14
22 agenda

IN THE
SUPREME COURT OF FLORIDA

CASE NUMBER 73,560

FILED
SID J. WHITE
MAR 28 1989
CLERK, SUPREME COURT
By _____ Deputy Clerk

GLADYS MARQUEZ,

Petitioner,

vs.

PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY,

Respondent.

ON DISCRETIONARY REVIEW FROM
THE DECISION OF THE THIRD DISTRICT
COURT OF APPEAL OF FLORIDA
CASE NUMBER 88-342

BRIEF OF DARRYL D. KENDRICK AS *AMICUS* CURIAE ON BEHALF OF THE ACADEMY OF FLORIDA TRIAL LAWYERS

DARRYL D. KENDRICK, ESQUIRE
437 EAST MONROE STREET, SUITE TWO
JACKSONVILLE, FLORIDA 32202
(904) 354-6002
FLORIDA BAR NO.: 0558885

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

SECONDARY SOURCES

STATUTE

PREFACE

The parties will be referred to as the petitioner and respondent respectively. Any references to the record forwarded by the Third District Court of Appeal will be marked by the letter "R," followed by a page number which corresponds to the Clerk's Index. References to the Appendix for this Brief will be marked by the letter "A," followed by the corresponding page number.

OPINIONS BELOW

The Third District Court of Appeal (R81-82, Al-2) affirmed a Summary Judgment in favor of the respondent which was issued by the trial judge in the Circuit Court for the Eleventh Judicial Circuit, Dade County, Florida (R79-80, A3-4). The trial court ruled that the petitioner was not entitled to any uninsured motorists benefits under the policy issued by the respondent (R79-80, A3-4).

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to the Florida Rules of Appellate Procedure, Rule 9.030(a)(2)(A)(iv) and (v).

INTRODUCTION

This Brief is being offered amicus curiae with the full knowledge and approval of both the petitioner and respondent. The Third District Court of Appeal properly certified the question at issue in this case as being one of great public importance. The decision of this Court will have far reaching and profound effects on all purchases of automobile uninsured motorist coverage within the state of Florida. The amicus curiae, on behalf of the Academy of Florida Trial Lawyers, supports the position of the petitioner herein, believing that the public will be best served by a reversal of the opinion of the Third District Court of Appeal. This Brief is filed pursuant to Rule 9.370 of the Florida Rules of Appellate Procedure.

QUESTION PRESENTED

WHERE THE TORTFEASOR'S LIMITS FOR BODILY INJURY LIABILITY ARE EQUAL TO THOSE CONTAINED IN THE INJURED PARTY'S UNINSURED MOTORIST COVERAGE, MAY THE INJURED PARTY RECOVER UNDER THE UNINSURED MOTORIST POLICY?

STATEMENT OF THE CASE AND FACTS

The material facts are aptly set forth in the Summary Final Judgment issued by the trial court (R79-80, A3-4), and will not be repeated in detail here. It should be noted that the petitioner and respondent have stipulated to the material issues of fact (R79, A3). In short, the petitioner claimed a right to $10,000.00 in uninsured motorist coverage under a policy issued by the respondent. The respondent claims that the uninsured motorist benefits are inapplicable to the case at bar due to the fact that the tortfeasor had $10,000.00 in liability coverage. At the heart of this issue is the interpretation of and legislative intent as to **Fla. Stat. § 627.727, as amended in 1984** (A5-7).

This issue has been resolved in very conflicting and diametrically opposed decisions of two of Florida's District Courts of Appeal. The First District Court of Appeal in **United States Fidelity and Guaranty vs. Woolard, 523 So. 2d 798 (Fla. 1st DCA 1988)** held that UM benefits were not available to an insured in this circumstance. However, the Fourth District Court of Appeal held in Shelby **Mutual** Insurance **Company vs. Smith, 527 So. 2d 830 (Fla. 4th DCA 1988)** that benefits were due under such circumstances. The Third District Court of Appeal in the case at bar adopted the opinion of the First District Court of Appeal but certified the Question herein to this Court because of the direct conflict between the District Courts of Appeal and because the issue is one of great public importance.

SUMMARY OF ARGUMENT

The certified question should be answered in the affirmative and the decisions of the Third District Court of Appeal and the trial court should be reversed. The Court should reject the reasoning of the First District Court in **Woolard** and should adopt the reasoning of the Fourth District Court in Shelby Mutual as the law of the state of Florida.

The 1984 amendments to Fla. Stat. § 627.727 are clearly applicable to the case at hand. The legislative history of those amendments show the direct and unambiguous intent of the lawmakers to make UM benefits available in exactly the type of situation which exists between the petitioner and respondent. All UM coverage is now excess and is payable without regard to the amount of liability insurance available from the tortfeasor.

