IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO: 72,870

THE SHELBY MUTUAL INSURANCE COMPANY OF SHELBY, OHIO,

Petitioner,

-vs-

MARY LOU SMITH,

Respondent.

BRIEF OF RESPONDENT ON JURISDICTION

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CITATIONS OF AUTHORITY

PREFACE

The Petitioner, Shelby Mutual Insurance Company, is seeking this Court to invoke its discretionary jurisdiction to review decisions of the Fourth District. Respondent, an insured of the Petitioner, was the Plaintiff in the trial court. The parties will be referred to by their proper names or as they appear in this Court. The following designation will be used:

(A) - Petitioner's Appendix

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts with the following additions. Smith settled with the tortfeasor for the full amount of its liability coverage, i.e., $50,000, after Shelby Mutual had provided permission for her to accept those policy limits (A1).

While noting in its decision that the legislature's failure to amend Subsection 6 of Fla. Stat. S627.727 in conjunction with the 1984 amendments created confusion regarding the intended scope of uninsured motorist coverage, the Fourth District quoted at length from the legislative history (A10-11). That excerpt provided an example which resolved the issue whether UM coverage is intended to be excess coverage and compelled the result reached by the Fourth District (A10-11). Thus, while noting the existence of confusion, the Fourth District relied on the settled principle of statutory construction that the legislative intent is the primary consideration in the interpretation of a statute, citing STATE v. WEBB, 398 So.2d 820 (Fla. 1981) (All).

SUMMARY OF THE *ARGUMENT*

The Fourth District Court of Appeal noted that its opinion conflicted with UNITED STATES FIDELITY & GUARANTY COMPANY v. WOOLARD, 523 So.2d 798 (Fla. 1st DCA 1988). Therefore, the issue is whether this Court should choose to exercise its discretionary jurisdiction to review this case. In that regard it should be noted that the conflicting language in WOOLARD, supra, is dicta. Additionally, the legislation at issue has recently been amended deleting the provisions regarding the excess nature of uninsured motorist coverage, see Motor Vehicle Insurance Reform Act of 1988, Ch. 88-370, Section 15, Laws of Fla. Therefore, the issue decided by the Fourth District is of limited application. For those reasons, this Court should exercise its discretion to deny jurisdiction in this case.

ARGUMENT

WHILE CONFLICT EXISTS BETWEEN THE FOURTH DISTRICT'S DECISION AND UNITED STATES FIDELITY & GUARANTY COMPANY v. WOOLARD, 523 So.2d 798 (Fla. 1st DCA 1988), THIS COURT SHOULD EXERCISE ITS DISCRETION TO DENY JURISDICTION.

Respondent does not dispute that the Fourth District's decision expressly conflicts with the decision of the First District in UNITED STATES FIDELITY & GUARANTY COMPANY v. WOOLARD, 523 So.2d 798 (Fla. 1st DCA 1988) regarding the construction of ~~Fla~~. ~~Stat~~. S627.727. However, that fact in itself does not require this Court to accept jurisdiction since conflict jurisdiction is discretionary under Article V, Section III(b)(3),

of the Florida Constitution. In determining whether to exercise that discretion in this case, this Court should consider that the conflicting language in WOOLARD, supra, is dicta and that the effect of this Court's decision will be of limited scope due to recent amendments to Fla. Stat. S627.727.

In WOOLARD, the uninsured motorist carrier filed a complaint for declaratory relief seeking a determination that its insured was not entitled to uninsured motorist benefits under her insurance policy. The insured filed a "counter-complaint" seeking to compel arbitration pursuant to Fla. Stat. §682.03(1) based on a provision in the insurance policy which authorized arbitration. Thereafter, the UM carrier moved to dismiss the counter-complaint. The court denied that motion, but granted the insured's request for an order compelling arbitration. The UM carrier appealed that order pursuant to Fla.R.App.P. 9.130(a)(3)(C)(iv) which provides jurisdiction for review of non-final orders determining a right to arbitration. The First District issued a decision reversing the trial court's order. In its opinion, the court discussed the applicability of the uninsured motorist coverage in situations where the tortfeasor's liability limits are equal to or greater than the limits available to the insured under his uninsured motorist policy. In that discussion, the First District construed ~~Fla~~. ~~Stat~~. S627.727 in a manner directly conflicting with the holding in the Fourth District's decision in the case ~~sub~~ judice. However, that language is dicta because the court's holding was simply that the

trial court's order compelling arbitration was in error (523 So.2d at 799):

