

IN THE SUPREME COURT OF FLORIDA

CASE NO: 75,257

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
APR 13 1989

CLERK OF COURT
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PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

In this claim for declaratory relief, Kalesa was involved in a September 22, 1985 automobile accident with a tortfeasor who had \$100,000 liability insurance limits. After the tortfeasor tendered his full insurance limits, Kalesa filed a declaratory relief action against Prudential seeking a determination that he was also entitled to \$25,000 uninsured motorist coverage under the Prudential policy.

The trial court granted summary judgment in favor of Kalesa and ruled that after the 1984 amendment to Florida Statute §627.727(3), uninsured motorist coverage applies in excess of a tortfeasor's insurance limits even where the uninsured motorist coverage is less than the tortfeasor's liability limits. The Fourth District Court of Appeal affirmed, but acknowledged that its decision conflicted with a decision of a sister court of appeal.

This court has recently ruled upon the precise question of law in the case of The Shelby Mutual Insurance Company v. Smith, 556 So.2d 393, (Fla. 1990) and that no uninsured motorist coverage exists where the tortfeasor's liability limits are greater than the uninsured motorist limits.

ISSUE

WHETHER THE COURT ERRED IN DETERMINING THAT UNINSURED MOTORIST COVERAGE IS AVAILABLE WHERE A TORT FEASOR'S LIABILITY LIMITS ARE GREATER THAN THE CLAIMANT'S UNINSURED MOTORIST LIMITS.

ARGUMENT SUMMARY

This Honorable Court has recently determined that uninsured motorist coverage is not available where a tortfeasor has liability insurance coverage with equal or greater insurance limits. Shelby Mutual Insurance Company v. Smith, 556 So.2d 393 (Fla. 1990) This court's decision constitutes binding precedent and requires reversal of the district court and trial court decisions.

ARGUMENT

In the case of Shelby Mutual Insurance Company v. Smith, 556 So.2d 393 (Fla. 1990) this court determined the precise issue presented in the instant case. Just as in the pending case, the tortfeasor's liability coverage exceeded the claimant's UM coverage. Because of this, this court stated that "there was simply no uninsured motor vehicle upon which to predicate a claim for UM coverage." Id. at 396 It is submitted that this decision constitutes binding precedent which requires reversal of the instant case.

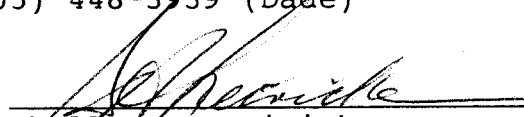
CONCLUSION

For the reasons set forth herein, it is respectfully requested that this Honorable Court reverse the decision of the Fourth District Court of Appeal and remand this case with directions to dismiss the declaratory relief action with prejudice.

Respectfully Submitted

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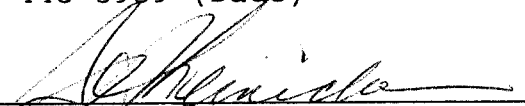
BY


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CERTIFICATE OF MAILING

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 13th day of April, 1990 to: Mark W. Clark, Esq., Lytal & Reiter, P. O. Box 024466, West Palm Beach, Florida 33402.

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