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IN THE SUPREME COURT
OF THE STATE OF FLORIDA

THE SHELBY MUTUAL INSURANCE COMPANY OF SHELBY, OHIO,

Petitioner,

v.

MARY LOU SMITH,

Respondent.

Case No.: 72,870

BRIEF OF AMICUS CURIAE OF THE FLORIDA ASSOCIATION FOR INSURANCE REVIEW SUPPORTING POSITION OF PETITIONER THE SHELBY MUTUAL INSURANCE COMPANY OF SHELBY, OHIO

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On Behalf of Amicus Curiae
FLORIDA ASSOCIATION FOR INSURANCE REVIEW

TABLE OF CONTENTS

TABLE OF CITATIONS

INTEREST OF THE FLORIDA ASSOCIATION FOR INSURANCE REVIEW AS AMICUS CURIAE

This amicus brief is submitted by the Florida Association for Insurance Review on behalf of the Defendant/Petitioner, The Shelby Mutual Insurance Company of Shelby, Ohio. The Florida Association for Insurance Review is a non-profit organization consisting of a number of insurance companies doing business in the State of Florida.

The purposes and objectives of this Association are two-fold. First, the Association provides a regular educational forum to discuss current developments in Florida law affecting the claims submitted to casualty insurance companies and the insurance coverage typically provided in casualty insurance policies. Secondly, the Association submits amicus briefing to assist Florida courts concerning major issues which affect casualty insurance coverage and the claims which are payable through that coverage.

The subject matter of this appeal significantly affects the insurance industry's risk evaluation, rate making, and coverage decision making. For those reasons, the Association seeks to present this Court with the insurance industry's recommendations.

STATEMENT OF THE CASE AND FACTS

This amicus would rely upon the Statement of the Case and Facts as contained in the Initial Brief on the Merits filed by the Defendant/Petitioner, Shelby Mutual Insurance Company.

POINT ON APPEAL

Amicus Curiae, The Florida Association for Insurance Reform respectfully submits the following point on appeal:

WHERE A TORTFEASOR FAILS TO MEET THE STATUTORY DEFINITION OF *AN* "UNINSURED MOTORIST" BECAUSE HIS LIABILITY LIMITS ARE EQUAL TO OR GREATER THAN THOSE OF THE INJURED PARTY, MAY THE COURTS ASSUME THAT THE LEGISLATURE INTENDED TO REPEAL THE DEFINITION SO AS TO ALLOW THE INJURED PARTY TO RECOVER UNINSURED MOTORIST BENEFITS?

SUMMARY OF THE ARGUMENT

The Florida Association for Insurance Review believes that an injured party is not entitled to recover uninsured motorist benefits under the 1984 amendments to the uninsured motorist statute, Section 627.727 Florida Statutes unless the tortfeasor's liability limits are less than those of the policyholder's UM coverage. Although the 1984 amendments revised the statute so as to disallow set-off, the legislature retained the definition of uninsured motorist to mean one whose liability limits were less than the UM coverage of the injured party.

Despite the legislative language, the court below in Shelby Mutual Insurance Company v. Smith, 527 So.2d 830 (Fla. 4th DCA 1988) concluded that the legislature intended to amend or repeal the definition of an uninsured motorist, but failed to do so through some oversight. This decision is in conflict with the holdings of United States Fidelity & Guarantee Company v. Woolard, 523 So.2d 798 (Fla. 1st DCA 1988) and Marquez v. Prudential Property and Casualty Insurance Company, ___ So.2d ___ (Fla. 3d DCA 1988) [13 FLW 2694, December 23, 19881. The Shelby decision obliterates the distinction between an uninsured and underinsured motorist, even though the legislature retains this distinction in subsections (1) and (6) of the statute, following the revisions.

In reaching its conclusion, the Shelbv court also ignored the cardinal rules of statutory interpretation. Despite the fact that the statute is not ambiguous on its face, the Shelby court turned to questionable extrinsic materials in order to seek out and justify a "conflict" or "ambiguity." The Fourth District Court of Appeal placed particularly heavy reliance on a hypothetical example contained in a staff summary prepared by a non-legislator whose credentials are unknown. The court also gave excessive credence to an article written by an attorney in a Continuing Legal Education publication. This attorney expressed the opinion that the legislature intended to implicitly repeal the definition of uninsured motorist in the statute. Conflicting views were expressed in the same publication. However, only the attorneys who disagreed with the result of the statute as it read found it ambiguous.

