

015
w/aff.
nos off

IN THE SUPREME COURT OF FLORIDA

CASE NO: 75257

FOURTH DISTRICT COURT OF APPEAL

CASE NO: 88-02140

PRUDENTIAL PROPERTY AND
CASUALTY INSURANCE COMPANY, a
foreign corporation,

Defendant/Appellant/Petitioner,

vs.

BENJAMIN A. KALESA, JR., and
KATHLEEN KALESA, his wife,

Plaintiffs/Appellees/Respondents.

FILED

JAN 11 1990

CLERK, SUPREME COURT
By: [Signature]
Deputy Clerk

PETITIONER'S BRIEF ON JURISDICTION

SHELLEY H. LEINICKE, ESQ.
WICKER, SMITH, BLOMQUIST, TUTAN,
O'HARA, McCOY, GRAHAM & LANE
Attorneys for Petitioner
P. O. Drawer 14460
Fort Lauderdale, Florida 33302
(305) 467-6405

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CITATIONS	ii
STATEMENT OF THE CASE AND FACTS.	1
ISSUE.	3
WHETHER JURISDICTION IS ESTABLISHED IN THIS CASE BECAUSE THE FOURTH DISTRICT COURT OF APPEAL HAS ACKNOWLEDGED THAT ITS DECISION IS IN DIRECT CONFLICT WITH THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN THE CASE OF UNITED STATES FIDELITY AND GUARANTY V. WOOLARD, 523 So.2d 798 (Fla. 1st DCA 1988). THE CASE IS ALSO IN DIRECT CONFLICT WITH THE DECISION IN MARQUEZ V. PRUDENTIAL, 534 So.2d 918 (Fla. 3rd DCA 1988).	
	3
ARGUMENT	4
JURISDICTION IS ESTABLISHED IN THIS CASE BECAUSE THE FOURTH DISTRICT COURT OF APPEAL HAS ACKNOWLEDGED THAT ITS DECISION IS IN DIRECT CONFLICT WITH THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN THE CASE OF UNITED STATES FIDELITY AND GUARANTY V. WOOLARD, 523 So.2d 798 (Fla. 1st DCA 1988). THE CASE IS ALSO IN DIRECT CONFLICT WITH THE DECISION IN MARQUEZ V. PRUDENTIAL, 534 So.2d 918 (Fla. 3rd DCA 1988).	
	4
CONCLUSION	6
CERTIFICATE OF MAILING	7

TABLE OF CITATIONS

	<u>PAGE</u>
<u>Government Employees Insurance Co. v. Brewton,</u> 538 So.2d 1375 (Fla. 4th DCA 1989)	4
<u>Marquez v. Prudential,</u> 534 So.2d 918 (Fla. 3rd DCA 1988)	4
<u>Morrison v. Universal Underwriters Insurance Co.,</u> 543 So.2d 425 (Fla. 5th DCA 1989)	5
<u>Shelby Mutual Insurance Co. v. Smith,</u> 527 So.2d 830 (Fla. 4th DCA 1988)	4
<u>United States Fidelity and Guaranty Co. v. Woolard,</u> 523 So.2d 798 (Fla. 1st DCA 1988)	4

STATEMENT OF THE CASE AND FACTS

This case stems from a claim for uninsured motorist coverage benefits. Kalesa sued Prudential for declaratory relief. He alleged that he was involved in an automobile accident on September 22, 1985 and suffered personal injury. He further asserted that the tortfeasor had tendered his liability limits of \$100,000 and that Kalesa had uninsured motorist coverage through Prudential with limits of \$25,000 per person, \$50,000 per occurrence. Kalesa sought a declaratory ruling that he was entitled to recover under the Prudential uninsured motorist coverage.

Prudential moved to dismissed, asserting that Kalesa was not entitled to any uninsured motorist benefits because the tortfeasor's liability insurance coverage was greater than the uninsured motorist limits. Kalesa then moved for summary judgment on the coverage issue. The trial court granted this motion and ruled that because of the 1984 amendment to Florida Statute §627.727(3), uninsured motorist coverage applies in excess of the liability insurance coverage available from the

The symbol "A" refers to the attached Appendix of Petitioner.

tortfeasor even where such uninsured motorist coverage is in an amount which is less than the tortfeasor's liability coverage.

