IN THE SUPREME COURT

OF FLORIDA

CASE NO. 72844

CONSOLIDATED AMERICAN INSURANCE COMPANY, INC.,

Petitioner

vs.

CHARLES BUCOLO AND
KIMBERLY CADE HENDERSON

Respondents.

RESPONDENT'S BRIEF ON JURISDICTION

CARON BALKANY
Attorney at Law
850 San Pedro Avenue
Coral Gables, Florida 33156

-and-

DANIELS & HICKS, P.A.
Suite 2400, New World Tower
100 N. Biscayne Boulevard
Miami, Florida 33132

Attorneys for Respondent
Henderson

TABLE OF CONTENTS

DANIELS AND HICKS, P. A.
SUITE 2400 NEW WORLD TOWER, 100 NORTH BISCAYNE BOULEVARD, MIAMI, FL 33132-2513 • TEL. (305) 374-8171

TABLE OF CITATIONS

OTHER AUTHORITIES CITED

STATEMENT OF THE CASE AND FACTS

The Third District decision of which Petitioner seeks review states:

> PER CURIAM.
>
> Affirmed. AIU Ins. Co. v. Block Marina Inv., Inc., 512 So.2d 1118 (Fla. 3d DCA 1987); § 627.426 (2)(a), Fla. Stat. (1985).

All of the other 'facts' in Petitioner's brief (with which Respondent is not in agreement) obviously do not appear on the face of the Third District decision and are not properly before this Court for purposes of determining jurisdiction.[1/]

SUMMARY OF ARGUMENT

The only way to get conflict review of a per curiam decision is via Jollie v. State, 405 So.2d 418 (Fla. 1981) and then only if the criteria specified in Jollie are met. Specifically, the decision must be a per curiam citation decision in which the referenced case is both (1) identified by the district court as controlling[2/], and (2) pending for review in the Florida Supreme Court. The Third District's per curiam decision in this

---

1/ Respondent notes, however, that Petitioner's own statement reveals that Petitioner concedes that there were valid existing insurance policies in this case, and that Petitioner's particular coverage defense is based on an exclusion contained in the policies' terms.

2/ All emphasis in this brief is supplied unless otherwise stated.

DANIELS AND HICKS, P.A.
SUITE 2400 NEW WORLD TOWER, 100 NORTH BISCAYNE BOULEVARD, MIAMI, FL 33132-2513 • TEL. (305) 374-8171

case does not meet the Jollie criteria because it does not identify the referenced case as controlling and because it also cites an additional, separate authority.

The per curiam decision also presents no basis for review of Petitioner's 'constitutional' issue which falls within none of the categories for either appeal or discretionary jurisdiction.

ARGUMENT

POINT I

THERE IS NO BASIS FOR CONFLICT REVIEW

The 1980 amendment to section 3 of Article V of the Florida Constitution was designed to limit the jurisdiction of the Florida Supreme Court. Jenkins v. State,, 385 So.2d 1356 (Fla. 1980). Of particular significance here was the amendments' elimination of conflict review of per curiam decisions issued without opinions. Id. Per curiam citation decisions have also been held non-reviewable. Dodi Publishing Co. v. Editorial America, S.A., 385 So.2d 1369 (Fla. 1980); Robles Del Mar, Inc. v. Town of Indian River Shores, 385 So.2d 1371 (Fla. 1980).

Jollie v. State, 405 So.2d 419 (Fla. 1981) created a single exception to the rule that per curiam decisions no longer present a basis for conflict review by this Court. Jollie dealt with review of per curiam citation opinions in a certain situation where the referenced opinion is pending for review before

DANIELS AND HICKS, P.A.
SUITE 2400 NEW WORLD TOWER, 100 NORTH BISCAYNE BOULEVARD, MIAMI, FL 33132-2513 • TEL. (305) 374-8171

the Florida Supreme Court. The Jollie Court characterized the situation as one which "applies only to a limited class of cases." 405 So.2d at 420. Specifically, the situation is that involving per curiam citation opinions where the referenced case is a lead opinion disposing of multiple cases before the district court; i.e., where the district court uses the labor-saving device of writing an opinion in the lead case and disposes of the other cases by a per curiam decision referencing the lead case.

