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IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO: 72,870

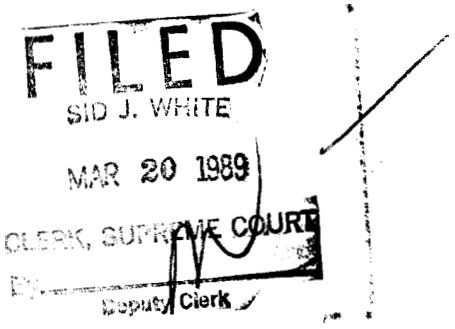
THE SHELBY MUTUAL INSURANCE COMPANY OF SHELBY, OHIO,

Petitioner,

-vs-

MARY LOU SMITH,

Respondent.
_____/



BRIEF OF RESPONDENT ON THE MERITS

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PREFACE

Respondent is an insured of the Petitioner and 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 designations will be used:

(R) - Record-on-Appeal

(A) - Respondent's Appendix

STATEMENT OF THE CASE AND FACTS

The Respondent will accept the Petitioner's Statement of the Case and Facts for purposes of this Court's review.

SUMMARY OF ARGUMENT

The Fourth District properly construed the 1984 Amendments to Fla. Stat. S627.727 and construed them to provide that uninsured motorist coverage is excess insurance, that is, it is not to be reduced by any benefits available to the insured under any other motor vehicle liability insurance coverages, including that of the tortfeasor. This interpretation is consistent with the intent of the legislature as clearly expressed in the legislative history. The Fourth District properly considered the legislative history because this Court has held on numerous occasions that legislative intent should control issues of statutory interpretation even when the result is inconsistent with the literal language of the statute. Additionally, the statute considered as a whole is ambiguous since it states in subsection (1) that the coverage is intended to be over and above

the benefits available to the insured under any motor vehicle liability insurance coverage and is intended to cover the difference between such benefits and the damages sustained by the insured up to the maximum amount of coverage. The Fourth District's interpretation is also proper because to accept Shelby Mutual's interpretation would result in a windfall to the insurers who were authorized by the legislature to charge a premium commensurate with the excess insurance mandated by the **1984** Amendments. For these reasons, the Fourth District's opinion should be approved, and UNITED STATES FIDELITY AND GUARANTY CO. v. WOOLARD, 523 So.2d **798** (Fla. 1st DCA **1988)** and MARQUEZ v. PRUDENTIAL PROPERTY AND CASUALTY INSURANCE CO., 534 So.2d **918** (Fla. 3d DCA **1988),** should be disapproved.

QUESTION PRESENTED

THE TRIAL COURT DID NOT ERR IN CONSTRUING THE 1984 AMENDMENTS TO SECTION 627.727, FLORIDA STATUTES, SINCE THERE IS AN AMBIGUITY IN THAT STATUTE AND, ITS INTERPRETATION IS OBVIOUSLY THE LEGISLATURE'S INTENT AS CLEARLY EXPRESSED IN THE LEGISLATIVE HISTORY.[1]

ARGUMENT

Shelby Mutual contends that in SHELBY MUTUAL INSURANCE CO. v. SMITH, 527 So.2d 830 (Fla. 4th DCA 1988), the Fourth District erred in construing the 1984 Amendments to Fla. Stat. S627.727 to provide that uninsured motorist insurance is excess insurance, i.e., the coverage is not to be reduced by any benefits available to the insured under any other motor vehicle liability insurance coverages, including that of the tortfeasor. However, the Fourth District's construction of the statute is obviously consistent with the legislative intent as clearly and repeatedly expressed in the legislative history. This Court has held on numerous occasions that legislative intent should control issues of statutory interpretation even when it is inconsistent with the literal language of the statute, see e.g., STATE v. WEBB, 398 So.2d 820 (Fla. 1981). The Fourth District properly applied that principle in this case. Even assuming arquendo, that an ambiguity is a prerequisite to reliance on legislative intent,

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[1]/Shelby Mutual characterizes the issue as being one of "stacking" the insured's UM coverage above the tortfeasor's coverage. The use of the term "stacking" would appear to be inappropriate in light of the technical definition of that term, see Fla. Stat. S627.4132.

the Fourth District noted that the 1984 Amendments to ~~Fla~~. ~~Stat~~. $627.727 created an ambiguity in the statute. Moreover, to accept the interpretation of the statute argued by Shelby Mutual would cause an unreasonable result in that the insurers would obtain a windfall at the expense of their insureds since the legislature specifically provided that premiums for uninsured motorist coverage would be increased in accordance with the increase in coverage. For these reasons, the decision of the Fourth District should be approved.

