SUPREME COURT OF FLORIDA

ALLSTATE INSURANCE COMPANY,

Petitioner,

vs.

EXECUTIVE CAR & TRUCK LEASING, INC., ET AL.,

Respondents.

CASE NO: 67,368

COMMERCIAL UNION INSURANCE COMPANY, ET AL.,

Petitioner,

vs.

EXECUTIVE CAR & TRUCK LEASING, ET AL.,

Respondents.

CASE NO: 67,409

ON PETITION TO INVOKE DISCRETIONARY REVIEW OF DECISION OF THE DISTRICT COURT OF APPEAL FOURTH DISTRICT OF FLORIDA

RESPONDENT'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND THE FACTS

The Respondents would adopt the Statement of the Case and The Facts of the Petitioner, Allstate Insurance Company.

JURISDICTIONAL ISSUES

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II

IS THERE AN EXPRESS AND DIRECT CONFLICT WITH COLE V. SOUTHEASTERN FIDELITY INSURANCE COMPANY, 10 FLW 1330 (3rd DCA, May 28, 1985) AND SUNSHINE DODGE, INC. V. KETCHEM, 455 SO.2D 395 (5th DCA 1984)?

SUMMARY OF ARGUMENT

There is no express and direct conflict resulting in the jurisdiction of this Court where a full reported decision cites as authority a case for which this Court has accepted conflict jurisdiction. The Court must review the entire opinion to determine if conflict exists between the holding in the present case and the other cases cited by Petitioners. Dodi Publishing Company v. Editorial American S.A., 385 So.2d 1369 (Fla. 1980).

There is no conflict between Cole v. Southeast Fidelity Insurance Company, 10 FLW 1330 (3rd DCA, May 28, 1985), Sunshine Dodge, Inc. v. Ketchem, 455 So.2d 395 (5th DCA 1984), and the present case. The decisions in Cole and Sunshine Dodge, although involving priorities of insurance coverage on leased motor vehicles, arrived at different results than the present case because of different contractual provisions between the parties. There is no conflict between the rules of law applied by the Courts in arriving at those decisions. Accordingly, conflict jurisdiction does not exist.

ARGUMENT

I

THERE IS NO PRIMA FACIE EXPRESS CONFLICT BETWEEN THE DECISION IN THE PRESENT CASE AND RELIANCE INSURANCE COMPANY V. MARYLAND CASUALTY COMPANY, 453 So.2d 854 (Fla. 4th DCA 1984) REVIEW GRANTED, FLORIDA CASE NUMBER 65-873 (10 FLW, April 5, 1985); ALLSTATE INSURANCE COMPANY V. VALUE RENT-A-CAR OF FLORIDA, INC., 463 So.2d 320 (Fla. 5th DCA 1985) REVIEW GRANTED, FLORIDA CASE NUMBER 66-726, AND ALLSTATE INSURANCE COMPANY V. FOWLER, 355 So.2d 506 (lst DCA 1984) REVIEW GRANTED, FLA CASE NUMBER 65-986.

Petitioners Commercial and Action contend that because the Fourth District Court of Appeal relied on the case of Reliance Insurance Company v. Maryland Casualty Company, 453 So.2d 854 (Fla. 4th DCA 1984), along with other authority, in reaching its decision in the present case, and that this Court has accepted for review Reliance, and Allstate Insurance Company v. Value Rent-A-Car of Florida, Inc., 463 So.2d 320 (5th DCA 1985), and Allstate Insurance Company vs. Fowler, 455 So.2d 506 (lst DCA 1984), there is a prima facie case of express conflict of this decision with Reliance, Value Rent-A-Car, and Fowler. Petitioners Commercial and Action support this contention by citing this Court's opinion in Jollie v. State, 405 So.2d 418 (Fla. 1981). This contention totally misconstrues and misapplies the holding in Jollie.

The Jollie case is one of a line of cases in which this Court sets out the guidelines governing its jurisdiction to accept for review Per Curium Affirmance cases on the basis of conflict. There is nothing in Jollie or the cases cited therein, which indicates that this Court will apply this rule to review a case, such as the present case, in which the District Court of Appeal has issued a full written opinion. The inapplicability of Jollie to this situation can be seen by analyzing this Court's reasoning in Jollie and its predecessor cases.

Prior to the 1980 Constitutional Amendment, this Court would accept for review PCA opinions by determining conflict through a review of the entire record. As a result of the 1980 Constitutional Amendment, which requires express and direct conflict

rather than merely direct conflict, this Court will not review the entire record (because any conflict would not be express). Jenkins v. State, 385 So.2d 1356 (Fla. 1980). Therefore, when the PCA opinion cites to a controlling case, this Court will not review the opinion of the case cited to determine if conflict exists (again because any conflict would not be express). Dodi Publishing Company v. Editorial America S.A., 385 So.2d 1369 (Fla. 1980). This is true even when the cited opinion is issued contemporaneously with the PCA opinion by the District Court of Appeal in an effort to resolve several cases covering the same legal issues. Robles Del Mar, Inc. v. Town of Indian River Shores, 385 So.2d 1371 (Fla. 1980).