ARGUMENT

A brief history of the applicability of UM coverages is warranted before presenting the arguments of the amicus curiae. Prior to the 1984 amendments, two types of UM coverage were available. The standard UM paid benefits only where the liability policy was less than the amount of UM coverage. This position was perhaps best illustrated by the case of Bayles vs. **State Farm Mutual** Insurance **Company, 483 *So.* 2d 482 (Fla. 1985).** The other coverage, called "excess" UM paid benefits in accordance with the damages of the insured without regard to the liability insurance limit carried by the tortfeasor. However, the statute on which **Bayles** was grounded was changed by the legislature. **Fla Stat. §** 627.727(1) and **(2)** were revised (A5-7). Unfortunately, the changes to subsections (1) and (2) without corresponding corrections to subsection (3) have left an ambiguity with which this Court must now deal. See **Florida Automobile** Insurance Law, (A8-9). The question, therefore, in its most basic form is: Did the 1984 amendments change the availability of UM benefits under such facts as presented in Bayles and in the case at bar? A review of the circumstances surrounding the passage of the 1984 amendments leads to the inescapable conclusion that the answer must be yes.

It is the opinion of the Academy of Florida Trial Lawyers that the amendments did, in fact, change the old concept of UM availability and made UM coverage applicable in all situations where the injury to the insured cannot be adequately compensatedby the tortfeasor or the tortfeasor's liability coverage. The reasoning of the **Bayles** decision simply cannot be applied to the post-amendment version of the statute in question. In **Bayles,** this Court stated that the decision to disallow benefits was "mandated by the language of Section 627.727(1)..." Id. at 404. That section allowed for a UM setoff: Section (2) made

a provision for "excess" UM. The 1984 amendments barred such a setoff and eliminated the ''excess'coverage sectionofthe statute (A5-7). Thisdemonstrates the legislature's intent to make all UM coverage ''excess''coverage. The rationale behind Bayles and like decisions can no longer be applied.

The respondent argues that because subsection (3) remains intact, UM availability must first be determined under the old rationale: by viewing the coverage in relation to the available liability coverage. This position is illogical. The UM benefits cannot be both "excess" (without setoff) and limited by liability coverage at the same time. These two principles are mutually exclusive. Therefore, there is no construction of the statute which can avoid this conflict.

In a post-Shelby **Mutual** decision, the Fourth District Court of Appeal discussed in detail the application of true "excess" UM insurance. **GEICO vs. Brewton, 14 FLW 574, ____ SO. 2d ____ (Fla.** 4th DCA 1989). That discussion now stands as an excellent example of how UM benefits should be paid. The Court detailed a hypothetical situation very similar to the case at bar.

The question addressed was the application of UM benefits where the UM policy and liability policy have equal limits of $10,000.00. Under the old view of UM insurance, the total coverage available would be $10,000.00 since the UM limit did not exceed the liability limit. Hence an insured with damages of $15,000.00 would receive only $10,000.00. Under "excess" coverage an insured would have $20,000.00 in available coverage. With damages of $5,000.00, the liability policy would pay the total and no UM could be claimed. However, where the damages equaled $15,000.00, the UM would pay the $5,000.00 which "exceeded" the tortfeasor's liability policy limit. Id. at 574. "Excess" UM does not create duplicitous recovery, nor does it relieve the liability carrier from

responsibility. Instead, it serves to protect the insured who is damaged beyond the tortfeasor's means and coverage. In that sense, "excess" UM serves a valuable public purpose.

It is also worth noting that "excess" UM provides the most protection to those who have minimal UM policies. People of limited means are the ones who are the most affected by the changes in UM coverage. People who can afford large UM policies will rarely face situations where the tortfeasor's policy is of equal (or greater) value. However, people who can afford only small limits are unlikely to obtain any true benefits from their UM coverage without "excess" interpretation and application. It is clear that this was one of those forces that fueled the legislative changes of 1984. Note that the House Summary uses a $10,000.00 policy as an example (A10-11).

Large underwriters of Florida automobile policies have already tacitly acknowledged that compliance with the 1984 amendments requires the removal of the old definition of uninsured (or underinsured) from their policies. For example, State Farm Insurance Company originally issued basic UM (designated "U" coverage) and "excess" UM (designated "U2") (A16-19). However, endorsements have been added to their policies reflecting that "U2" has merged into basic "U" coverage (A20-22). Although the original coverage clearly limited unavailability to cases where the UM was greater than the liability coverage (A17), the "excess" coverage has omitted this requirement (A20). The new standard is whether the damages exceed the available liability limits (A20). Anything less would not be true "excess" coverage and would violate legislative intent.