The Fourth District Court of Appeal's methodology in Shelby is incorrect because it is based on three erroneous assumptions: (1) The court assumed that it could entertain the review of extrinsic matters, despite the fact that there was no conflict or ambiguity in the statute as it read: (2) The court assumed that a staff summary should be accorded weight equal to the legislative mandate contained in the language of the statute: and (3) The court assumed that the legislature intended to repeal the definition of uninsured motorist contained in the statute. Because the Shelby court's construction of the unambiguous statute resulted in a rewriting of the terms of the

statute, it consisted of an "abrogation of legislative power". Holly v. Auld, 450 So.2d 217, 219 (Fla. 1984) As such, the decision was error and should be quashed.

ARGUMENT

WHERE A TORTFEASOR FAILS TO MEET THE STATUTORY DEFINITION OF AN "UNINSURED MOTORIST" BECAUSE HIS LIABILITY LIMITS ARE EQUAL TO OR GREATER THAN THOSE OF THE INJURED PARTY, THE COURTS MAY NOT ASSUME THAT THE LEGISLATURE INTENDED TO REPEAL THE DEFINITION SO AS TO ALLOW THE INJURED PARTY TO RECOVER UNINSURED MOTORIST BENEFITS.

Amicus Curiae, the Florida Association for Insurance Review, urges this Court to accept the holdings of United States Fidelity & Guarantee Company v. Woolard, 523 So.2d 798 (Fla. 1st DCA 1988) and Marquez v. Prudential Property and Casualty Insurance Company, ____ So.2d ____ (Fla. 3d DCA 1988) [13 FLW 2694, December 23, 19881. These opinions state that the 1984 amendments to the uninsured motorist statute, Section 627.727 Florida Statutes, do not change the fact that a party may not recover UM benefits unless he or she is injured by an "uninsured" motorist as defined by the statute. Therefore, the 1984 amendments, which disallow the set-off from UM limits coverage for amounts paid by others, are still applicable only to policyholders whose UM coverage is greater than that of the tortfeasor's liability limits.

The Florida Association for Insurance Review also urges this Court to reject the conflicting opinion of the Shelby Mutual Insurance Company v. Smith, 527 So. 2d 830 (Fla. 4th DCA 1988), below, which concluded that the legislature intended to amend or repeal the definition of an uninsured motorist, but failed to do

so through some oversight. The court below held that UM benefits were not excess only when one was insured by an uninsured motorist. Instead, that Court determined that UM coverage was now excess to the coverage of every driver on the road, even if the driver failed to meet the statutory definition.

In Woolard, the First District Court of Appeal properly looked to the plain meaning of the statutory language that eliminated set-off but retained the requirement that one must have a true UM claim before benefiting from this coverage. The definition of uninsured motorist in the statute is one whose liability insurance is less than the injured party's UM coverage. Therefore, in order to invoke a UM claim, one would still have to be injured by a motor vehicle meeting that definition. There is nothing in that definition which conflicts with the provision negating set-off. The provisions are harmonious and without ambiguity. It simply continues to provide that:

> [I]f the alleged tortfeasors in this case do not qualify as uninsured motorists...[the injured parties] are not entitled to recover under the uninsured motorist portion of the policy...

Woolard, 523 So.2d at 799. If the tortfeasor qualifies as an uninsured motorist, then the end result is that set-off from coverage is eliminated.

In order to rule otherwise, the Shelby court below created its own artificial ambiguity by going outside the statute itself in search of a conflict. The alleged ambiguity was found by

comparing the statutory language with a hypothetical example contained in a staff summary of the House bill, a summary written by a non-legislator staff employee whose credentials are unknown, an article written by an attorney, and by looking at the title of the House Bill.

Such methodology is clearly at odds with this Court's past rulings on statutory interpretation. This Court has instructed the lower courts to look to the statute itself to determine the intent of the legislature. When the language of the statute itself conveys an unequivocal meaning, it is not the function or prerogative of the courts to speculate further on statutory construction. Department of Lesal Affairs v. Sanford-Orlando Kennel Club, Inc., 434 So.2d 879 (Fla. 1983); Heredia v. Allstate Insurance Company, 358 So.2d 1353 (Fla. 1978) The plain meaning of a statute's language is the first consideration in determining legislative intent. Only when the language in and of itself is of doubtful meaning should any matter extrinsic to the statute alone be consulted. St. Petersburs Bank & Trust Company v. Hamm, 414 So.2d 1071 (Fla. 1982); Florida State Racing Commission v. McLaughlin, 102 So.2d 574 (Fla. 1958)