In Jollie the authority relied on by the PCA had previously been accepted by this Court (and reversed) and this Court found there to be an express and direct conflict with a decision of another District Court of Appeal. This Court held that the reference to a case which conflicted with a decision in another District Court of Appeal created a prima facie case of conflict between the PCA decision and that of the other District Court of Appeal. Petitioners Commercial and Action argue that a prima facie case of conflict exists between the authorities cited in the present case and other District Court of Appeal cases.

The mere fact that one of the decisions cited to support the opinion in the present case may conflict with that of another District Court of Appeal does not necessarily mean that the decision in the present case conflicts as well. Since there is a full written opinion in the present case, unlike Jollie, the opinion should be reviewed to determine if the decision conflicts with that of any other District Court of Appeal. Dodi Publishing Company v. Editorial American S.A., 385 So.2d 1369 (Fla. 1980).

In Dodi, this Court stated:

> "The issue to be decided from a Petition for Conflict Review is whether there is express and direct conflict in the decision of this District Court before us for review, not whether there is conflict in a prior written opinion which is now cited for authority". Dodi Publishing Company v. Editorial America S.A., 385 So.2d 1369 (Fla. 1980).

Therefore, in order to determine whether conflict jurisdiction exists in the present case, this finding must be based on whether the decision in the present case conflicts with that of any other District Court of Appeal, and not whether one of the cases cited in the decision conflicts.

ARGUMENT

II

THERE IS NO EXPRESS AND DIRECT CONFLICT BETWEEN COLE V. SOUTHEASTERN FIDELITY INSURANCE COMPANY, 10 FLW 1330 (3rd DCA, May 28, 1985) AND SUNSHINE DODGE, INC. V. KETCHEM, 455 SO.2D 395 (5th DCA 1984).

Petitioners Commercial and Action contend in their Brief that there is express and direct conflict between the decision of the Fourth District Court of Appeal in the present case and the decision by the Third District Court of Appeal in Cole v. Southeastern Fidelity Insurance Company, 10 FLW 1330 (3rd DCA, May 28, 1985). Petitioner Allstate contends in its Brief that there is express and direct conflict between the Fourth District Court of Appeal's decision in the present case with Cole, and also with the decision of the Fifth District Court of Appeal in Sunshine Dodge, Inc. v. Ketchem, 455 So.2d 395 (5th DCA 1984). Petitioners Commercial and Action make a belated attempt to raise conflict with Sunshine Dodge only in their response to Petitioner Allstate's Brief. Respondents contend that no express and direct conflict exists due to the factual distinctions between those three decisions and the present case.

All of these decisions concern the priority of insurance coverage in a leased car situation and the effect of Florida Statute 627.7263(1) on that priority. Florida Statute 627.7263(1) provides:

> "The valid and collectible liability insurance or personal injury protection insurance providing coverage for the lessor of a motor vehicles for rent or lease shall be primary unless otherwise stated in bold type on the face of the rental or lease agreement. Such insurance shall be primary for the limits of liability and personal injury protection coverage as required by ss 324.021(7) and 627.736".

The present case involves a Lessor, a Lessee, and a Driver, each of whom has a separate insurer and policy of insurance. In Sunshine Dodge there is a Lessor, Lessee, and Driver, but the Lessee and the Driver are covered by the same insurer and policy. In Cole, the Lessee and Driver is the same individual who has a separate insurer from the Lessor. The Lessors and Lessees in all three cases have written leases with provisions involving insurance coverage. The approach taken by the Fourth District Court of Appeal in the present case to determine the priority of coverage does not differ from the approach taken by the Fifth District Court of Appeal in Sunshine Dodge or the Third District Court of Appeal in Cole but reaches a different result due to the vastly different lease provisions involved. In the present case, the Fourth District Court of Appeal held that where the provisions of the above statute are not satisifed with regard to shifting primary insurance coverage (as is the case in all three cases), the insurance for the lessor is primary to the extent of the financial responsibility law, i.e. $10,000.00. Once the public policy of the State has been satisfied, by making the lessor's insurer primarily liable up to $10,000.00, the Fourth District Court of Appeals follows this Court's decision in Insurance Company of North America v. Avis Rent-A-Car System, Inc., 448 So.2d 1149 (Fla. 1977) by seeking to determine if the parties have contracted to shift the burden of coverage and if so, enforces those agreements. The Court below stated:

> "Alternatively, Appellants argue that even if they are found to be primarily responsible, the Statute specifically limits their responsibility to $10,000.00, the statutory limit of the Financial Responsibility Law. This issue has already been determined by this Court and by the Second District in Reliance Insurance Company v. Maryland Casualty Company, 453 So.2d 854 (Fla. 4th DCA 1984) and Patton v. Lindo's Rent-A-Car, Inc. 415 So.2d 43 (Fla. 2d DCA 1982). In accordance therewith we find that Industrial has the primary coverage, but only to the extent of $10,000.00.

