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IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA
CASE NO.: 74,317

Second District Court of Appeal
Case No.: 88-1676

UNIVERSAL UNDERWRITERS INSURANCE COMPANY,

Plaintiff/Petitioner,

vs.

LARRY WAYNE MORRISON and KAY MORRISON, his wife,

Defendants/Respondents.
_____/



**BRIEF OF PETITIONER ON THE MERITS**

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## PREFACE

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## STATEMENT OF THE CASE AND OF TEE FACTS

The issue in this case is the same as the issues pending before this Court in Shelby Mutual Insurance Company v. Smith, Case Number 72,870, and Marquez v. Prudential Property and Casualty, Case Number 73,560.

In the case at bar, Petitioner/Appellee, UNIVERSAL UNDERWRITERS INSURANCE COMPANY (UUIC) filed a Declaratory Judgment action pursuant to Chapter 86, Florida Statutes, against Appellant, LARRY WAYNE MORRISON (MORRISON), seeking a judicial determination of whether MORRISON was entitled to uninsured motorist benefits under an insurance policy issued to Register Chevrolet. (R 1-8).

MORRISON was injured while an occupant of a Register Chevrolet vehicle as a result of a motor vehicle accident caused by the negligence of one Albert Smith (Smith). Smith was insured by Travelers Insurance Company (Travelers) under a policy with a $25,000.00 bodily injury liability limit. (R 1-8; 9-91). The UUIC policy provided uninsured motorist benefits to MORRISON with a $20,000.00 bodily injury limit. (R 9-89).

MORRISON took the position that he was entitled to $20,000.00 from UUIC over and above the $25,000.00 from the tortfeasor's insurer, Travelers, based upon Section 627.727(1), Florida Statutes, which reads in pertinent part:

> "The amount of coverage available under this section (uninsured motorist coverage) shall not be reduced by a set off against any coverage including liability insurance."

UUIC took the position that you never reach the set off provisions of Section 627.727(1), Florida Statutes, quoted above, because MORRISON was not injured by an operator of an uninsured motor vehicle which was defined in Section 627.727(3)(b), Florida Statutes, to include an insured motor vehicle when the liability insurer thereof:

> "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 coverage is applicable to the injured person."

This, in common parlance, is referred to as "under-insured" motorist coverage. The UUIC policy issued to Register Chevrolet contained a similar definition defining uninsured motorist vehicle to include:

> ". . . which, at the time of the accident, was insured or bonded with at least the amounts required by the applicable law where covered auto is principally garaged, but their limits are less than the limits of this insurance."

Based upon the policy provision and upon the supporting statutory language in Section 627.727(3)(b), Florida Statutes, UUIC moved for Summary Judgment. (R 107). The motion was granted by the Honorable L. R. Huffstetler, Jr., Circuit Judge. (R 128-129; 130). MORRISON moved for a rehearing (R 134-135) which was denied by the Court. (R 133).

MORRISON then appealed to the Fifth District Court of Appeal which reversed the Final Judgment in favor of UUIC. Morrison v. Universal Underwriters, 543 So.2d 425 (Fla. 5th DCA 1989). This Court's Order accepting jurisdiction was entered September 26, 1989.

## SUMMARY OF ARGUMENT

The issue in this case is whether legislative amendments to the set off provisions of the uninsured motorist statute work to constructively "repeal" another portion of the uninsured motorist statute which defines uninsured motor vehicle to include an insured motor vehicle when the liability insurer of the insured motor vehicle:

> "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 coverage applicable to the injured person."

Section 627.727(3)(b), Florida Statutes.

The issue has been discussed by four of the five District Courts of Appeal with opposite results. The First District Court of Appeal in USF&G v. Woolard, 523 So.2d 798 (Fla. 1st DCA 1988) and the Fourth District Court of Appeal in Marquez v. Prudential Property, 534 So.2d 918 (Fla. 3rd DCA 1988) have held that the changes in the set off provisions did not alter the language requiring the tortfeasor's bodily injury liability limits to be less than the available uninsured motorist limits prior to there being an uninsured motorist claim. To the contrary, the Fourth District Court of Appeal in Shelby Mutual v. Smith, 527 So.2d 830 (Fla. 4th DCA 1988) and the Fifth District Court of Appeal in the case at bar, Morrison v. Universal Underwriters, 543 So.2d 425 (Fla. 5th DCA 1989) held that the

legislature meant to repeal Section 627.727(3)(b), Florida Statutes, when it enacted the amendments to the set off provisions of the uninsured motorist statute, but "forgot" to do it.

The First and Third Districts analysis that the definition section in Section 627.727(3)(b), Florida Statutes, was not changed by the amendment are better reasoned opinions. This Court should adopt those decisions and reverse the Fifth District Court of Appeal's decision in the case at bar.