Courts are not empowered to construe unambiguous statutes in a way which would extend, modify, or limit the expressed terms contained therein. Holly v. Auld, 450 So.2d 217 (Fla. 1984) ~~See also~~ Vocelle v. Knight Brothers Paper Company, Inc., 118 So.2d 664 (Fla. 1st DCA 1960) (holding that where a statute contains the definition of a word or phrase, that meaning must be

ascribed to the word or phrase whenever repeated in the same statute, unless contrary intent clearly appears). The Fourth District also ignored its own precedent in holding otherwise. See Cobb v. Maldonado, 451 So.2d 482 (Fla. 4th DCA 1984); Nash v. Fort Lauderdale Board of Adjustment, 462 So.2d 88 (Fla. 4th DCA 1985)

The Fourth District's methodology in Shelby is incorrect because it is based on three erroneous assumptions: (1) The court assumed that it could entertain the review of extrinsic matters despite the fact that there was no conflict or ambiguity in the statute as it reads; (2) The court assumed that a staff summary should be accorded weight equal to the legislative mandate contained in the language of the statute; and (3) The court assumed that the legislature intended to repeal the definition of uninsured motorist contained in the statute, a definition which is still included, unchanged, in the UM revisions which will go into effect in 1989.

As to the first assumption, the opinion below never addresses the fact that there is no ambiguity on the face of the statute. In fact, that first rule of statutory interpretation is totally ignored. The court makes a brief reference to the preface or title of House Bill 319 which amended Section 627.727 as "providing that uninsured motorist coverage is over and above any motor vehicle coverage." If that title were taken absolutely literally, it might be considered ambiguous when compared to the statutory language itself. However, the title is not the law.

The purpose of the title is simply to give notice of the subject matter of the Act and is not binding as to the Act's meaning or application. Pruitt V. State, 363 So.2d 552 (Fla. 1978); Carter v. Government Employees Insurance Company, 377 So.2d 242 (Fla. 1st DCA 1979), cert. denied, 389 So.2d 1108 (Fla. 1980)

The decision below also concluded that ambiguity was present in the statute itself because there were two conflicting viewpoints in a Continuing Legal Education publication as to the interpretation of this statute. This article is not an acceptable extrinsic matter to be examined for legislative intent, even if there were an ambiguity in the statute itself. The court's conclusion that the law must be ambiguous because several attorney-authors say that it is so is clearly error. It should also be noted that the article reflected conflicting viewpoints and only the attorneys who disagreed with the statute found it ambiguous. The court's extremely heavy reliance on these articles in reaching its decision is misplaced.

As to the second assumption, there is no historical precedent for giving so great a weight to a staff report on a House Bill. The Fourth District Court of Appeal raised that report to the status of a provision of the statute itself by comparing a hypothetical example in the report to the actual statutory language. In doing so, the court noted a conflict because the illustration involved a tortfeasor and a UM policyholder with identical limits.

The decision of Ellsworth v. Insurance Company of North America, 508 So.2d 395 (Fla. 1st DCA 1987) does indicate that staff summaries are accorded significant respect by Florida courts as an aid to statutory interpretation. However, the Fourth District Court of Appeal ignored its own precedent by relying so heavy on the opinion of a non-legislator staff member whose credentials were not even identified. In McClellan v. State Farm Mutual Insurance Company, 366 So.2d 811 (Fla. 4th DCA 1979), disapproved on other grounds, South Carolina Co. v. Kokay, 398 So.2d 1355 (Fla. 1981), the court refused to consider the affidavit of a member of the legislature as to the intent of a statutory provision. It is an even more questionable practice to place such heavy reliance on a hypothetical example of the effect of a new law as set out in report written by a party who may have had no understanding of uninsured motorist law. It is far more likely that the example in the staff report contain the error, rather than the statute itself.

The third erroneous assumption made in the opinion below is completely contrary to Florida law. It requires this Court to accept the premise that the legislature actually intended to repeal the definition of an "uninsured motorist" when it enacted the 1984 amendments, but inexplicably failed to do so. Once again, the court below relied heavily on attorney opinion in the Continuing Legal Education article. This opinion, which was by no means unchallenged, stated that the legislature "implicitly" redefined the term "underinsured motorist" to mean a motorist

whose liability limits were insufficient to cover all of the injured party's damages. This definition, which the court below took it upon itself to repeal, has remained constant throughout many sessions of the legislature and is, in fact, still the definition maintained alongside the new UM revisions which will go into effect in 1989.