(A. 2-5) The District Court of Appeal, Fourth District of Florida, affirmed this ruling, but has acknowledged conflict with a decision of a sister court of appeal (A. 1)

ISSUE

WHETHER JURISDICTION IS ESTABLISHED IN THIS CASE BECAUSE THE FOURTH DISTRICT COURT OF APPEAL HAS ACKNOWLEDGED THAT ITS DECISION IS IN DIRECT CONFLICT WITH THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN THE CASE OF UNITED STATES FIDELITY AND GUARANTY V. WOOLARD, 523 So.2d 798 (Fla. 1st DCA 1988). THE CASE IS ALSO IN DIRECT CONFLICT WITH THE DECISION IN MARQUEZ V. PRUDENTIAL, 534 So.2d 918 (Fla. 3rd DCA 1988)

ARGUMENT

JURISDICTION IS ESTABLISHED IN THIS CASE BECAUSE THE FOURTH DISTRICT COURT OF APPEAL HAS ACKNOWLEDGED THAT ITS DECISION IS IN DIRECT CONFLICT WITH THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN THE CASE OF UNITED STATES FIDELITY AND GUARANTY V. WOOLARD, 523 So.2d 798 (Fla. 1st DCA 1988). THE CASE IS ALSO IN DIRECT CONFLICT WITH THE DECISION IN MARQUEZ V. PRUDENTIAL, 534 So.2d 918 (Fla. 3rd DCA 1988)

Jurisdiction is established in the instant case pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(v) and 9.030(a)(2)(A)(vi). The District Court of Appeal, Fourth District of Florida, has acknowledged that its decision is in conflict with the case of United States Fidelity and Guaranty Co. v. Woolard, 523 So.2d 798 (Fla. 1st DCA 1988). (A. 1, 6-7) It is also submitted that there is an express and direct conflict with the decision of the Third District Court of Appeal in the case of Marquez v. Prudential, 534 So.2d 918 (Fla. 3rd DCA 1988). (A. 8)

The instant case involves the question of whether uninsured/underinsured motorist coverage exists where a tortfeasor's liability limits are greater than the claimant's UM limits. (A. 1-5) The Fourth District Court of Appeal has answered this question in the affirmative in the instant case and also in the cases of Government Employees Insurance Co. v. Brewton, 538 So.2d 1375 (Fla. 4th DCA 1989) and Shelby Mutual Insurance Co. v. Smith, 527 So.2d 830 (Fla. 4th DCA 1988). (A.

1, 9-10, 11-12) The Fifth District Court of Appeal has adopted the same position in the case of Morrison v. Universal Underwriters Insurance Co., 543 So.2d 425 (Fla. 5th DCA 1989). (A. 13-14) This same question has, however, been answered in the affirmative by the First and Third District Courts of Appeal: United States Fidelity and Guaranty Co. v. Woolard, Marquez v. Prudential, supra. (A. 6-7, 8) Conflict has been acknowledged in the decisions of the district courts.

In the pending case, the Fourth District has acknowledged that its decision conflicts with the Woolard decision. The Shelby Mutual case is presently pending in the Florida Supreme Court on conflict certiorari review in Case Number 72,870.

The Third District's decision in the Marquez case, where the court also certified the question as one of great public importance, is presently pending review before the Florida Supreme Court in Case Number 73,560.

It is suggested that the Florida Supreme Court should exercise its discretion and entertain the instant case on the merits in order to insure uniformity in the decisions of the courts of this state.

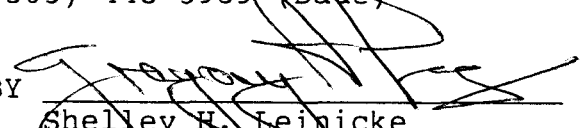
CONCLUSION

For the reasons set forth herein, it is respectfully suggested that jurisdiction is established because the instant decision is acknowledged to be in direct conflict with the case of United States Fidelity and Guaranty Co. v. Woolard, 523 So.2d 798 (Fla. 1st DCA 1988). It is also submitted that the instant decision expressly and directly conflicts with the decision of Marquez v. Prudential, 534 So.2d 918 (Fla. 3rd DCA 1988), F.C.T. Case No. 73,560. Acceptance of jurisdiction in this cause is essential in order to insure uniformity of decisions of the courts of this state.

Respectfully Submitted

WICKER, SMITH, BLOMQUIST, TUTAN,
O'HARA, McCOY, GRAHAM & LANE, P.A.
P. O. Box 14460
Fort Lauderdale, FL 33302
(305) 467-6405 (Broward)
(305) 448-3939 (Dade)

BY


Shelley H. Leinicke
Florida Bar No. 230170

CERTIFICATE OF MAILING

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 10th day of January, 1990 to: Mark W. Clark, Esq., Lytal & Reiter, P. O. Box 024466, West Palm Beach, Florida 33402.

WICKER, SMITH, BLOMQUIST, TUTAN,
O'HARA, McCOY, GRAHAM & LANE, P.A.
P. O. Box 14460
Fort Lauderdale, FL 33302
(305) 467-6405 (Broward)
(305) 448-3939 (Dade)

BY 

SHELLEY H. LEINICKE
Florida Bar No. 230170