them because they voluntarily obtained PIP coverage equivalent to that which Florida residents are required to obtain. In response, SPENCE filed a reply to the Affirmative Defenses admitting that she has not suffered an injury which meets the threshold requirement of §627.737, Florida Statutes, but denying that the tort exemption contained in the No Fault Act, applies to a non-resident, regardless of the fact that they voluntarily obtained PIP coverage.

Thereafter, SPENCE, HUGHES and IMPERIAL filed Motions for Summary Judgment and alternatively, Judgment on the Pleadings, on the issue of liability.

Then, on December 26, 1984, SPENCE, HUGHES and IMPERIAL filed a Joint Statement of Facts in which it was stated that there were no genuine issues as to any material facts concerning liability, and requesting the Court to resolve the issue of liability based upon the undisputed facts and the argument of counsel.

Next, on January 3, 1985, the parties simultaneously filed separate Memorandums of Law supporting their positions as to the applicability of the No Fault Act to a non-resident. Thereafter, on January 8, 1985, the Court heard Oral Arguments on this issue.

The Court entered a Final Order on February 6, 1985, in which the Respondents' Motion for Summary Judgment was granted and the Petitioner's Motion for Summary Judgment was denied and the Motions for Judgment on the Pleadings were found moot. In reaching its conclusion, the Court made the following findings:

1. The Florida Motor Vehicle No Fault Law is applicable to this action.

2. The tort exemption as expressed in §627.737, Florida Statutes is applicable to these non-resident defendants.

3. The vehicle driven and owned by the non-resident defendants was not required to be registered and licensed in Florida.

4. The non-resident defendants were not required under Florida law to maintain security on the vehicle, however, the non-resident defendants obtained security.

5. The insurance policy covering the non-resident defendants provided the Plaintiff with the same rights and protections required of a resident motorist by the Florida Motor Vehicle No Fault Law.

6. The non-resident defendants are, therefore, entitled to the privileges and immunities granted by the Florida Motor Vehicle No Fault Law, including the tort exemption expressed in §627.737, Florida Statutes.

SPENCE appealed this Order to the Fifth District Court of Appeals, the original Notice of which was filed on February 27, 1985, and amended on March 12, 1985.

Then, on April 3, 1986, the Fifth District Court of Appeals sitting en banc, affirmed the trial court's Order. The Appellate Court split evenly, with three judges in the majority and three dissenting. The Court went on to certify that its decision passed upon a question of great public importance and certified the question as follows:

"ARE NON-RESIDENTS WHO VOLUNTARILY OBTAIN PIP COVERAGE CONFORMING TO FLORIDA'S NO FAULT LAW (§627.730-627.7405, FLA. STAT.) EXEMPT FROM TORT LIABILITY UNDER §627.737, FLORIDA STATUTES, TO THE SAME EXTENT AS RESIDENTS WHO OBTAIN THE SAME COVERAGE BECAUSE THEY ARE REQUIRED BY STATUTE TO DO SO?"

SUMMARY OF ARGUMENT

A strict construction of the No Fault Act, as is required by the fact that it is in derogation of common law, leads to the inescapable conclusion that non-residents who voluntarily provide PIP coverage are not tort exempt. In particular, a literal reading of §627.737, of the No Fault Act, which contains the tort exemption provision, places two (2) requirements on parties attempting to qualify for the tort exemption.

First, the party must be an owner, registrant, operator or occupant of a "motor vehicle". The No Fault Act defines motor vehicle as,

"Any self-propelled vehicle with four or more wheels which is of a type both designed and required to be licensed for use on the highways of this State." (emphasis added). §627.732, Florida Statute.

Hence, if a vehicle is not of a type required to be registered in Florida, then its owner, registrant, operator or occupant is not entitled to raise the tort exemption.

Second, the party must have obtained PIP coverage as he or she was required to obtain by the Act. Non-residents are not required by the No Fault Act to obtain PIP coverage, except in limited circumstances none of which apply to the case at bar. Thus, non-residents are not tort exempt.

Therefore, since neither HUGHES nor IMPERIAL, as non-residents, are required to provide PIP coverage, and since the automobile owned by Imperial and operated by HUGHES was not of the type "required to be licensed for use on the highways of this state," the Respondents do not qualify for the tort exemption under either of the requirements of §627.737 of the Florida Statutes, regardless of the fact that they voluntarily obtained PIP coverage from their own state.

This conclusion is supported by the Department of Insurance's interpretation of the No Fault Act found at Section 4-27.09(2) of the Florida Administrative Code, which states that non-residents do not receive PIP benefits and are not tort exempt. Also, this conclusion is supported by the holdings in Julien v. Johnson, 438 So.2d 503 (Fla. 5th DCA 1983) and Deal Motors, Inc. v. Carrington, 305 So.2d 811 (Fla. 3rd DCA 1974).

Furthermore, this interpretation of the No Fault Act does not violate non-residents' rights to equal protection, due process or their right to travel, because the State of Florida had both a reasonable and compelling governmental interest for making a distinction between residents and non-residents. The Legislature passed the No Fault Act in an effort to lower insurance premiums in Florida. To extend the tort exemption to non-residents, would not serve this purpose. Instead, it would only

serve to unnecessarily limit Florida residents access to the courts.

