IN THE SUPREME COURT OF FLORIDA

WORLD SERVICE LIFE INSURANCE COMPANY,

Petitioner,

vs.

ELEANOR V. BODIFORD, as Personal Representative of the Estate of GROVER T. BODIFORD, Deceased,

Respondent.

CASE NO.: 72,~~361~~ 631
(DCA Case No.: 87-1369)

INVOCATION OF DISCRETIONARY JURISDICTION
TO REVIEW NON-FINAL ORDERS OF THE
FIRST DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON JURISDICTION

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INTRODUCTORY STATEMENT

References herein to the petitioner, WORLD SERVICE LIFE INSURANCE COMPANY, will be designated as "World" or the "petitioner." References to the respondent, ELEANOR V. BODIFORD, as Personal Representative of the Estate of GROVER T. BODIFORD, Deceased, will be designated as "Bodiford" or the "respondent."

References to the attached Appendix will be designated by the symbol, "A," followed by the page number.

ISSUES PRESENTED

I. THIS COURT IS WITHOUT DISCRETIONARY JURISDICTION BECAUSE THE PETITIONER'S NOTICES FAIL TO INCLUDE THE ORDER ARGUED IN THE PETITIONER'S BRIEF ON JURISDICTION

II. THIS COURT IS WITHOUT DISCRETIONARY JURISDICTION BECAUSE THE PETITIONER URGES CONFLICT WITH A DECISION RENDERED AFTER THE ORDER COMPLAINED OF

III. IF DISCRETIONARY JURISDICTIONAL POWER EXISTS, THIS COURT SHOULD DECLINE TO EXERCISE IT

SUMMARY OF ARGUMENT

This Court is without discretionary conflict jurisdiction for two reasons:

First, by the terms of both its original notice [A6-A7] and its amended notice [A8-A9], the petitioner World seeks review of (1) an order denying rehearing [A4], and (2) an order granting Bodiford's motion for appellate attorney's fees [A5]. World has failed to seek review of the district court's underlying order (dated April 6, 1988) [A1-A3], as to which World in its brief urges conflict jurisdiction. The underlying order is not lodged in this Court by attempted review of the later nonfinal ones. Manifestly, neither of the latter supports conflict jurisdiction. **[Point I].**

Second, World fails to demonstrate conflict in the April 6, 1988 order itself. Conflict is urged solely with a decision of this Court which was announced two days after the April 6 order became final. Thus, there is no conflict to review. There has been no offense to precedential harmony and uniformity, merely the announcement of new case law. **[Point II].**

Even if the discretionary jurisdiction is found to exist, it should not be exercised. There is no interdistrict split to resolve; if the decision below is wrong, this Court's later decision has already harmonized the precedent. Nor does particularized justice, if here germane, compel intervention, since the decision of the district court of appeal is sustainable on grounds other than that urged as conflict. **[Point III].**

ARGUMENT

I. THIS COURT IS WITHOUT DISCRETIONARY JURISDICTION BECAUSE THE PETITIONER'S NOTICES FAIL TO INCLUDE THE ORDER ARGUED IN THE PETITIONER'S BRIEF ON JURISDICTION

Petitioner served its notice to invoke the discretionary jurisdiction of this Court on June 22, 1988. [A6-A7]. On July 1, 1988, Petitioner served its amended notice to invoke discretionary jurisdiction. [A8-A9]. Neither notice brings up for review the order of the First District Court of Appeal, rendered April 6, 1988, [A1-A3], which serves as the basis for World's assertion of conflict jurisdiction.

Rather, World's original notice clearly includes only the order denying rehearing (and rehearing en banc), rendered May 24, 1988; and World's amended notice includes only the May 24 order and the subsequent order awarding appellate attorney's fees to Respondent, rendered June 8, 1988. Both notices mention the April 6 order, to be sure, but only by way of characterizing the effect of the May 24 order denying rehearing.[1]

Under appellate principles of long standing, a notice of appeal which seeks review of an order denying rehearing does not

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[1] The pertinent language of the notices is as follows:

> . . . to review the decision of this Court rendered May 24, 1988, denying Appellant's Motion for Rehearing En Banc the Opinion of this Court filed April 6, 1988 reversing the lower court's award of attorneys fees.. . .

See Appendix, infra, at A6, A8.

bring up for review the underlying order of which rehearing was denied. See, e.g., Klemenko v. Klemenko, 97 So.2d 11 (Fla. 1957); Finley v. Finley, 103 So.2d 191 (Fla. 1958); Oxford v. Polk Federal Savings & Loan Association, 147 So.2d 603 (Fla. 2d DCA 1962) [all decided under former Florida Appellate Rule 5.2(a); see now Fla.R.App.Proc. 9.130(a)(4)]. All argument in petitioner's brief pertaining to the April 6 order should be stricken as not properly before the Court.