Shelby Mutual argues that there is no ambiguity in Fla. Stat. S627.727 and, therefore, the Fourth District's decision is inconsistent with cases in which this Court has held that unambiguous statutes should be construed literally without reliance on other evidence of legislative intent, citing HEREDIA v. ALLSTATE INSURANCE CO., 358 So.2d 1353 (Fla. 1978); ST. PETERSBURG BANK AND TRUST CO. v. HAMM, 414 So.2d 1071 (Fla. 1982). While it is Respondent's position that there is an ambiguity in ~~Fla~~. ~~Stat~~. S627.727, see Argument, infra, pg. 14-16 even assuming arguendo the statute is unambiguous, the Fourth District properly relied on the legislative history which clearly intended the result it reached.

This Court has held on numerous occasions that a statute should be construed and applied so as to give effect to evident legislative intent, regardless of whether such construction varies from the statute's literal meaning, B.B. v. RICHARDSON, 23 So.2d 718 (Fla. 1945); FOLEY v. STATE, 50 So.2d 179 (Fla. 1951); DELTONA CORP. v. FLORIDA PUBLIC SERVICE COMMISSION, 220 So.2d 905

(Fla. 1969); GRIFFIS v. STATE, 356 So.2d 297 (Fla. 1978); STATE v. WEBB, supra; CITY OF BOCA RATON v. GIDMAN, 440 So.2d 1277 (Fla. 1983); VILDIBILL v. JOHNSON, 492 So.2d 1047 (Fla. 1986). FLORIDA JAI ALAI, INC. v. LAKE HOWELL WATER AND RECLAMATION DISTRICT, 274 So.2d 522 (Fla. 1973).

For example, in STATE v. WEBB, this Court construed the Florida Stop and Frisk Law, Fla. Stat. §901.151. While that statute stated that "probable cause" is a prerequisite to a valid frisk, this Court determined that that phrase was not utilized in the same sense that it was used when referring to arrests and search warrants. Instead, the legislature intended a lesser standard of "cause" to justify a frisk. This Court noted that its construction contradicted the strict letter of the statute. However, it justified that departure because there was overwhelming legislative history in support of that interpretation, including, inter alia, an historical note in the Florida Legislative Service Bureau, 398 So.2d at 825, fn. 6. In the case sub judice, the Fourth District specifically relied upon STATE v. WEBB in support of its determination that the legislative history justified a departure from the literal language of the definition contained in Fla. Stat. §627.727(3)(b).

In GRIFFIS v. STATE, supra, this Court construed Fla. Stat. §943.42(1975) as requiring that a vehicle be used in an illegal drug operation as a prerequisite to forfeiture, even though that interpretation conflicted with the literal reading of the statute. It was noted that the statute constituted a substantial

adoption of the provisions of the Uniform Controlled Substances Act and was intended to be consistent with the Federal statutory scheme. This Court reviewed the congressional committee reports of the Federal Act and the notes of the Uniform Act and concluded that the literal reading of the Florida statute must yield to the obvious legislative intent. In GRIFFIS, this Court quoted with approval from BEEBE v. RICHARDSON, supra, **23** So.2d at **719:**

> ...[W]here the context of a statute taken literally conflicts with a plain legislative intent clearly discernible, the context must yield to the legislative purpose. For otherwise the intent of the lawmakers would be defeated.

Despite the fact that the cases relied upon by Shelby Mutual appear to conflict with those discussed above, they can be reconciled. In ST. PETERSBURG BANK AND TRUST v. HAMM, supra, this Court stated that the legislative intent is determined primarily from the language of the statute and, therefore, unambiguous statutes should be applied literally. However, the opinion noted, 414 So.2d at **1073,** "This case does not present the overwhelming evidence of a contrary [legislative] intent expressed in GRIFFIS [v. STATE, supra,]."