> The situation presented in this cause ordinarily applies only to a limited class of cases.
>
> The problem arises from the practical situation which faces all appellate courts at one time or another - that is, how to dispose conveniently of multiple cases involving a single legal issue without disparately affecting the various litigants.
>
> Traditional practice in dealing with a common legal issue in multiple cases, both in district courts and here, has been to author an opinion for one case and summarily reference that opinion on all the others.

405 So.2d at 420. Under such circumstances, the Jollie Court determined, if review of the lead case was granted and pending (or if the lead case was reversed), the per curiam decisions citing the lead case would also be subject to conflict review:

> Common sense dictates that this Court must acknowledge its own public record actions in dispensing with cases before it. We thus conclude that a district court of appeal per curiam opinion which cites as controlling authority a decision that is either pending review in or has been reviewed by this Court continues to constitute prima facie express conflict and allows this Court to exercise its jurisdiction.

405 So.2d at 420.

DANIELS AND HICKS, P.A.
SUITE 2400 NEW WORLD TOWER, 100 NORTH BISCAYNE BOULEVARD, MIAMI, FL 33132-2513 • TEL. (305) 374-8171

In announcing this rule, however, the Jollie Court was careful to note a distinction between (1) decisions like Jollie which reference a lead opinion, and (2) "those per curiam opinions which merely cite counsel-advising cases." 405 So.2d at 420. The Jollie rule was only to provide possible review in the former cases, not the latter. The Jollie Court thus suggested procedural means for the district courts to identify the true Jollie type cases.

> First, we suggest the district courts add an additional sentence in each citation PCA which references a controlling contemporaneous or companion case, stating that the mandate will be withheld pending final disposition of the petition for review, if any, filed in the controlling decision.
>
> In essence, this will "pair" the citation PCA with the referenced decision...

405 So.2d at 420.

> [W]e further suggest that the district courts devise one or more methods to distinguish a contemporaneous or companion case - for example, with distinguishing citation signals or by certifying that an identical point is at issue in the cited case - from cases which offer a mere counsel notification citation.

405 So.2d at 421. The Jollie Court then went on to emphasize that absent some identification of the case referenced in a citation PCA decision as a controlling case by one of the suggested means, the citation PCA would remain non-reviewable:

> We reaffirm that mere citation PCA decisions rendered in the traditional form will remain non-reviewable by this court for the reasons stated in Dodi Publishing and Robles Del Mar.

405 So.2d at 421.

DANIELS AND HICKS, P.A.
SUITE 2400 NEW WORLD TOWER, 100 NORTH BISCAYNE BOULEVARD, MIAMI, FL 33132-2513 • TEL. (305) 374-8171

Here, the Third District's PCA citation decision does not identify the referenced case (decided some nine months previously) as controlling, does not stay the mandate, and does not in any way flag the case as eligible for Jollie review.

The Third District is well aware of the procedures for providing a basis for Jollie review. See, e.g., Shaw v. General Motors Corp., 503 So.2d 362 (Fla. 3d DCA 1987); Brackenridge v. Amete, Inc., 503 So.2d 363 (Fla. 3d DCA 1987); Desvergundt v. Koppers, 506 So.2d 60 (Fla. 3d DCA 1983); Manuel v. Eig Cutlery, Inc., 506 So.2d 1100 (Fla. 3d DCA 1987); Purty v. McDonnell Douglas Corp., 508 So.2d 501 (Fla. 3d DCA 1987); Pinero v. Sears, Roebuck & Co., 515 So.2d 422 (Fla. 3d DCA 1987). No such procedure was employed by the Third District in this case, and there is accordingly no basis for review under Jollie.[3/]

Respondent notes an additional feature of this case which precludes Petitioner from meeting its burden of demonstrating that this Court has jurisdiction. The Third District's per curiam decision references not only the AIU case, but also a statute, i.e. § 627.426 (2)(a) Fla.Stat. As noted above, Petitioner could show no entitlement to review on the basis of the cited AIU case as it was not identified as a controlling - rather

---

3/ It is particularly noteworthy that the Third District certified a potential conflict in the referenced case of AIU Insurance Co. v. Block Marina Investment, Inc., 512 So.2d 1118 (Fla. 3d DCA 1987) with U.S.F.& G. v. American Fire and Indemnity, 511 So.2d 624 (Fla. 5th DCA 1987) (see 512 So.2d at 1120, n.4), but did not certify any such potential conflict here.