This Court need only cursorily examine the orders of May 24 and June 8 to see that they contain no language which could "expressly and directly conflict with a decision of another district court of appeal or of the Supreme Court on the same question of law." Accordingly, review under Fla.R.App.Proc. 9.030(a)(2)(A)(iv) must be denied.

II. THIS COURT IS WITHOUT DISCRETIONARY JURISDICTION BECAUSE THE PETITIONER URGES CONFLICT WITH A DECISION RENDERED AFTER THE ORDER COMPLAINED OF

Assuming, arguendo, that the notices suffice to bring the April 6 order before this Court, there is still no basis for the exercise of discretionary jurisdiction.

World urges conflict between an order of the First District Court of Appeal dated April 6, 1988, and a decision of this Court[2] dated May 26, 1988---two days after World's motion for rehearing was denied. Thus, the petitioner would ask this Court

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[2] Miami Children's Hospital v. Tamayo, 13 FLW 340 (Fla.S.Ct., May 26, 1988, Case No. 71,213). The decision is mistakenly attributed to the First District Court of Appeal in Petitioner's brief on jurisdiction.

to require the district courts of appeal to bring their decisions into conformity with law not yet announced at the time of decision.

This is not the purpose of discretionary conflict jurisdiction. It remains true, under the present rules as under the old, that the purpose of the power is to maintain harmony and uniformity in the decisional law of Florida, to assure its integrity as precedent, not to correct every arguable adjudicative error that may be urged in a particular case. Compare, e.g., Hastings v. Osius, 104 So.2d 21 (Fla. 1958) and Ansin v. Thurston, 101 So.2d 808 (Fla. 1958), with Jenkins v. State, 385 So.2d 1356 (Fla. 1980).

The decision below (April 6, 1988) was final upon the denial of rehearing (May 24, 1988) by the district court of appeal. As of that date, it stood in conflict with no authority urged by World. If that decision was wrong, it stands corrected as precedent by this Court's later announcement in Miami Children's Hospital v. Tamayo, 13 FLW 340 (Fla.S.Ct., May 26, 1988, Case No. 71,213). There is neither need nor basis for the exercise of discretionary conflict jurisdiction.

III. IF DISCRETIONARY JURISDICTIONAL POWER EXISTS, THIS COURT SHOULD DECLINE TO EXERCISE IT

In the alternative, the respondent submits that, even if jurisdiction is discretionary, it should not be exercised. In the first place, as already argued above, accepting jurisdiction would promote the attainment of no decisional uniformity or harmony that does not already exist by virtue of Tamayo, supra.

Second, and without searching the record, it should already be clear that an independent basis exists for the decision below. As the First District Court of Appeal noted, the contingent fee contract provided simply for a fee of "45% of the gross amount received, if case is appealed." Opinion at 2 (emphasis added). Moreover, the trial court did apply the factors set out in Florida Patients Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985). Id. at 2-3. Since the "gross amount received" includes both the policy benefits and a reasonable attorney's fee determined by the court[3], the reasonable fee based on the Rowe factors did not exceed the fee agreement between attorney and client. In short, the limiting language of Rowe was not offended by the award to Bodiford of the full amount of the attorney's fee that the trial court found to be reasonable based on the Rowe factors.

Thus, neither precedential harmony nor particularized justice argues here for the exercise of discretionary conflict jurisdiction.

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[3] By statute, of course, a reasonable attorney's fee is deemed a part of the damages recoverable by the insured upon the wrongful refusal to pay first-party benefits. Section 627.428, Fla. Stat. (1979). See Cincinnati Insurance Company v. Palmer, 297 So.2d 96 (Fla. 4th DCA 1974); Gibson v. Walker, 380 So.2d 531 (Fla. 5th DCA 1980); Universal Underwriters Insurance Company v. Gorgei Enterprises, Inc., 345 So.2d 412 (Fla. 2d DCA 1977).

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should decline to exercise discretionary conflict jurisdiction.

Respectfully submitted,

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By: 

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Respondent's Brief on Jurisdiction was furnished to Deborah M. Overstreet, attorney for petitioner, at Post Office Box 70, 221 McKenzie Avenue, Panama City, Florida 32402, by U.S. mail, this 22nd day of July, 1988.

MICHEL L. STONE