In any event, the first priority of this Court must be the fulfillment of legislative intent. As noted in State vs. Webb, 398 So. 2d 820 (Fla. 1981)

at 824:

> It is a fundamental rule of statutory construction that legislative intent is the polestar by which the court must be guided, and this intent must be given effect even though it may contradict the strict letter of the statute. (emphasis added).

Therefore, even assuming the subsections of the statute could be reconciled, the Court's duty would be unsatisfied if such a construction ignored the intent of the legislature. Id.

In this case, the intent of the legislature is abundantly clear. We have available a copy of the Florida House of Representatives Bill Analysis - Staff Summary and Analysis (hereinafter called House Summary), which give a clear and unambiguous statement of legislative intent (A10-13). The House Summary identifies HB319 as "a bill which requires motor vehicle insurers to offer only excess uninsured motorist coverage" (emphasis added) (A10).

The House Summary goes on to give an example which is factually identical to the case at bar. It further explains that, after passage of the amendments, UM coverage will be available under suchcircumstances (A10-11). The petitioner's case falls squarely into the example given. The intent to make UM coverage available in such cases cannot be seriously questioned. Furthermore, the House Summary goes on to state that the bill "makes excess uninsured motorist coverage the only type of uninsured motorist coverage..." (All). It is, therefore, equally clear that UM coverage is available, without regard to the amount of liability coverage, in all cases.

The Court is bound to give "that construction to the act Which comports with the evident intention of the legislature." **Foley vs. State, 50 So 2d. 179 (Fla. 1951) at 184.** The intent of the legislature in regard to the 1984 amendments to Fla. **Stat. § 627.727** as identified in the House Summary is simple and

straightforward. The Court is completely justified in relying on such expressions of legislative intent (A15). (See Webb, Foley, and **Cury vs. Lehman, 55 Fla. 847, 47 So. 18, cited in Foley.)** Where legislative intent in clearly discernible, "the context must yield to the legislative purpose". **Beebe vs. Richardson, 23 So. 2d 718 (Fla, 1945) at 719.**

The Fourth District Court of Appeal properly determined and gave effect to the intent of the legislature in regard to the issue at hand. Any contrary finding must either ignore this intent or give an unreasonable interpretation to the law which would lead to "excess" UM which is available only where it is greater than the liability, butuncollectable otherwise. This flies in the face of all logic and disregards the clear meaning of "excess" UM. Statutes should be interpreted reasonably. See **City of Boca Raton vs. Gidman, 440 So. 2d 1277 (Fla. 1983).**

The First District Court of Appeal, in stark contrast to the Fourth District Court of Appeal, never mentioned legislative intent in the **Woolard** decision. There was apparently no attempt to determine and apply the intent that is clearly evidenced in the House Summary. It seems probable, therefore, that the First District Court of Appeal was not presented with this information. Since legislative intent is the "polestar by which the Court must be guided", the Woolard decision fails the most crucial test of accuracy. **Webb at 824.**

The faults of the Woolard case are perhaps best pointed out by another opinion of the First District Court of Appeal: **Woodard vs. Pennsylvania National Insurance Company, 13 FLW 2223, _____ So. 2d _____ (Fla. 1st DCA 1988).** In that case, the First District Court of Appeal held that UM coverage was payable even though the liability policy was equal to the UM limits. The Court found that UM protection was intended to be available "in addition to liability

coverage, rather than reduced by such coverage." (emphasis in original) Id. at 2225. Judge Wigginton, who wrote the Woolard opinion, concurred with the result in Woodard. The key language which evidenced the legislative intent was apparently the crucial factor in the second opinion. The latter case also implicitly rejected the application of Bayles, on which the first decision admittedly relied. Woolard at 798.

original

CONCLUSION

The certified question should be answered in the affirmative. This Court should adopt the reasoning of the Fourth District Court of Appeal in Shelby Mutual as the law of Florida. Legislative intent is paramount to all other concerns and, where evident, should be given effect, even if doing so will void some statutory provision. Legislative intent in the case at bar is clear and apparent. Therefore, the Court should find all UM insurance to be "excess" UM and to be applicable based solely on damages and without regard to the liability insurance limits. Anything less will require the reinstitution of the old standards of two tier UM structure contrary to the legislature's directive.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Gerald E. Rosser, Esquire, Attorney for Petitioner, 1110 Brickell Ave., Suite 406, Miami, Florida 33131, and Shelley H. Leinicke, Esquire, Attorney for Responder$, P.O. Drawer 14660, Ft. Lauderdale, Florida 33302, by mail this 27th day of March, 1989.

.Respectfully Submitted,

DARRYL D. KENDRICK, ESQUIRE
FLORIDA BAR #0558885
437 EAST MONROE STREET, SUITE TWO
JACKSONVILLE, FLORIDA 32202
(904)354-6002