24

IN THE SUPREME COURT OF FLORIDA

CASE NO. **72,870**

THE SHELBY MUTUAL INSURANCE COMPANY OF SHELBY, OHIO,

Petitioner,

vs.

MARY LOU SMITH,

Respondent.
_____/

ON PETITION FOR REVIEW FROM THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT

INITIAL BRIEF OF PETITIONER ON THE MERITS
(With Separate Appendix)

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TABLE OF CONTENTS

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INTRODUCTION

The Petitioner, The Shelby Mutual Insurance Company of Shelby, Ohio, seeks review and reversal of the May 11, 1988, opinion of the Fourth District of Appeal of Florida, The Shelby Mutual Insurance Company v. Smith, 527 So.2d 830 (Fla. 4th DCA 1988), which affirmed a summary final judgment in favor of the Respondent on the issue of whether the Respondent was entitled to uninsured motorist benefits.

On August 5, 1988, Petitioner filed a Notice to Invoke Discretionary Review before this Court and, after consideration of the briefs regarding that issue, this court entered an Order accepting jurisdiction on January 19, 1989. This case is scheduled for argument on Tuesday, May 2, 1989. Accordingly, this Court has jurisdiction pursuant to Article V, § 3(b)(3), Florida Constitution (1980), and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv).

The Petitioner, The Shelby Mutual Insurance Company of Shelby, Ohio, was the Appellant in the Fourth District Court of Appeal and the Defendant in the declaratory judgment action before the trial court.

The Respondent, Mary Lou Smith, was the Appellee before the Fourth District Court of Appeal and the Plaintiff in the trial court.

The parties will be referred to as they appear before this Court or by name.

1 12

References to the appendix will be designed by the letter "A".

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STATEMENT OF THE CASE AND FACTS

Respondent Mary Lou Smith's Amended Complaint alleged that on or about March 9, 1985, Smith had been involved in a two car automobile accident caused solely by the fault of the other driver. As a result of the accident, the Respondent alleged she suffered permanent injuries and that the tortfeasor's insurance company paid to Smith the full limits of its insurance policy, Fifty Thousand and 00/100 ($50,000.00) Dollars. (A. 1).

The Amended Complaint also alleged that the Respondent had a motor vehicle insurance policy with Shelby Mutual which provided for uninsured/underinsured motorist coverage in the amount of Twenty-Five Thousand and 00/100 ($25,000.00) Dollars. Despite filing a claim for uninsured motorist benefits, Shelby Mutual denied coverage. (A. 2).

Shel y Mutual filed an Answer and Counterclaim for Declaratory Relief. In its Answer, Shelby Mutual admitted issuing the motor vehicle insurance policy to Smith and admitted the other material allegations of the Amended Complaint. Shelby Mutual also asserted, however, as an affirmative defense that Smith's accident did not involve an "uninsured motor vehicle" as defined in § 627.727(3), Florida Statutes, and that she therefore was not entitled to uninsured motorist coverage. The Counterclaim sought declaratory relief determining that the there was no uninsured motorist coverage

for the accident and alleged that Shelby Mutual was unsure of its rights under § 627.727, Florida Statutes, as amended in **1984,** noting that there were no appellate opinions construing those amendments to the statute. (A. 2).

Smith thereafter moved for a summary judgment. After hearing argument on the motion, the trial court concluded that Smith was entitled to Twenty-Five Thousand and 00/100 ($25,000.00) Dollars in uninsured motorist coverage under her policy with Shelby Mutual. The trial court's order referred the parties to arbitration as provided by the uninsured motorist policy.

