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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

# BRIEF OF PETITIONER ON JURISDICTION
(With Separate Appendix)

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## INTRODUCTION

The Petitioner, The Shelby Mutual Insurance Company, seeks this Court to invoke its discretionary jurisdiction to review the Florida Fourth District Court of Appeal's decision in The Shelby Mutual Insurance Company v. Mary Lou Smith, ___So.2d___, Case No. 86-2802 (Fla. 4th DCA May 11, 1988) [13 FLW 11071, on rehearing, (Fla. 4th DCA July 27, 1988) [13 FLW 17581. Contending that the Fourth District Court of Appeal's decision below expressly and directly conflicts with a decision of another district court of appeal on the same question of law, the Petitioner asserts that this Court has discretionary 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 was the Appellant in the Fourth District Court of Appeal and the Defendant in the trial court.

The Respondent 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. 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, $50,000.00. (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 $25,000.00. Despite filing a claim for uninsured motorist benefits, Shelby Mutual denied coverage. (A. 2).

Shelby 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. However, Shelby Mutual also asserted 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 $25,000.00 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 $50,000.00 and that Smith's vehicle had uninsured/underinsured motorist coverage in the amount of $25,000.00, 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 Appeal concluded that the Florida Legislature in its **1984** amendment to § 627.727, Florida Statutes, provided that all



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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).

This petition for review timely ensued.

## SUMMARY OF THE ARGUMENT

The decision of the Fourth District Court of Appeal below that the 1984 amendment to § 627.727, Florida Statutes, renders all uninsured/underinsured motorist coverage to be excess and that such coverage should pay over and above a tortfeasor's liability insurance directly and expressly conflicts with the First District Court of Appeal's holding on the same issue in United States Fidelity & Guaranty Company v. Woolard, 523 So.2d 798 (Fla. 1st DCA 1988). The parties below so stipulated and the Fourth District Court of Appeal acknowledged this fact in its ruling on rehearing.

The ultimate decision on this issue dramatically impacts upon the automobile insurance industry's risk evaluation and rate structure as well as on each motorist in this state. Because strong policy reasons exist to resolve the conflict between the districts on this important question, this Court should accept jurisdiction in the instant matter.



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## ARGUMENT

I. THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL BELOW EXPRESSLY AND DIRECTLY CONFLICTS WITH THE FIRST DISTRICT COURT OF APPEAL'S DECISION IN UNITED STATES FIDELITY & GUARANTY COMPANY V. WOOLARD, 523 So.2d 798 (Fla. 1st DCA 1988) ON THE SAME QUESTION OF LAW.

Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv) and Article V, § 3(b)(3), Florida Constitution (1980) provide that discretionary jurisdiction of the Supreme Court is invoked where a decision by a district court of appeal expressly and directly conflicts with a decision of another district court of appeal or of the Supreme Court on the same question of law. In the instant case, it is undisputed by both the parties before this Court as well as the Fourth District Court of Appeal itself that the decision by the Fourth District below conflicts with the First District's opinion in United States Fidelity & Guaranty Company v. Woolard, 523 So.2d 798 (Fla. 1st DCA 1988) on the same question of law. Accordingly, this Court should accept jurisdiction to resolve this important matter.

In the court below, the Fourth District Court of Appeal held that the Florida Legislature intended the 1984 amendment to § 627.727, Florida Statutes, to provide that all uninsured/underinsured motorist coverage be excess coverage. Further, the court concluded that the uninsured/underinsured motorist coverage should pay over and above the tortfeasor's liability

coverage should said liability coverage be inadequate to fully compensate the injured insured. (A. 11).

In the Woolard decision, the First District Court of Appeal found that the 1984 amendments did not change the definition of uninsured motorist and concluded that the Florida Legislature's failure to do so made the amendments to § 627.727(1) and (3), Florida Statutes, applicable only if a person first met the "uninsured motorist" definition:

> Appellees assert that pursuant to section 627.727(1), as amended in 1984, all uninsured motorist coverage is excess coverage, with no setoff 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 section 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 having 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, 482 So.2d 402 (Fla. 1985).
>
> United States Fidelity & Guaranty Company v. Woolard, supra, 523 So.2d at 799.

The First District therefore concluded, contrary to the Fourth District, that the 1984 amendment to § 627.727, Florida Statutes did not mean all uninsured/underinsured motorist coverage was to be excess. Further, the First District rejected the concept that uninsured/underinsured motorist coverage should pay over and above the tortfeasor's liability insurance. United States Fidelity & Guaranty Company v. Woolard, supra.

The conflict between these two decisions was admitted by the Respondent in the rehearing response below (A. 19) and by the Fourth District itself in its opinion on rehearing:

> The petition for rehearing is denied and we write only to note that the appellant correctly points out in its petition for rehearing that the First District has issued a conflicting opinion on the same issue we have resolved. See, U.S.F.&G. Co. Woolard, 13 F.L.W. 1001 (Fla. 1st DCA April 26, 1988).
>
> Shelby Mutual Insurance Company v. Smith. ___So.2d___, Case No. 86-2802 (Fla. 4th DCA July 27, 1988) [13 FLW 1758].

Under such circumstances, it is clear that a direct and express conflict between the district courts of appeal exists on this issue.

As noted by the Fourth District Court of Appeal, the Florida Legislature's actions in its 1984 amendments has caused confusion on this question which is readily apparent not only by the various treatments of the issue in the treatises, but by the very fact that conflicting decisions on this issue have been released within the span of a mere few weeks.

The ultimate decision whether the Florida Legislature's 1984 amendments to § 627.727, Florida Statutes, act to create excess coverage on a tortfeasor's liability policy dramatically impacts upon the automobile insurance industry's risk evaluation and the attendant rate structure. In the same vein, the motorists of this state are additionally and obviously impacted by the analysis of the legislative changes.

Under such circumstances, strong policy reasons exist for this Court to accept jurisdiction of the instant matter for the resolution of this important question.

## CONCLUSION

Based upon the foregoing rationale and authority, the Petitioner respectfully requests this Honorable Court to accept jurisdiction in the instant cause.

Respectfully submitted,

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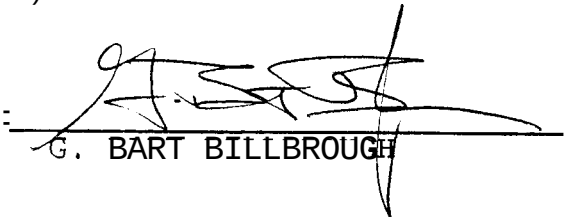
By: 
G. BART BILLBROUGH

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 15th day of August, 1988 to: PATRICK B. FLANAGAN, ESQ., 319 Clematis Street, West Palm Beach, Florida 33401; WALTER JONES, ESQ., Kocha & Jones, P.A., P. O. Box 1427, West Palm Beach, Florida 33402 and PHILIP M. BURLINGTON, ESQ., of Edna L. Caruso, P.A., Suite 4-B/Barristers Building, 1615 Forum Place, West Palm Beach, Florida 33401.

By: _____
G. BART BILLBROUGH

GBB151/bj