DANIELS AND HICKS, P.A.
SUITE 2400 NEW WORLD TOWER, 100 NORTH BISCAYNE BOULEVARD, MIAMI, FL 33132-2513 • TEL. (305) 374-8171

than counsel notification - case. A fortiori, Petitioner has shown no entitlement to review where there has also been cited a separate and additional authority for the decision. Petitioner -- who has the burden of demonstrating a jurisdictional basis -- is certainly not entitled to have the additionally cited authority treated as surplusage. And the only way this Court could determine the significance of the citation to two separate authorities would be to delve into the record underlying the per curiam decision - precisely the exercise which precludes review. The Jollie Court noted this very point:

> Justice Thomas, the father of Florida's district courts of appeal and the strongest advocate of the principle that the district courts "were meant to be courts of final appellate jurisdiction," said this Court had no authority to "dig into a record to determine whether or not a per curiam affirmance by a district court of appeal conflicts."

405 So.2d at 420 (citing Lake v. Lake, 103 So.2d 639, 642-43 (Fla. 1958). Here, the Court cannot determine whether the two authorities are cited cumulatively or disjunctively or whether certain facts about the instant case make the general holding in AIU merely pertinent and the statute dispositive.[4/]

4/ In fact, the dehors-the-decision facts recited by Petitioner in its statement of the case show that where the AIU and USF&G decisions involved lapsed endorsements and policies, this case involves concededly existing policies where the Petitioner/insurer seeks to rely on an exclusion. Petitioner's also conceded failure to timely raise that 'particular coverage defense' falls squarely under the § 627.426(2)(a) provision cited by the Third District.

DANIELS AND HICKS, P.A.
SUITE 2400 NEW WORLD TOWER, 100 NORTH BISCAYNE BOULEVARD, MIAMI, FL 33132-2513 • TEL. (305) 374-8171

In sum, Jollie sets out certain criteria which must be met before per curiam decisions - including per curiam citation decisions - are subject to conflict review. The Jollie criteria are not met here. Petitioner has shown no jurisdictional basis for conflict review of the Third District's per curiam decision.

POINT II

THERE IS NO JURISDICTION FOR REVIEW OF PETITIONER'S 'CONSTITUTIONAL' ISSUE

The Third District's per curiam decision self-evidently does not (1) declare invalid a state statute or provision of the state constitution so as to invoke appeal jurisdiction under Fla. R.App. 9.030(a)(1)(A)(ii), or (2) expressly declare valid a state statute or expressly construe a provision of the state or federal constitution so as to invoke discretionary jurisdiction under Fla.R.App. 9.030(a)(2)(A)(i) or (ii). Petitioner's 'constitutional' issue argument presents no basis for exercise of jurisdiction by this Court.

DANIELS AND HICKS, P. A.
SUITE 2400 NEW WORLD TOWER, 100 NORTH BISCAYNE BOULEVARD, MIAMI, FL 33132-2513 • TEL. (305) 374-8171

CONCLUSION

Based on the foregoing facts and authorities, Respondent respectfully submits that the Third District's per curiam decision presents no basis for this Court to exercise jurisdiction and that review should accordingly be denied.

Respectfully submitted,

CARON BALKANY
Attorney at Law
850 San Pedro Avenue
Coral Gables, Florida 33156

-and-

DANIELS & HICKS, P.A.
Suite 2400, New World Tower
100 N. Biscayne Boulevard
Miami, Florida 33132

BY: Elizabeth Koebel Clarke
ELIABETH KOEBEL CLARKE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Respondent's Brief on Jurisdiction was mailed this 2nd day of September 1988 to: WILLIAM C. MERRITT, ESQ., Merritt, Sikes & Craig, P.A., 111 S.W. Third Street, Third Floor, McCormick Building, Miami, Florida 33130.

Elizabeth Koebel Clarke

ELIZABETH KOEBEL CLARKE

DANIELS AND HICKS, P. A.
SUITE 2400 NEW WORLD TOWER, 100 NORTH BISCAYNE BOULEVARD, MIAMI, FL 33132-2513 • TEL. (305) 374-8171