The issue reviewed by the Fourth District Court of Appeal was whether the trial court erred in granting summary final judgment in favor of Smith. In that appeal, Shelby Mutual argued that the trial court erred in granting summary final judgment in favor of the Respondent because the trial court improperly determined that the tortfeasor's vehicle was an "uninsured motor vehicle" within the meaning of § 627.727 **(3),** Florida Statutes **(1983).** Shelby Mutual argued that in light of the fact that the tortfeasor's vehicle had liability coverage in the amount of Fifty Thousand and 00/100 ($50,000.00) Dollars and that Smith's vehicle had uninsured/underinsured motorist coverage in the amount of Twenty-Five Thousand and 00/100 ($25,000.00) Dollars, it was improper for the trial court to conclude that the tortfeasor's

vehicle met the statutory definition of "uninsured motor vehicle.'' (A. 3).

On May 11, 1988, the Fourth District Court of ppeal concluded that the Florida Legislature in its 1984 amendment to § 627.727, Florida Statutes, provided that all uninsured/underinsured motorist coverage be excess coverage and that it pay over and above the tortfeasor's liability coverage should the liability coverage be inadequate to fully compensate the injured insured. In reaching this result, the Fourth District Court of Appeal noted that the 1984 amendments created confusion regarding the proper application of § 627.727(3), Florida Statutes. (A. 6, 11).

Shelby Mutual thereafter moved for rehearing, rehearing en banc, and for certification of issue for Supreme Court review. In that motion, Shelby Mutual in part noted the First District Court of Appeal had reached the opposite conclusion on the same issue considered by the Fourth District in the instant case. *See*, United Fidelity & Guaranty Company v Woolard, 523 So.2d 798 (Fla. 1st DCA 1988). (A. 12-16).

In response to the motion for rehearing, Smith conceded that the First District's opinion in the Woolard conflicted with the Fourth District's opinion here. (A. 17-18).

On July 27, 1988, the Fourth District Court of Appeal denied the motion for rehearing, but did note that the First District's opinion in Woolard conflicted with its opinion on the same issue. (A. 19).

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On August 5, 1988, Shelby Mutual filed a Notice to Invoke Discretionary Jurisdiction, contending that the Fourth District Court of Appeal's decision below expressly and directly conflicted with a decision of another District Court of Appeal on the same question of law. As such, Shelby Mutual contended that this Court had discretionary jurisdiction pursuant to Article V § 3(b)(3), Florida Constitution (1980), and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv).

On January 19, 1989, this Court entered its order accepting jurisdiction and setting the cause for oral argument.

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POINT ON APPEAL

WHETHER THE LOWER COURT ERRED IN CONSTRUING THE 1984 AMENDMENTS TO SECTION 627.727, FLORIDA STATUTES, TO REQUIRE UNINSURED MOTORIST COVERAGE TO STACK ABOVE A TORTFEASOR'S LIABILITY COVERAGE WITHOUT SETOFF WHERE A REVIEW OF THE PLAIN AND CLEAR LANGUAGE OF THE STATUTE AS WELL AS THE FACTS IN THIS CASE SHOWS THAT THERE WAS NO "UNINSURED MOTOR VEHICLE" IN THE FIRST INSTANCE, AS DEFINED AND REQUIRED BY § 627.727(3).

SUMMARY OF THE ARGUMENT

The statute governing uninsured motorist ben fits, § 627.727, Florida Statutes, has at all times clearly provided that a vehicle is not uninsured unless the tortfeasor's insurance coverage is less than the uninsured motorist coverage available to the allegedly injured claimant. While the 1984 amendments to § 627.727(1), Florida Statutes, may have required uninsured motorist benefits to pay in excess of liability coverage, that requirement was conditioned on the existence of an "uninsured motor vehicle" in the first instance.

This Court should follow the lead of the First District Court of Appeal in United States Fidelity & Guaranty Company v. Woolard, 523 So.2d 798 (Fla. 1st DCA 1988) and the Third District Court of Appeal in Marquez v. Prudential Property & Casualty Insurance Company, 534 So.2d 918 (Fla. 3d DCA 1988) in holding that an uninsured motor vehicle continues to be a vehicle for which the limits of bodily injury liability for its insured are less than the limits applicable to the injured's uninsured motorist coverage.

