IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO 65,003

DISTRICT COURT OF APPEAL NO. 83-972

JIMMY R. VELEZ,

Petitioner,

vs.

CRITERION INSURANCE COMPANY,
a foreign corporation,

Respondent.

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ON PETITION FOR CONFLICT CERTIORARI FROM THE
SECOND DISTRICT COURT OF APPEAL, STATE OF FLORIDA
APPEAL NO: 83-972

RESPONDENT'S ANSWER BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND OF THE FACTS

Because Petitioner[1] attempts to invoke the Court's discretionary jurisdiction on the ground that the rule of law announced by the Second District in this case expressly and directly conflicts with a previously announced rule of law, the most accurate and simple statement of the case and of the facts is the decision rendered by the Second District itself. Thus, for its statement, Respondent simply adopts by reference the opinion of the Second District.

The Second DCA's decision was simply and logically that a 1.5 horsepower moped is a self-propelled vehicle,[2] (A-1 to 4), therefore, the insured, as an occupant of his moped when injured, was not entitled to recover PIP from the policy insuring his motor vehicle which was not involved in the accident.[3]

The Second District's opinion was issued January 27, 1984. (A-1). Petitioner served a motion for rehearing on February 6, 1984 which was denied by order of the Second DCA dated February 28, 1984. Petitioner's notice to invoke discretionary jurisdiction was filed in this Court on March 8, 1984 and Petitioner's jurisdiction brief was served March 16, 1984.

Respondent's answer brief on jurisdiction was served April 5, 1984.

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[1]Petitioner was the Plaintiff in the trial court and Appellant before the Second District, Jimmy R. Velez. Respondent, Criterion Insurance Company, was Defendant and Appellee respectively.

[2]The Second DCA's opinion is attached as an appendix to Petitioner's Brief. Reference to pages of the appendix is indicated by (A-).

[3]The moped was not listed as an insured vehicle under the Criterion policy.

ISSUES CONCERNING JURISDICTION

I.

THE RULE OF LAW ANNOUNCED BY THE SECOND DISTRICT IN THIS CASE DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE DECISIONS IN STATE FARM MUTUAL AUTOMOBILE INS. CO. V. LINK, 416 SO.2D 875 (FLA.5TH DCA 1982) OR PROGRESSIVE AMERICAN INS. CO. V. GLENN, 428 SO.2D 367(FLA.5TH DCA 1983) BY HOLDING THAT A MOPED IS A SELF-PROPELLED VEHICLE.

ARGUMENT

Petitioners seek to invoke the jurisdiction of this Court pursuant to Article V, Section 3(b)(3), Florida Constitution (1980) concerning decisions which expressly and directly conflict with decisions from another appellate court. There are only two principal situations authorizing the use of conflict jurisdiction: (1) when the decision announces a rule of law that conflicts with a rule previously announced by another appellate court, or (2) when the decision applies a rule of law to produce a different result in a case involving substantially the same controlling facts as those in a prior case decided by another appellate court. Nielson v. City of Sarasota, 117 So.2d 731(Fla.1960). Under the recent amendments to the Florida Constitution, the conflict must be "express" and contained within the rules announced by the court. Jenkins v. State, 385 So.2d 1356(Fla.1980). For jurisdictional purposes, a conflict must exist between the actual decisions and not merely between statements of opinion or reasons contained with the decisions. Gibson v. Maloney, 231 So.2d 823 (Fla.1970).

The Fifth DCA in Link held only that a moped was a bicycle

and not a vehicle which reasoning automatically precluded a moped from being a self-propelled vehicle. The Fifth District relied upon the 1980 version of the "No-Fault Law"[4] and section 316.003(2) which defined bicycle as including mopeds. This definition was incorporated into section 627.732(1)'s definition of a motor vehicle which excluded mopeds.

Section 316.003(64) defined "vehicle" which also specifically excluded a moped.

Progressive v. Glenn, supra, simply affirmed an award of PIP citing Link, then launched into a discussion of why a policy exclusion could not restrict entitlement to uninsured motorists benefits pursuant to public policy, which is totally irrelevant to the issues herein.

As pointed out by the Second District in this case, the legislature deleted the phrase "except mopeds as defined in sec. 316.003(2)" from 627.732(1)'s definition of motor vehicles and the reference is not contained in sec.627.736(4)(d)(1), either the 1980 or 1982 version.

The Second District simply found no reason to incorporate sec.316.003(2)'s definition which, while included in 627.732(1) is omitted from the statute sought to be construed, i.e. 627.736(4)(d)(1) - what is meant by the term "self-propelled vehicle"?

The only question then is whether Link's decision that a moped is a bicycle creates direct and express conflict with the Second District's decision that a moped is a self-propelled vehicle.

[4] Sec.627.730-627.741, Fla.Stat.(Supp.1980)

In applying the Nielson criteria, it is clear that the two cases did not apply the same rule of law to produce a different result, though the two cases involved substantially the same controlling facts.

Finally, it is Respondent's position that it is unclear whether either the 5th DCA or the 2nd DCA announced a rule of law per se. The 5th DCA affirmed an award of PIP to an occupant of a moped because it found that a moped was a bicycle not a vehicle. The 2nd DCA affirmed denial of PIP to an occupant of a moped stating simply that it disagreed with Link's incorporation of the chapter 316 definitions into the PIP statute. The Second DCA's decision thus did not really announce a rule of law but rather implicitly found that a moped was a self-propelled vehicle.

Thus, there is no real conflict in the actual decisions but only conflict with the reasons contained therein. This does not constitute express and direct conflict. Gibson v. Maloney, supra.

II.

THE DECISION IN THIS CASE DOES NOT EXPRESSLY AFFECT A CLASS OF CONSTITUTIONAL OFFICERS.

To invoke this provision providing for certiorari jurisdiction, a decision must directly and in the same way exclusively affect the duties, powers, validity, formation, termination or regulation of a particular class of constitutional or state officers. Spradley

v. State, 293 So.2d 867(Fla.1974).

The Department of Highway Safety and Motor Vehicles and Department of Insurance are not constitutional or state officers. Both are administrative regulatory agencies. They do not "interpret" legislative enactments, which is an obvious function of the judiciary branch of the government. Said agencies do promulgate administrative rules which purport to offer guidance in applying laws, a function which hardly elevates these administrative bureaucrats to the height of constituional or state officers.

In any case, the 2nd DCA's decision does not directly or exclusively affect the two departments' duties since all the opinion did was affirm the trial court's denial of PIP to an occupant of a moped on the basis that the moped was a self-propelled vehicle.

Respondent urges that the absence of any citations of authority to support Petitioner's assertion of jurisdiction on this basis indicates the absence of any basis in law for same and Respondent urges rejection of this ground.

CONCLUSION

The Second District's decision in this case only disagrees with the reasoning utilized by the Fifth DCA in Link. Link found that based upon the definitions incorporated into sec.627.732(1) from sec.316.003, as the statutes then existed, a moped was a bicycle. The 2nd DCA simply disagreed with the 5th DCA's incorporation of definitions from a statute not referenced by the statute under construction, and applying the statutes as they existed on the date of this accident, agreed with the trial court's finding that a moped was a self-propelled vehicle. Thus, there are no conflicts of announced rules of law or application of the same rule of law to obtain different results.

Finally, the decision does not expressly and exclusively affect a class of constitutional or state officers.

Respondent requests that this Honorable Court decline jurisdiction of this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by United States Mail to DANIEL C. KASARIS, ESQUIRE, P. O. Box 4192, St. Petersburg, Florida 33731 this 6th day of April, 1984.

FOWLER, WHITE, GILLEN, BOGGS,
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