In HEREDIA v. ALLSTATE INSURANCE, this Court simply noted that it was not the "function or prerogative of the courts to speculate on [statutory] constructions more or less reasonably, when the language itself conveys an unequivocal meaning," [Emphasis supplied.] **358** So.2d at **1355.** However, when the legislative intent is clearly manifest in legislative history, a

court does not need to speculate when adopting an interpretation that is consistent with it.

Thus, it would appear that this Court adheres to the "plain meaning" doctrine of statutory construction, but will depart from it when the legislative history overwhelmingly supports a contrary interpretation. This is consistent with the rationale of the "plain meaning" doctrine, i.e., that the legislature is assumed to know the meaning of the words it has used and to have expressed its intent through the use of the words found in the statute, THAYER v. STATE, 335 So.2d 815 (Fla. 1976); S.R.G. CORP. v. DEPARTMENT OF REVENUE, 365 So.2d 687, 689 (Fla. 1978). However, that canon of statutory construction does not provide any flexibility for a situation in which the legislature made an honest mistake in expressing its intent in the statutory language. While such occurrences are rare, this Court has not rigidly adhered to the "plain meaning" doctrine, when doing so would clearly violate legislative intent. Instead, it has authorized exceptions to that doctrine "when a literal interpretation would lead to an illogical result or one not intended by the lawmakers," PARKER v. STATE, 406 So.2d 1089, 1091 (Fla. 1981). That is the situation here and the Fourth District properly resolved it.

The legislative intent is clearly and repeatedly expressed in the legislative history that the coverage mandated by Fla. Stat. S627.727 is to be excess coverage, i.e., over and above any other applicable coverage or benefits. Therefore, this Court would not be speculating in approving the interpretation adopted

by the Fourth District. That the legislative intent is clear from the legislative history is apparent from the fact that neither Shelby Mutual nor the Florida Association for Insurance Review (Amicus Curiae, hereafter "The Insurance Association") have argued, even as an alternative position, that the legislative history can be reconciled with their interpretation of the statute. A brief summary of the legislative history demonstrates this point unequivocally.

Prior to the 1984 Amendments, Fla. Stat. (5627.727 provided that motor vehicle insurers were required to offer two forms of uninsured motorist coverage: standard uninsured motorist coverage, under which the protection available to the insured was reduced by any liability insurance benefits available from the tortfeasor; and "excess underinsured motor vehicle coverage" which provided coverage for an insured over and above the benefits available under the tortfeasor's liability coverage (~~Fla~~. ~~Stat~~. §627.727(1972)). In 1984, the legislature decided to merge those two types of coverage and provide that uninsured motorist coverage would be over and above any motor vehicle liability coverage of the tortfeasor.

The proposed amendments to Fla. Stat. (5627.727 were contained in House Bill 319. The title to House Bill 319 was (A10):

> A bill to be entitled An act relating to insurance; amending s. 627.727, F.S., providing that uninsured motorist coverage is over and above any motor vehicle liability coverage; prohibiting setoffs; deleting the requirement that an insurer make available excess underinsured motor vehicle coverage;

providing an effective date. [Emphasis supplied.]

The House Summary noted that the Bill (A4):

> Changes uninsured motorist coverage to be that of excess underinsured motor vehicle coverage and abolishes the need of insurers to offer excess underinsured motor vehicle coverage. Provides that uninsured motorist coverage shall be over and above any motor vehicle liability coverage and prohibits setoffs. [Emphasis supplied.]

The Staff Summary and Analysis of House Bill 319 (hereafter "Staff Summary"), noted that (Al): "This Bill requires motor vehicle insurers to offer only excess uninsured motorist coverage." In discussing prior law and the effect of the proposed amendments, the drafters noted that under the existing version of Fla. Stat. S627.727 motor vehicle insurers were required to offer two forms of uninsured motorist coverage: the standard uninsured motorist coverage and excess uninsured motorist coverage (A1). They noted that under the standard uninsured motorist coverage, the amount of protection available to the insured is reduced by any liability insurance benefits available from the tortfeasor whereas under the excess uninsured motorist coverage "the full limit of uninsured motorist protection is available in addition to, and not reduced by, the other party's liability coverage"[2] (Al). The Staff Summary noted

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[2]Excess underinsured motor vehicle coverage had been previously defined in Fla. Stat. §627.727(2)(b)(1972) as:

> [P]roviding coverage for an insured motor

(Footnote Continued)

that the proposed amendments would make "excess uninsured motorist coverage the only type of uninsured motorist coverage required to be offered by insurers" (A2).