The Fourth District Court of Appeal's analysis below erroneously failed to consider the proposition that a clearly worded statute will be afforded its plain meaning. Because the language set forth in § 627.727 in its entirety is clear and unambiguous, there was no need to engage in judicial

interpretation of legislative notes and records in deciding this case.

Reversal is warranted.

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ARGUMENT

WHETHER THE LOWER COURT ERRED IN CONSTRUING THE **1984** AMENDMENTS TO SECTION 627.727, FLORIDA STATUTES, TO REQUIRE UNINSURED MOTORIST COVERAGE TO STACK ABOVE A TORTFEASOR'S LIABILITY COVERAGE WITHOUT SETOFF WHERE A REVIEW OF THE PLAIN AND CLEAR LANGUAGE OF THE STATUTE AS WELL AS THE FACTS IN THIS CASE SHOWS THAT THERE WAS NO "UNINSURED MOTOR VEHICLE" IN THE FIRST INSTANCE, AS DEFINED AND REQUIRED BY § 627.727(3).

A review of the record in this case will show that the Fourth District Court of Appeal incorrectly resorted to a review of possible legislative history in an attempt to interpret the **1984** amendments to § 627.727, Florida Statutes. In doing so, the Fourth District Court of Appeal ignored the plain meaning of the language utilized by the Florida Legislature in the **1984** amendments. A close examination of the issues in this case shows that the First and Third District Courts of Appeal properly found the wording of subsections 627.727(1) and (3) did not change the fact that the law applied only to uninsured motorist situations and the definition of an uninsured motorist did not change with the **1984** amendment.

Prior to the legislature's amendment of § 627.727, Florida Statutes, in **1984,** the statutory uninsured motorist law plainly allowed for the setoff of a tortfeasor's liability coverage against the insured party's underinsured motorist coverage. Similarly, the legislature provided in § 627.727(2)

that insurers would make available excess underinsured motorist coverage against which liability coverage could not be setoff. Shelby Mutual Insurance Company v. Smith, 527 So.2d 830 (Fla. 4th DCA 1988).

The Florida Legislature's 1984 amendments prohibited the setoff of liability coverage, but left unchanged the definition of an "uninsured motor vehicle":

> (1) No motor vehicle liability insurance policy shall be delivered or issued for delivery in this state with respect to any specifically insured or identified motor vehicle registered or principally garaged in this state unless uninsured motor vehicle coverage is provided therein or supplemental thereto for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness, or disease, including death, resulting therefrom.
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> The coverage described under this section shall be over and above, but shall not duplicate, the benefits, available to an insured under any workers' compensation law, personal injury protection benefits disability benefits law, or similar law; under any automobile medical expense coverage; under any motor vehicle liability coverage; or from the owner or operator of the uninsured motor vehicle or any other person or organization jointly or severely liable together with such owner or operator for the accident; and such coverage shall cover the difference, if any, between the sum of such benefits and the damages sustained, up to the maximum amount of such coverage provided under this section. The amount of coverage under this section shall not be reduced by a set-off against any coverage, including liability insurance.

* * *

(3) For the purpose of this coverage, the term "uninsured motor vehicle'' shall, subject to the terms and conditions of such coverage, be deemed to include an insured motor vehicle when the liability insurer thereof:

(a) Is unable to make payment with respect to the legal liability of its insured within the limits specified therein because of insolvency; or

(b) Has provided limits of bodily injury liability for its insured which are less than the limits applicable to the insured person provided under uninsured motorist's coverage applicable to the injured person.

§ 627.727(1) and (3), Florida Statutes.

Although three District Courts of Appeal have addressed the import of the 1984 amendments to § 627.727, Florida Statutes, only the Fourth District Court of Appeal has concluded that the legislature repealed § 627.727(3), Florida Statutes, definitions by implication. The other courts which have addressed this issue have applied § 627.727, Florida Statutes, in its entirety to conclude that a party must first meet the "uninsured motorist" definition before recovering uninsured motorist benefits.