We must then decide which insurance policy comes next as between the owner/lessor (Industrial), the lessee (Commercial), and the negligent user (Allstate)."

In order to make this determination, the Fourth District Court of Appeal looked to the existence of any agreements between the Lessor, the Lessee, and the Driver.

Because the Driver had no agreement with either party, and because he was the actual tortfeasor and the Lessee and Lessor were only vicariously liable, the Court determined the driver's insurer should be responsible for the second level of coverage following the initial $10,000.00, citing Fowler, supra. Then, priority of coverage needed to be determined between the Lessor and Lessee. The Court stated:

> "To determine the third level of insurance coverage as between the owner/lessor and lessee we must consider the lease agreement..."

The Court determined that the lease contained a provision whereby the Lessee agreed to provide insurance for the benefit of the Lessor, and an indemnity provision whereby the Lessee agreed to completely indemnify the Lessor for all liability as a result of negligent use of the vehicle. Therefore, the Lessee's insurer had the next level of coverage, the Court stated:

> "Thus, the parties have agreed that the lessor is to be completely indemnified by the lessee (except for its statutory responsibility of $10,000.00 as discussed earlier). Accordingly, Industrial, the lessor's insurance company, should not have to pay until both of Commercial's policies (primary and excess) are exhausted."

This same approach is taken by the Courts in Cole and Sunshine Dodge but different results are reached because most importantly, the lease provisions are different.

As in the present case, the Fifth District Court of Appeal in Sunshine Dodge held that the Lessor's insurer provided primary coverage for the $10,000.00 by operation of the Statute. When considering the agreements between the Lessor and Lessee, however, the Court held the Lessor to be liable for the second level of coverage as well, to the extent of its policy limits.

In Sunshine Dodge the lease agreement provided that the Lessor would provide insurance for the benefit of the Lessee (rather than the Lessee agreeing to provide insurance for the benefit of the Lessor as in the present case), and that the Lessee would indemnify the Lessor only for damages not covered by that insurance policy (unlike the present case where the Lessee agreed to indemnify the Lessor for all damages). Since the Lessor agreed to provide insurance and the Lessee agreed to

indemnify the Lessor for all damages not covered by that insurance, the Fifth District Court of Appeal quite naturally held them to their agreements under this Court's doctrine from INA, supra. Since the Fourth District Court of Appeal merely held the parties to their agreement in the present case, no conflict exists.

The Third District Court of Appeal, in Cole, also, held the Lessor's insurance primary for the first $10,000.00. Following the rule of INA, the Court examined the agreement between the parties and found no agreement to provide insurance or indemnity. The Court therefore looked to the "other insurance" clauses in the respective policies and held that the Lessor's insurer was liable to the extent of its coverage under general contract construction principles. Following that, however, the Lessor was entitled, by common law, to be indemnified by the Lessee/Driver (and his insurer), who was the active tortfeasor. The Court stated:

> "Since there is no statutory or contractual reason for confining the application of this principle to the $10,000.00 statutory requirement, or to any other limits other than those stated on this policy, we direct that, on remand, Southeastern's coverage be declared to be primary to the full extent of its liability limits" Cole, supra, at 1331.

The Fourth District Court of Appeal found in the present case that there was a contractual reason, i.e., the lease provisions, to limit the Lessor's primary coverage to the $10,000.00 required by the Statute. Therefore, the present case's decision does not conflict with that of Cole.

The Petitioners have attempted to raise the various "other insurance" clauses in the policies in the present case to create conflict with the holding in Cole, but it should be noted that this matter was not raised by any of the Petitioners at the trial level, nor in their Briefs at the appellate level, and was only first raised at Oral Argument and in Petitions for Rehearing. Therefore, they should be precluded from asserting this argument as a ground for conflict.

Because the present case, Cole, and Sunshine Dodge, do not actually conflict, but are only decided differently based upon their facts, this Court does not have jurisdiction and the Petitioners' Petition For Review should be denied.

CONCLUSION

The Petitioners' Petition for Review should be denied since there is no prima facie direct conflict with the Reliance, Value Rent-A-Car, and the Fowler decisions, and the doctrine of "prima facie direct conflict" is inapplicable to the present case where there is a full written opinion rather than a PCA. Further, there is no express and direct conflict with the decisions in Cole and Sunshine Dodge due to the factual distinction of those cases.

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