> Since appellant's action for declaratory relief clearly involves coverage questions which, as appellees admit, are matters to be determined by a court, and not by arbitrators, the granting of an arbitration demand in this instance was error... Therefore, we reverse and remand for further proceedings on appellant's declaratory action. [Emphasis in original.]

It is clear that the language at issue in WOOLARD was dicta because the only issue before the First District was whether the order compelling arbitration was erroneous. As noted above, the court determined that because the issues raised by the UM carrier's complaint involved coverage questions arbitration was inappropriate. The court did not have to determine the scope of UM coverage under Fla. Stat. (5627.727 because that issue had not been reached by the trial court and was not necessary to a determination that arbitration was inappropriate. Moreover, the UM carrier in that case had not presented any evidence regarding the policy limits of the tortfeasor or the insured, but had simply made allegations in its complaint for declaratory relief. Thus, the issue was not appropriate for final resolution. This is further demonstrated by the closing language of the opinion where the court remands for further proceedings on the declaratory action.

Since the conflicting language in WOOLARD constitutes dicta, it is not controlling authority and, therefore, it does not create the type of confusion which conflict jurisdiction was intended to remedy. Thus, while the language in the two opinions

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at issue present a conflict, this Court should exercise its discretion to deny jurisdiction, especially in view of the limited effect of the Fourth District's decision in light of recent legislative amendments.

Subsequent to the Fourth District's initial opinion in this case and subsequent to the motion for rehearing and response thereto, the Florida legislature enacted the Motor Vehicle Insurance Reform Act of 1988, Ch. 88-370, Laws of Fla. In that act, the legislature amended Fla. Stat. 5627.727 to eliminate the language which provided that uninsured motorist coverage must be excess coverage, i.e., in addition to any other available coverage including the liability insurance of the tortfeasor, see Ch. 88-370, Section 15, Laws of Fla. Section 15 also added the following language to Fla. Stat. §627.727(1):

> The maximum liability of the uninsured motorist coverage shall be the lowest of:
>
> (a) The difference between the limit of uninsured motorist coverage and the amount paid in compensatory damages to the insured by or for any person who may be legally liable for the bodily injury, sickness, or disease, or death resulting therefrom; or
>
> (b) the amount of compensatory damages; or
>
> (c) the limits of liability of the uninsured motorist coverage.

The legislature provided that Section 15 would be effective October 1, 1989. Thus, the Fourth District's decision will be of limited application, since it will apply only to uninsured motorist policies issued prior to October 1, 1989.

In summary, while the language of the Fourth District's opinion conflicts with language in WOOLARD, supra, this Court should decline jurisdiction because the language in WOOLARD was dicta. Additionally, in view of subsequent legislative amendments, the Fourth District's holding will be limited to uninsured motorist policies issued on or before October 1, 1989. Therefore, this Court should exercise its discretion and decline jurisdiction to review the Fourth District's decision.

CONCLUSION

For the reasons stated above, this Court should decline to exercise jurisdiction to review the Fourth District's decision.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished to G. BART BILLBROUGH, ESQ., 1 Biscayne Tower, Ste. 2500, 2 South Biscayne Blvd., Miami, FL 33131, by mail, this 19th day of September, 1988.

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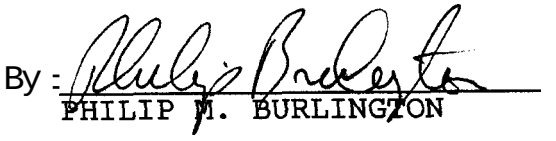
By: 
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