In United States Fidelity & Guaranty Company v. Woolard, 523 So.2d 798 (Fla. 1st DCA 1988), the First District Court of Appeal reviewed the 1984 amendments, noted that the legislature did not change the definition of an uninsured motorist, and concluded that its failure to do so made the

amendments to § 627.727(1) and (2), Florida Statutes, applicable only if a person met the subsection (3) "uninsured motorist" definition:

> Appellees assert that pursuant to § 627.727(1), as amended in 1984, all uninsured motorist coverage is excess coverage, with no set-off for the tort-feasor's coverage. We disagree with appellees' application of that amendment to this case. The present wording of subsections 627.727(1) and (3), has not changed the fact that § 627.727 is applicable only to uninsured motorist situations, and the definition of an uninsured motorist did not change with the 1984 amendment. The statute still provides that it applies only for the protection of insureds who are legally obligated to recover damages from owners and operators of uninsured motor vehicles and that an uninsured motor vehicle is one in which the liability limits are less than the limits applicable to the injured person under the injured person's uninsured motorist coverage. A party not injured by an uninsured motorist, or one not have a claim against an uninsured motorist, may not recover under the uninsured motorist provision of his own policy. See. McKinnie v. Progressive American Insurance Co., 488 So.2d 825 (Fla. 1986) and Bayles v. State Farm Mutual Automobile Insurance Company, 483 So.2d 402 (Fla. 1985).
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> United States Fidelity & Guaranty Company v. Woolard, supra, 523 So.2d at 799.

The Third District Court of Appeal reached the same conclusion as the Woolard court in Marquez v. Prudential Property & Casualty Insurance Company, 534 So.2d 918 (Fla. 3d DCA 1988). In that case, the Third District Court of Appeal aligned itself with the First District Court of Appeal in its

conclusion that the 1984 amendments to § 627.727, Florida Statutes, did not alter the requirement that there be an uninsured motorist as defined by § 627.727(3)(b):

> We agree with the opinion of the First District Court of Appeal in United States Fidelity & Guaranty Co. v. Woolard, 523 So.2d 798 (Fla. 1st DCA 1988), deciding that the 1984 amendments to § 627.727, Florida Statutes, did not change the definition of an uninsured motor vehicle enunciated in § 627.727(3)(b), Florida Statutes (1983). Thus, we hold that an uninsured motor vehicle continues to be a vehicle for which the limits of bodily injury liability for its insured are less than the limits applicable to the injured person's uninsured motorist coverage. See McKinnie v. Progressive Ins. Co., 488 So.2d 825 (Fla. 1986); Bayles v. State Farm Mut. Auto. Ins. Co., 483 So.2d 402 (Fla. 1985).
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> Marquez v. Prudential Property & Casualty Insurance Company, supra.

Applying the tests from Woolard and Marquez to the instant facts, it is clear that the trial court, as well as the Fourth District Court of Appeal, improperly permitted recovery against the Petitioner. The Respondent's uninsured motorist coverage was Twenty-Five Thousand and 00/100 ($25,000.00) Dollars and the tortfeasor's liability coverage was Fifty Thousand and 00/100 ($50,000.00) Dollars. Because the limits of bodily injury liability provided by the tortfeasor's liability insurer exceed the uninsured motorist benefits, the tortfeasor's vehicle was not an "uninsured motor vehicle" under § 627.727(3), Florida Statutes, and the requirements of § 627.727(1), Florida Statutes, therefore are

not activated. Accordingly, the lower court should have entered and the Fourth District Court of Appeal should have required a final judgment in favor of the Petitioner, not the Respondent.

The Fourth District Court of Appeal's analysis of this issue below, Shelby Mutual Insurance Company v. Smith, 527 So.2d 830 (Fla. 4th DCA 1988), focused on what that court perceived to be confusion created by the 1984 amendment. The court spent a substantial period of time discussing the Florida Bar Continuing Legal Education's Florida Automobile Insurance Law (1985) manual and various authors' assessment of the legislature's actions. After review of the information contained therein as well as the House of Representatives' staff summary and bill preface, the Fourth District Court of Appeal concluded that confusion existed regarding proper application of § 627.727. Under such circumstances, the court concluded that the legislature "meant" to change the definitional section, but had failed to do so. Shelby Mutual Insurance Company v. Smith, supra, 527 So.2d at 834-835.

