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

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

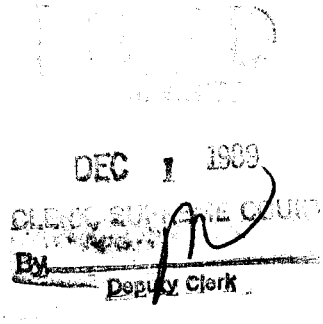
UNIVERSAL UNDERWRITERS INSURANCE COMPANY,

Plaintiff/Petitioner,

vs.

LARRY WAYNE MORRISON and KAY MORRISON, his wife,

Defendants/Respondents.



REPLY BRIEF OF PETITIONER ON THE MERITS

JEFFREY R. FULLER, ESQUIRE
WILLIAMS, BRASFIELD, WERTZ,
FULLEK & LAMB, P.A.
2553 First Avenue North
Post Office Box 12349
St. Petersburg, FL 33733-2349
(813) 327-2258 / TPA 224-0430
ATTORNEYS FOR PLAINTIFF/
PETITIONER, UUIC

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PREFACE

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STATEMENT OF THE CASE AND OF TEE FACTS

Petitioner adopts its Statement of the Case and of the Facts as contained in its Brief on the Merits.

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 issue in this case and the companion pending cases, Shelby Mutual Insurance Company v. Smith, Case No. 72,870 and Marquez v. Prudential Property & Casualty, Case No. 73,560 is whether Section 627.727(3)(b), Florida Statutes, should be repealed by this Court since the legislature failed to do so. This issue has raised such a controversy around the state that four of five District Courts of Appeal have written one or more opinions on the subject and there are currently three cases pending before this Court. The number of lawyers involved in the issue along with the differing opinions of the District Courts of Appeal should illustrate the futility of going beyond the clear language of the Statute in an attempt to divine the "intent" of the legislature in its 1984 amendment of Section 627.727(1), Florida Statutes.

Opinions of the Fourth District Court of Appeal cited in Morrison's Answer Brief further illustrate the futility in ignoring the clear language of the Statute. The Fourth District Court of Appeal previously had held in Shelby v. Smith, 527 So.2d 830 (Fla. 4th DCA 1988)[1] that Section 627.727(3)(b), Florida Statutes, should be repealed by the Court since the legislature

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[1] Currently pending before this Court in Case #72,870.

should have done so but did not. Subsequently in Shelby, Park v. Wausau Underwriters Insurance Company, 14 F.L.W. 1606 (Fla. 4th DCA, decided July 7, 1989) the E'ourth District Court of Appeal reaffirmed its Smith decision, and also noted that a subsequent amendment to the Statute there under consideration, Section 627.727(2)(b), Florida Statutes, should be considered to be a clarification of legislative intent concerning that issue. Oddly enough, the Court below in this case, the Fifth District Court of Appeal, rejected the argument that a 1988 amendment to Section 627.727 was clarifying legislative intent and in spite of the differing views of the amendments, reached the same conclusion as the Fourth District Court of Appeal in Smith, rejecting the First District Court of Appeal decision in USF&G v. koolard, 523 So.2d 798 and the Third District Court of Appeal decision in Marquez v. Prudential Property & Casualty Insurance Company, 534 So.2d 918 (Fla. 3rd DCA 1988). The confusion on this issue is solely the result of those courts which want to ignore a Statute which is on the books in the State of Florida. Under Article 3, Sections 7 and 8, Constitution of the State of Florida, the House of Representatives of the State of Florida considered Section 627.727(3)(b), Florida Statutes, passed it, it was then passed by the Senate, and then signed by the Governor. The courts are now in a position to say that another bill repealing that statute which has never been passed by the House of Representatives, never passed by the Senate, and never approved by the Governor, nevertheless exists to repeal the Statute. It is a gross

violation of the fundamental doctrine of Separations of Power for the Supreme Court to take the position that a duly approved Statute is repealed without consideration by the legislative and executive branches of that repeal.

A similar argument that the legislature "meant" to repeal or amend a Statute by the enactment of another but simply "forgot" to do it was rejected by the First District Court of Appeal in Gunite Works, Inc. v. Lovett, 392 So.2d 910 (Fla. 1st DCA 1980). That court, quoting from this Court's decision in Carlile v. Game and Freshwater Fish Commission, 354 So.2d 362 (Fla. 1978) stated:

> "Where it is apparent that substantial portions of a Statute have been omitted by process of amendment, the courts have no express or implied authority to supply omissions that are material and substantive, and not merely clerical and unconseyuential."

As applied to this case, Section 627.727(3)(b), Florida Statutes, was not included in the process of amendment and the courts have no express or implied authority to subject the Statute to repeal resulting in a material and substantive change. The provisions of Section 627.727(3)(b), Florida Statutes, as demonstrated by the plethora of litigation generated, are not "merely clerical and unconsequential".

Lastly respondent raises, for the first time, an argument that Universal Underwriters Insurance Company amended its language and that the amended policy language is applicable

to the case at bar. Not only was this not raised in any court, either at trial level or before the Fifth DCA, but it also runs contrary to the pleadings (A 1-2 and A 3-4) in this case where respondent admitted to the language quoted in the initial brief. The language, therefore, has no application in the case at bar although it obviously may affect subsequent cases involving Universal Underwriters Insurance Company.

CONCLUSION

Universal Underwriters Insurance Company respectfully requests this Court accept jurisdiction and review this cause on its merits.

Respectfully submitted,

JEFFREY R. FULLER, ESQUIRE
WILLIAMS, BRASFIELD, WERTZ, FULLER & LAMB, P.A.
2553 First Avenue North
Post Office Box 12349
St. Petersburg, FL 33733-2349
(813) 327-2258 / TPA 224-0430
Florida bar #218618
ATTORNEYS FOR PLAINTIFF/PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 29th day of November, 1989, to: JAMES M. CALLAN, JR., ESQUIRE, 807 North Fort Harrison Avenue, Clearwater, Florida 34615.

JEFFREY R. FULLER, ESQUIRE
WILLIAMS, BKASFIELD, WERTZ, FULLER & LAMB, P.A.
2553 First Avenue North
Post Office Box 12349
St. Petersburg, FL 33733-2349
(813) 327-2258 / TPA 224-0430
Florida Bar #218618