3-14-89

IN THE SUPREME COURT OF FLORIDA

CASE NUMBER 73,560

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GLADYS MARQUEZ,

Plaintiff, Petitioner,

vs.

PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY,

Defendant, Respondent.

ON DISCRETIONARY REVIEW FROM THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL OF FLORIDA
CASE NO. **88-342**

INITIAL BRIEF ON TH MERITS OF GLADYS MARQUEZ

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INTRODUCTION

This is the initial brief of Plaintiff, Petitioner, GLADYS MARQUEZ, who will be referred to by name or as Plaintiff. Defendant, Respondent PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY will be referred to as PRUDENTIAL or Defendant. References to the record forwarded from the Third District Court of Appeal will be by the letter "R" and a page number corresponding to the Clerks index. References to the appendix to this brief will be by the letter "A" and a page number.

STATEMENT OF THE CASE AND FACTS

This proceeding arises from the decision of the Third District Court of Appeal in *Gladys Marquez* v. *Prudential Property and Casualty Insurance Co.,* __ So.2d __ (Fla. 3d DCA December 13, 1988). (R81-82, A1-2) The Third District affirmed a summary judgment in favor of PRUDENTIAL finding no uninsured motorist coverage applicable to Plaintiffs claim. (R79-80, A3-4)

The material facts are all contained in the summary final judgment entered in the trial court. (R79-80, A3-4) MARQUEZ was involved in an automobile accident on Marach 5, 1986, and at the time had uninsured motorist coverage with PRUDENTIAL in the amount of $10,000. The tortfeasor had automobile liability insurance in the amount of $10,000. The trial court determined that under Florida Statutes §627.727(3) there was no uninsured motorist as statutorily defined, and that therefore Plaintiff was not entitled to uninsured motorist coverage.

Plaintiff appealed, and the lower tribunal determined that the 1984 revisions to $627.727 did not change the definition of uninsured motorist, and that the trial court had

been correct. In its opinion the Third District certified the following question to this Court as being of great public importance:

> 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?

The lower tribunal also certified conflict with the decision on the same issue in ***The** Shelby Mutual Ins. Co. v. Smith,* 527 So.2d 830 (Fla. 4th **DCA** 1988), which decision is pending review in this Court, Case No. 72,870, set for oral argument on May 2, 1989.

ISSUE PRESENTED FOR REVIEW

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?

SUMMARY OF ARGUMENT

The certified question should be answered in the affirmative, and the decisions of the lower tribunal and trial court reversed. The Court should approve the reasoning and decision of the Fourth District Court of Appeal in *The Shelby Mutual* **Ins.** *Co.* **v.** *Smith,* 527 So.2d 830 (Fla. 4th DCA 1988).

ARGUMENT

Both the lower tribunal and the First District Court of Appeal, in *United States Fidelity & Guar.* ***Co.* v. *Woolard*,** 523 So.2d 798 (Fla. 1st DCA 1988) based their negative answers to the issue presented here on the language of 627.727(3)(b) Florida Statutes (1983):

> For the purposes of this coverage, the term 'uninsured motor vehicle' shall . . . be deemed to include an insured motor vehicle when the liability insurer thereof:
> (b) has provided limits of bodily injury liability for its insured which are less than the limits applicable to the injured person provided under uninsured motorist's coverage applicable to the injured person.

Those two Districts ignored any effect of the 1984 amendments to §627.727(1). **A** portion

of the changed language of that subsection reads:

> The [uninsured motorist] coverage described under this section shall be over and above, but shall not duplicate, the benefits available to an insured . . . under any motor vehicle liability coverage . . . and such coverage *shall cover the difference, f 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. (emphasis added)

The quoted language from the 1984 version of 627.727(1) appears to provide that an insured who has received benefits under "any motor vehicle liability insurance" and to the extent that such benefits do not satisfy his damages, the insured may recover those damages from his uninsured motorist coverage. That interpretation is at odds with the definitional language of §627/727(3)(b) relied on by the First and Third Districts.

The Fourth District, in *Shelby Mutual* v. *Smith, supra,* reached its decision contrary to those of the First and Third Districts by consideration of the 1984 amendments to §627.727(1). **A** thorough discussion of the confusion created by the 1984 amendments was made in the decision, and will not be repeated here, but is adopted by MARQUEZ as her position in the instant case. In resolving ambiguity created by the 1984 amendments when read with the existing definition of uninsured motorist in §627.727(3)(b) the Fourth District sought to find the legislative intent by examing the legislative bill analysis of House Bill 319. (R31-40, **A5-8)** The court then determined that the legislature had intended that all uninsured motorist coverge would be equivalent to what was previously known as "excess uninsured motorist coverage," a separate category of insurance deleted by HB 319.

It is respectfully urged by Plaintiff that the First and Third District Courts of

Appeal held too rigidly to the definition of uninsured motorist in §627.727(3)(b), and should have engaged in the futher analysis of the effects of the statutory changes made by the Fourth District. This Court should approve the decision of the Fourth District and disapprove the others.

CONCLUSION

Based on the foregoing, the decision presented for review should be reversed, the certified question answered in the negative, and the cause remanded for determination of attorney's fees by the trial court for the proceedings in the Third District Court of Appeal, and in this Court pursuant to the motion for attorney's fees which accompanies this brief.

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