## ARGUMENT

WHERE THE TORTFEASORS' BODILY INJURY LIABILITY LIMITS EXCEED THE INJURED PERSON'S UNINSURED MOTORIST LIMITS, THE INJURED PERSON MAY NOT RECOVER UNINSURED MOTORIST BENEFITS FROM THE UNINSURED MOTORIST CARRIER.

The operative facts are not in dispute. MORRISON was involved in an automobile accident while an occupant of a vehicle owned by Register Chevrolet. UUIC provided uninsured motorist coverage in a policy issued to Register Chevrolet in the amount of $20,000.00. The tortfeasor in the automobile accident, Smith, was insured by Travelers with a bodily injury liability limit of $25,000.00.

Section 627.727(3)(b), Florida Statutes, provides that a vehicle is "uninsured" when an insured motor vehicle's liability insurer:

> "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 coverage applicable to the injured person."

Similar language is found in the UUIC policy which defines uninsured motorist vehicle to include:

> ". . . which, at the time of the accident, was insured or bonded with at least the amounts required by the applicable law where a covered auto is principally garaged, but their limits are less than the limits of this insurance."

Since the tortfeasor's carrier provided $25,000.00 in liability limits, it has, in fact, provided its insured, Smith, with liability limits in excess of the available uninsured

motorist benefits under the UUIC policy. Therefore, under the statutory definition of "uninsured motor vehicle" this Smith vehicle insured by Travelers was not an uninsured motor vehicle and therefore, no coverage is triggered pursuant to the above quoted policy provisions and statutory language.

The Fifth District Court of Appeal below, however, held that the above quoted statute was by implication repealed by the legislature by the enactment of Section 627.727(1), Florida Statutes, in 1984. That statute reads, in pertinent part:

> "The amount of coverage available under this section shall not be reduced by a set off against any coverage including liability insurance."

The same conclusion was reached by the Fourth District Court of Appeal in Shelby v. Smith, 527 So.2d 830 (Fla. 4th DCA 1988), currently pending before this Court, Case Number 72,870. Two other District Courts of Appeal have considered this same question and reached the opposite conclusion, that is, that Section 627.727(3)(b), was not repealed by implication, USF&G v. Woolard, 523 So.2d 798 (Fla. 1st DCA 1988) and Marquez v. Prudential Property, 534 So.2d 918 (Fla. 3rd DCA 1988), currently pending in this Court, Case Number 73,560.

The First District Court of Appeal in USF&G v. Woolard, Supra, points out that the changes in the set off language did not alter the definition of an uninsured motorist and therefore you do not reach the question of set offs until you have an

uninsured motorist. Where the tortfeasor's limits exceed the limits available under an uninsured motorist policy, then the tortfeasor is not "uninsured" and the changes in the set off language by the 1984 amendment do not come into play.

The opposite conclusion was reached by the Fourth District Court of Appeal in Shelby Mutual Insurance v. Smith, Supra. The Fourth District Court of Appeal noted that the Florida legislature when it enacted the 1984 amendments to Section 627.727(1), did not amend or repeal Section 627.727(3), Florida Statutes. In spite of the Florida legislature's failure to amend or repeal that section, however, the Fourth District Court of Appeal felt the legislature intended to do *so* and therefore construed Section 627.727(3), Florida Statutes, to be repealed even though it acknowledged that the legislature had not done *so.*

The next Court to consider the issue was the Third District Court of Appeal in Marquez v. Prudential Property. Cognizant of both Shelby Mutual Insurance Company, Supra, and Woolard, Supra, the Court chose to follow the First District Court of Appeal holding that the 1984 amendments did not change the definition in the definition of the uninsured motor vehicle annunciated in the unrepealed and unamended Section 627.727(3)(b).

The final District Court of Appeal to consider this issue at this time is the Fifth District Court of Appeal in the case at bar which rejected the First and Third Districts and sided with the Fourth District on this issue. The Court below analysis is based upon what it considers to be confusion due to the legislature's failure to eliminate Section 627.727(3)(b), Florida Statutes when it enacted the 1984 amendments. The Court concluded that since prior to the 1984 amendments insurers were required to offer both "standard" UM coverage and excess under-insured coverage to policy holders, and the 1984 amendment required only the offering of excess uninsured (under-insured) coverage, by implication the legislature simply "forgot" to repeal Section 627.727(3)(b), Florida Statutes. Since the Court was of the opinion that that section never did apply as a threshold determination to be made in regard to excess under-insured coverage, it now applies only to a type of insurance no longer allowed in Florida under the 1984 statute. Reliance is made also on the Woolard case and its consideration of the House of Representatives staff summary and analysis.