The Staff Summary provided an example to demonstrate the application of prior law and the effect of the proposed amendments (A1-2):

> [A]ssume a motorist purchases uninsured motorist coverage with limits of $10,000 per person, $20,000 per accident. He is involved in an accident with another motorist who has bodily injury liability insurance of $10,000 per person, $20,000 per accident. Under these facts, no uninsured motorist coverage is available [under existing law] if the motorist has purchased the standard uninsured motorist protection. If the motorist elected to purchase the excess uninsured motorist coverage, assuming the damages are sufficient, the full $10,000 excess UM would be available, in addition to the $10,000 liability insurance available from the other driver.

The Staff Summary also noted the economic impact of the amendment which was, necessarily, that premiums for uninsured

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(Footnote Continued)

> vehicle when the other person's liability insurer has provided limits of bodily injury liability for its insured which are less than the damages of the injured person purchasing such excess underinsured motor vehicle coverage. Such excess coverage shall provide the same coverage as the uninsured motor vehicle coverage provided in subsection (1), except that the excess coverage shall also be over and above, but shall not duplicate, the benefits available under the other person's liability coverage. The amount of such excess coverage shall not be reduced by a setoff against any coverage, including liability insurance.

motorist coverage would increase due to the required increase in coverage (A2-3). The drafters listed examples of uninsured motorist rates under the prior law and the greater premiums that would be necessary under the proposed amendment, noting (A3):

> The bill would make the premiums for excess uninsured motorist [coverage] applicable to all persons choosing to purchase this coverage.

The amendments proposed in House Bill 319 and the comments thereon remained intact through a revision of the Staff Summary (A5-9). Thereafter, they were repeated virtually verbatim in the Senate Staff Analysis and Economic Impact Statement for the proposed Senate Bill 0243 (which incorporated House Bill 319) and two revisions thereof (A15-19). The amendments and their intended effect were discussed in the same terms in the Final Staff Summary prepared by the Committee on Commerce of the Florida House of Representatives (A23-27).

Throughout each of the Staff Summaries, the precise example quoted, supra, was repeated which indicated that the uninsured motorist coverage was to apply even when the tortfeasor's liability coverage limits were the same as the insured's UM limits. Clearly, that result was intended by the legislature even though it was inconsistent with the definitional section of the statute, Fla. Stat. §627.727(3). But the legislature obviously overlooked that subsection because that subsection of the statute was never mentioned in any of the legislative history materials.

The economic impact portion of each Staff Summary specifically noted that the Bill would make the premiums for excess uninsured motorist coverage applicable to all persons choosing to purchase uninsured motorist coverage. Each Staff Summary contained a table which listed examples of the increased premiums for excess uninsured coverage that would be charged by five different carriers in certain geographical regions of Florida.

The Bill became law on May 21, 1984, Ch. 84-41 Laws of Florida. The title of the Bill as passed was, in pertinent part (A28), "A bill to be entitled An act relating to insurance; amending s. 627.727, F.S., providing that uninsured motorist coverage is over and above any motor vehicle liability coverage;...." This Court has noted with respect to a different statute, that (STATE v. WEBB, supra, 398 So.2d at 824):

> In determining legislative intent, we must give due weight and effect to the title of section 901.151, Florida Statutes (1977), which was placed at the beginning of the section by the legislature itself. The title is more than an index to what the section is about or has reference to; it is a direct statement by the legislature of its intent. BERGER v. JACKSON, 156 Fla. 251, 768, 23 So.2d 265 (1945).

In order to modify the statutory language to implement the intended change, the legislature amended the provisions of Fla. Stat. S627.727 as follows (the language added by amendment is underlined):

> 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 automobile medical expense coverages; under any motor vehicle liability insurance coverages; or from the owner or operator of the uninsured motor vehicle or any other person or organization jointly or severally liable together with such owner or operator for the accident. The coverage described in this section 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 available under this section shall not be reduced by a setoff against any coverage, including liability insurance.