However, should the Court disagree and find the Act's distinction between non-residents and residents unconstitutional, the only proper action would be to strike the entire tort exemption from the Act, rather than invade the province of the Legislature by changing the clear meaning of the Statute.

ARGUMENT

I ARE NON-RESIDENTS WHO VOLUNTARILY OBTAIN PIP COVERAGE CONFORMING TO FLORIDA'S NO FAULT LAW (§627.730-627.7405, FLA. STAT.) EXEMPT FROM TORT LIABILITY UNDER §627.737, FLORIDA STATUTES, TO THE SAME EXTENT AS RESIDENTS WHO OBTAIN THE SAME COVERAGE BECAUSE THEY ARE REQUIRED BY STATUTE TO DO SO?

A strict construction of the No Fault Act leads to the inescapable conclusion that non-residents, who voluntarily provide PIP coverage, are not tort exempt. A strict construction is required because the No Fault Act is in derogation of the common law. Carlile v. Game and Fresh Water Fish Comm., 354 So.2d 362 (Fla. 1977). Without question, the No Fault Act, with its tort exemption, is in derogation of the common law right to traditional tort remedies. Therefore, it should not be expanded farther than a literal reading of its language requires, State v. Egan, 287 So.2d 1 (Fla. 1973).

The tort exemption of the No Fault Act is found at §627.737, of the Florida Statutes and provides in pertinent part:

"(1) Every owner, registrant, operator, or occupant of a motor vehicle with respect to which security has been provided as required by §627.730-627.7405, and every person or organization legally responsible for his acts or omissions, is hereby exempted from tort liability for damages be-

cause of bodily injury, sickness, or disease arising out of the ownership, operation, maintenance, or use of such motor vehicle in this state...." (Emphasis added).

A strict construction of this section of the No Fault Act, places two requirements on parties attempting to raise the tort exemption.

First, the party attempting to qualify for the tort exemption must be an owner, registrant, operator or occupant of a "motor vehicle". The No Fault Act defines "motor vehicle" as,

"Any self-propelled vehicle with four or more wheels which is of a type both designed and required to be licensed for use on the highways of this state . . ." (Emphasis added) §627.732, Fla. Stat.

Therefore, if a vehicle is not of a type required to be registered in Florida, then its owner, registrant, operator or occupant is not entitled to raise the tort exemption. This interpretation is supported by the fact that the original definition of motor vehicle did not include the language that the vehicles be of a type "required to be licensed for use on the highways of this state." This language was specifically added by the Legislature in 1978. The original definition was as follows:

"Motor vehicle means a sedan, station-wagon, or jeep type vehicle not used as a public livery conveyance for passengers and includes any other four

wheel motor vehicle used as a utility automobile and a pickup or panel truck which is not used primarily in the occupation, profession, or business of the insured." §627.732, Florida Statute (1972).

In 1978 this definition was changed to the following:

"Motor vehicle means any self-propelled vehicle which is of a type both designed and required to be licensed for use on the highways of this state . . ." §627.732, Florida Statute (1978). (Emphasis added)

The definition was changed again in 1982, however, the Legislature chose to retain the phrase,

"required to be licensed for use on the highways of this state . . ."
§627.732, Florida Statute (1982).

The only logical reason for the Legislature to have added and retained this phrase was to clarify their intention that the No Fault Act not be applied to non-residents whose motor vehicles are not required to be registered in Florida.

Second, the party attempting to qualify for the tort exemption must have obtained PIP coverage as he or she was required to do by the Act. Pursuant to §627.733 of the No Fault Act, non-residents are not required by the Act to obtain PIP coverage, except in limited circumstances none of which apply here. Thus, non-residents do not qualify for the tort exemption. It is particularly important to take notice of the Legislature's choice of the word "required" to understand that it is irrelevant whether non-residents voluntarily provide PIP coverage.

Applying these two requirements, which are contained in §627.737 of the No Fault Act, it becomes abundantly clear that the Respondents, HUGHES and IMPERIAL, do not qualify for the tort exemption. As to the first requirement, the Trial Court made a specific finding that the vehicle driven by HUGHES and owned by IMPERIAL was not required to be registered or licensed in Florida. Therefore, it is not a motor vehicle within the meaning of the No Fault Act. Thus, its owner, registrant, operator or occupant are not tort exempt. Next, as to the second requirement, the Trial Court made a specific finding that HUGHES and IMPERIAL were not required by the Act to provide PIP coverage. Accordingly, they are not tort exempt.

This conclusion is supported by the Department of Insurance's interpretation of the No Fault Act, found at section 4-27.09(2) of the Florida Administrative Code, which states that non-residents do not receive PIP benefits and are not tort exempt. This rule interprets the Act as providing for two exceptions to the general rule that non-residents do not qualify for PIP benefits or the tort exemption, neither of which apply to the case at bar.

The first such exception is for situations in which the non-resident is attempting to collect PIP benefits from a resident for injuries sustained while occupying a motor vehicle which he does not own. This exception focuses on whether the owner of the motor vehicle is one