In order to construe that the legislature intended the repeal of Section 627.727(3)(b), Florida Statutes, by its enactment in 1984 of the amendment to Section 627.727(1), Florida Statutes, reliance is made upon those District Courts of Appeal *so* deciding on State v. Webb, 398 So.2d 820 (Fla. 1981) concerning the rule of statutory construction that legislative

intent is to be given effect even though it may contradict the strict letter of the statute. The rule, however, has never before been used as it was by the Fourth and Fifth District Courts of Appeal in these cases to actually repeal a statute. In effect, the Fourth and Fifth District Courts of Appeal are substituting their own judgment of the wisdom of the statute for that of the legislature which chose not to repeal the statute in the face of other statutory provisions changing certain set off provisions in the law which, in the opinion of some such as the Fourth and Fifth District Courts of Appeal, to result that those courts did not think was "fair".

State v. Webb, Supra, dealt with the statutory interpretation of the wording "probable cause" under the Florida Stop and Frisk Law. In light of its enactment after the United States Supreme Court decision in Terry v. Ohio, 392 U.S. 1 (1968), the Court interpreted "probable cause" to be "reasonableness" under the teachings of Terry as opposed to -he more stringent "probable cause" findings required for arrest warrants, etc. The rule of construction relied upon is that, where the strict wording of a statute would defeat legislative intent, it is the legislative intent which governs in construing the statute. However, nothing in those cases following that rule of construction allows a Court to repeal a statute simply because other statutory provisions do not make the law "work" like the Court thinks it should.

A Court cannot presume and refuse to enforce a law simply because it thinks the legislature "should have" repealed the law when other changes in the statute were made.

It is a fundamental rule of statutory construction that where the words of the legislature are clear and unambiguous, judicial interpretation of legislative history is not a substitute for application of the laws unequivocal meaning. Heredia v. Allstate, 358 So.2d 1353 (Fla. 1978). This Court stated in Heredia:

> "In matters requiring statutory construction, Courts always seek to effectuate legislative intent. Where the words selected by the legislature are clear and unambiguous, however, judicial interpretation is not appropriate to displace the expressed intent. Foley v. State ex rel. Gordon, 50 So.2d 179, 184 (Fla. 1951); Platt v. Lanier, 127 So.2d 912, 913 (Fla. 2nd DCA 1961). It is neither the function nor prerogative of the Courts to speculate on constructions more or less reasonable, when the language itself conveys an unequivacable meaning."

Where the statute is clear and unambiguous and conveys a clear and definite meaning, as the statutes in the case at bar, there is no reason to resort to rules of statutory construction for interpretation because statutes must be given their plain and obvious meaning. See Bewick v. State, 501 So.2d 72 (Fla. 5th DCA 1987). While legislative intent is helpful in the construction of statutes, it is the plain meaning of the statutory language which warrants first consideration in determining the legislature's intent. St. Petersburg Bank & Trust Company v. Hamm, 414 So.2d 1071 (Fla. 1982).

The problem with the analysis of this issue by the Fourth District Court of Appeal and the Fifth District Court of Appeal in Woolard and in the case at bar, is that it completely ignores a law passed by the legislature which yields a contrary result and, in effect, states a judicial position that the amendment to Section 627.727(1), Florida Statutes, "should have" gone farther and repealed Section 627.727(3)(b), Florida Statutes. The statute involved should be read in its entirety, and it presents very workable formula for determining the applicability of under-insured motorist coverage. Under the statute, if a tortfeasor's available liability limits exceed the uninsured motorist liability limits of an injured person, the injured person's recovery is against the tortfeasor and his insurer only. If, on the other hand, the injured person has chosen to purchase uninsured motorist benefits in excess of the available limits of the tortfeasor, the injured person's recourse is against the tortfeasor, the tortfeasor's insurer, and his own uninsured motorist carrier for the amount of coverage he chose to purchase. The judicial repeal of Section 627.727(3)(b), Florida Statutes, alters this legislative scheme making available to all uninsured motorist coverage regardless of the limits available to the tortfeasor. That is not the scheme of the statute, and that scheme should not be accomplished by judicial fiat.

It is respectfully requested that the decisions of USF&G v. Woolard, Supra, and Marquez. v. Prudential Property, should be followed by the Supreme Court and the decisions of Shelby v. Smith, Supra, and the Fifth District Court of Appeal in the case at bar, should be rejected.

## CONCLUSION

It is respectfully requested that this Court reverse the decision of the Fifth District Court of Appeal below, and find that Respondent, MORRISON, is not entitled to uninsured motorist benefits under the UUIC policy.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 16th day of October, 1989, to: JAMES M. CALLAN, JR., ESQUIRE, 807 North Fort Harrison Avenue, Clearwater, Florida 34615.

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