The legislature deleted the language of subsection (1), which provided:

> Only the underinsured motorist's automobile liability insurance shall be set off against underinsured motorist coverage.

Additionally, the legislature deleted the provisions of Fla. Stat. §627.727(2)(b), which required insurers to offer excess underinsured motor vehicle coverage in addition to the traditional uninsured motorist's coverage. That provision had also provided that the amount of such excess coverage should not be reduced by a setoff against any liability insurance coverage.

In summary, the legislative history of the 1984 amendments to ~~Fla~~. ~~Stat~~. §627.727 clearly demonstrates that it was the legislature's intent that uninsured motorist coverage would constitute "excess" coverage, i.e., its benefits would be in addition to any benefits available from the tortfeasor's liability coverage. The legislature attempted to implement this change by adding to ~~Fla~~. ~~Stat~~. §627.727(1) the language to the effect that the coverage provided would be over and above the

benefits available to an insured "under any motor vehicle liability insurance coverages." The legislature also added the language that the coverage would include the difference between the benefits obtained from other sources (including the tortfeasor), and the damages sustained. However, the legislature did not amend Fla. Stat. §627.727(3) regarding the definition of an uninsured motor vehicle, even though the language added to the statute and the example utilized in every Staff Summary was inconsistent with it.

Consideration of the legislative history discussed above is appropriate because it clearly defines the legislature's intent regarding the scope of uninsured motorist coverage. However, the Fourth District specifically noted this Court's holding in STATE v. WEBB, supra, to the effect that the legislative intent is the "polestar" by which the court must be guided even if it contradicts the strict letter of the statute, 527 So.2d at 835. The force and clarity of the legislative history in this case are much greater than this Court deemed sufficient to overrule the literal language of the statutes in STATE v. WEBB, supra, and GRIFFIS v. STATE, supra.

Shelby Mutual contends that the Fourth District resorted to legislative intent without the requisite finding of an ambiguity. However, the Fourth District quoted from the Florida Bar Continuing Legal Education's Florida Automobile Insurance Law (1985) as describing the "problem created by the Florida Legislature's 1984 amendment" SHELBY MUTUAL, supra, 527 So.2d 834. In that quotation, it was noted that the legislature had

"created an ambiguity" (Ibid). As that article stated, there is an ambiguity in Fla. Stat. S627.727 which was created by the 1984 Amendments. In subsection (1) the statute states that the coverage "shall be over and above, but shall not duplicate, the benefits available to an insured under...any motor vehicle liability insurance coverage." That language is inconsistent with the definition of uninsured motor vehicle in subsection (3)(b), which restricts such vehicles to those having liability insurance equal to or greater than the insured's. The definitional section is also inconsistent with the language added by the legislature that the coverage would "cover the difference between the sum of such benefits and the damages sustained up to the maximum amount of such coverage provided under this section" (A31). Further, inconsistency is apparent from the language stating, "the coverage available under this section shall not be reduced by a setoff against any coverage" (A31). Resolution of this ambiguity can be achieved by reading the legislative history which clearly demonstrates that the legislature intended the provisions in subsection (1) to control since it explicitly provided an example that is inconsistent with subsection (3)(b) and stated its intention that all UM coverage would be "excess uninsured motorist coverage." These conflicts can also be resolved by relying on the principle that the last expression of the legislature on a given subject will control when there are inconsistent provisions in the same statutes, JOHNSON v. STATE, 27 So.2d 276, 282 (Fla. 1946); ALBURY v. CITY OF JACKSONVILLE

BEACH, 295 So.2d 297, 300 (Fla. 1974); STATE v. DUNMANN, 427 So.2d 166, 168 (Fla. 1983).

It should also be noted that if the interpretation adopted by the Fourth District is not implemented, an unreasonable result would obtain. The legislature specifically provided that once the 1984 Amendments became law, the premiums for excess uninsured motorist coverage would be applicable to all persons purchasing uninsured motorist coverage in Florida. Shelby Mutual and The Florida Association seek to obtain a windfall for the insurers by, on the one hand, accepting the greater premium mandated by the legislature, but on the other hand, limiting the scope of coverage. Such a result should not be condoned by this Court. Clearly, it was not the result intended by the legislature nor can it be justified by any sense of equity.