The conclusion below requires that one accept repeal by implication. Repeals by implication, however, are not favored by this court, nor by Fourth District Court of Appeal precedent. State v. Dunmann, 427 So.2d 166 (Fla. 1983) (holding that if a new and old portion of a statute "operate upon the same subject without positive inconsistency or repugnancy in their practical effect and consequences, they should each be given the effect designed for them unless a contrary intent clearly appears."); Sweet v. Josephson, 173 So.2d 444 (Fla. 1965); Richey v. Town of Indian River Shores, 337 So.2d 410 (Fla. 4th DCA 1976). Furthermore, when interpreting a statute, courts are instructed to avoid interpretations which would render part of the statute meaningless. Cilento v. State, 377 So.2d 663 (Fla. 1979); Finlayson v. Broward County, 471 So.2d 67 (Fla. 4th DCA 1985); Topeka Inn Manasement v. Pate, 414 So.2d 1184 (Fla. 1st DCA 1982).

The Shelby decision below also obliterates any distinction between an uninsured and an underinsured motorist. To accept the Shelby rationale one would have to conclude that the legislature itself no longer recognized such a distinction. However, the

legislature continued to recognize a separate entity -- the underinsured motorist -- in Section 627.727 Subsections (1) and (6) of the statute even following the 1984 amendments. If one is to believe that "legislative oversight" led to the retention of the definition provision in Subsection (3), one would also have to believe that the legislature also intended, but forgot, to amend the rest of the statute.

The Fourth District Court of Appeal is required by law to give effect to all provisions of the statute, including the definitions. The court should have considered that the legislature was fully capable of deleting, modifying, or adding to the definition of uninsured motorist, and chose not to do so. The opinion below, in effect, rewrote the statute on the basis of questionable extrinsic materials. By construing an unambiguous statute in a way which extended its expressed terms and reasonable and obvious implications was an "abrogation of legislative power". Holly v. Auld, 450 So.2d at 219. This court has held that a court is not free to replace one term with another in order to provide what the court perceives to be a preferred connotation. Such an adjustment is appropriately made only by legislative, and not judicial, redrafting. "Respect for the separation of governmental powers requires no less." Heredia v. Allstate Insurance Company, 358 So.2d at 1355.

The Florida Association for Insurance Review calls for a requirement of proper statutory interpretation by the Florida courts. It would be dangerous precedent to hold otherwise. The

insurance industry should be accorded the right to some certainty in its decisions involving rate making, risk evaluation, and coverage. In order to do so, it is incumbent upon this court to recognize binding precedent holding that if a statute is unambiguous on its face, a resort to extrinsic evidence of contrary legislative intent is totally improper.

The insurance industry should not be expected to seek out obscure staff analysis reports written by authors who are not themselves legislatures. The insurance industry could never be sure of its rights and obligations if it could not trust that the unambiguous language of the statute itself was insufficient to instruct the industry on coverage decisions. A staff report is simply not a part of the statute, nor are articles written by attorneys interpreting the statute. The Fourth District Court of Appeals heavy reliance on those questionable extrinsic materials tainted its opinion and ran contrary to established Florida law instructing courts on the interpretations of statutes. Even if the Shelby court believed that the retention of the statutory definition of uninsured motorist was a legislative oversight, the proper response was to alert the legislature, not redraft the statute. Zorzos v. Rosen by and Through Rosen, 467 So. 2d 305 (Fla. 1985) The decision below was error and should be quashed.

CONCLUSION

This court should quash the opinion of the Fourth District Court of Appeal below in Shelby Mutual Insurance v. Smith, 527 So.2d 830 (Fla. 4th DCA 1988). In its stead, this court should adopt the opinions of United States Fidelity and Guarantee Company V. Woolard, 523 So.2d 798 (Fla. 1st DCA 1988) and Marauez v. Prudential Property and Casualty Insurance Company, ___ So.2d ___ (Fla. 3d DCA 1988) [13 FLW December 23, 19881. These opinions correctly interpreted the statute to require that an uninsured motorist claim can be predicated only on the existence of an "uninsured motorist" defined as a party whose liability limits are less than the injured party's UM coverage.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail to Patrick B. Flanagan, Esq., 319 Clematis St., West Palm Beach, Fl. 33401; Walter Jones, Esq., P. O. Box 1427, West Palm Beach, Fl. 33402; Philip M. Burlington, ESq., Suite 4-B/Barristers Bldg., 1615 Forum Place, West Palm Beach, Fl. 33401; and G. Bart Billbrough, Esq., 169 E. Flagler St., Miami, Fl. 33131, this 13th day of February, 1989.

By: BONITA L. KREELAND