The fundamental flaw with the analysis of the Fourth District Court of Appeal is that its presumes confusion where none exists. Indeed, a brief review of certain well-established rules of statutory construction shows that the Fourth District Court of Appeal improperly went beyond the clear language of § 627.727, Florida Statutes, itself.

In Heredia v. Allstate Insurance Company, 358 So.2d 1353 (Fla. 1978), this Court made clear that where the words of a legislative enactment are clear and unambiguous, judicial interpretation .of legislative history should not substitute for application of the law's unequivocal meaning:

> In matters requiring statutory construction, courts always seek to effectuate legislative intent. Where the words selected by the Legislature are clear and unambiguous, however, judicial interpretation is not appropriate to displace the expressed intent. Foley v. State ex rel. Gordon, 50 So.2d 179, 184 (Fla. 1951); Platt v. Lanier, 127 So.2d 912, 913 (Fla. 2d DCA 1961). It is neither the function nor prerogative of the courts to speculate on constructions more or less reasonable, when the language itself conveys an unequivocal meaning.
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> Heredia v. Allstate Insurance Company, supra, 358 So.2d at 1354-1355.

Where language in a statute is clear and unambiguous and conveys a clear and definite meaning, there is no reason to resort to rules of statutory construction for interpretation because the statute must be given its plain and obvious meaning. Buick v. State, 501 So.2d 72 (Fla. 5th DCA 1987). While legislative intent is helpful in the construction of statutes, it is the plain meaning of the statutory language which warrants first consideration in determining the legislature's intent. St. Petersburg Bank & Trust Company v. Hamm, 414 So.2d 1071 (Fla. 1982).

The critical flaw of the Fourth District Court of Appeal's analysis is that it failed to follow these primary

rules of statutory construction. In the instant case, there was no need to seek out the legislature's intent where the plain and ordinary language made very clear the circumstances surrounding application of the **1984** amendments to § 627.727. In particular, the changes in subsection (1) made clear that applicability arose when an "uninsured motor vehicle" situation occurred. Nothing about the **1984** amendments, however, changed the fact that there had to be an "uninsured motor vehicle" pursuant to § 627.727(3), Florida Statutes, before any of the changes affected an interested party. The language was clear, unambiguous, and apparently contrary to what the Fourth District Court of Appeal panel would have liked to have seen on these facts. That, however, is not the test.

In summary, the Petitioner submits that it is the analysis of the First District Court of Appeal in Woolard and the Third District Court of Appeal in Marquez which should govern this case. Since its enactment, the uninsured motorist statute has stated that for the purposes of determining the availability of uninsured motorist coverage, there must be an uninsured motor vehicle. Because that prerequisite definition has remained unchanged throughout the evolution of the statute, this Court should reject the Fourth District Court of Appeal's attempt to repeal by implication that requirement. A review of the statutory language in this case makes clear that there is no need to resort to attempts at legislative

mind-reading. In applying the plain, clear and concise requirements of § 627.727, Florida Statutes, in its entirety, this Court should follow the lead of First and Third District Courts of Appeal and reverse the ruling below.

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CONCLUSION

Based upon the foregoing rationale and authority, the Petitioner respectfully requests this Honorable Court to reverse the ruling of the Fourth District Court of Appeal below and remand the cause with instructions to enter final judgment in favor of the Petitioner.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 13th day of February, 1989 to: PATRICK B. FLANAGAN, ESQ., 319 Clematis Street West Palm Beach, Florida 33401; WALTER JONES, ESQ., Kocha & Jones, P.A., Post Office Box 1427, West Palm Beach, Florida 33402; and PHILIP M. BURLINGTON, ESQ., Edna L. Caruso, P.A., Suite 4-B/Barristers Building, 1615 Forum Place, West Palm Beach, Florida 33401.

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