Shelby Mutual relies on the First District's decision in UNITED STATES FIDELITY AND GUARANTY CO. v. WOOLARD, 523 So.2d 798 (Fla. 1st DCA 1988) and MARQUEZ v. PRUDENTIAL PROPERTY AND CASUALTY INSURANCE CO., 534 So.2d 918 (Fla. 3d DCA 1988). In those cases, the courts focused solely on subsection (3)(b) of the statute and made no attempt to analyze the legislature's intent. Shelby Mutual argues that this is proper because the courts were only empowered to literally apply the statute. However, this Court has quashed previous district court decisions in which statutes were applied literally, upon determining that the construction was inconsistent with the clear legislative intent, see e.g., STATE v. WEBB, supra; CITY OF BOCA RATON v. GIDMAN, supra. Curiously, while both Shelby Mutual and The

Insurance Association criticize the Fourth District for relying on the legislative history, neither of them address STATE v. WEBB, supra, which was cited as authority for that reliance by the Fourth District. This must be construed as a concession, sub silentio, that they cannot muster any argument to challenge that proposition, nor its application in this case.

Neither Shelby Mutual nor The Insurance Association have addressed the legislative history relied upon by the Fourth District. Apparently they would concede that, if it is considered, their position would have to be rejected. The Insurance Association contends that there is no historical precedent for giving "so great a weight to a staff report on a house bill" (Insurance Association Brief pg.11). It should be noted that this Court relied on the Staff Analysis of a House Bill in NEW HAMPSHIRE INSURANCE GROUP v. HARBACH, 439 So.2d 1383, 1385-86 (Fla. 1983), to determine legislative intent with respect to Fla. Stat. S627.727 and S627.4132 relating to uninsured motorist coverage. Additionally, legislative Staff Summaries have been relied upon by this Court in numerous other cases, IVEY v. CHICAGO INSURANCE CO., 410 So.2d 494 (Fla. 1982); ROBERSON v. FLORIDA PAROLE AND PROBATION COMMISSION, 444 So.2d 917 (Fla. 1983); COONS v. CONTINENTAL INSURANCE CO., 511 So.2d 971 (Fla. 1987); CARAWAN v. STATE, 515 So.2d 161 (Fla. 1987); ALLEN v. STATE, 526 So.2d 69 (Fla. 1988); MAGAW v. STATE, 14 FLW 27 (Fla. January 12, 1989). Therefore, it is not unprecedented for this Court to rely on Staff Summaries. This is eminently reasonable

since they represent the clearest expression of legislative intent for bills promulgated in the Florida Legislature.

In summary, this is a situation in which the legislature clearly made a mistake in amending a statute to comply with its intentions. In view of the technical and arcane nature of the uninsured motorist statute, it is not surprising that such a mistake would occur. The canons of statutory construction must be sufficiently flexible to provide for such a situation when it can be demonstrated conclusively as in this case. This Court has in the past applied the principle that the legislative intent should control even when it is inconsistent with the literal language of the statute, and the Fourth District properly followed that principle in this case. No hardship results from such a holding since the legislature specifically provided for the increased premiums to compensate the insurance companies for the increased coverage. However, adoption of the interpretation imposed by the First and Third Districts would result in an inequitable result since the insureds would have been paying premiums for coverage that they are not entitled to receive. Such an unreasonable result cannot be justified, especially when settled principles of statutory construction support the reasonable result. For these reasons, the Fourth District's decision is correct and should be approved.

CONCLUSION

For the reasons stated above, the decision of the Fourth District in SHELBY MUTUAL INSURANCE CO. v. SMITH, supra, should be approved, and the decisions of the First District in UNITED FIDELITY AND GUARANTY CO. v. WILLARD, supra, and the Third District in MARQUEZ v. PRUDENTIAL PROPERTY AND CASUALTY INSURANCE CO., supra, should be disapproved.

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; and BONITA L. KNEELAND, ESQ., P.O. Box 1438, Tampa, FL 33601, by mail, this 15th day of March, 1989.

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