W.O.O.A.

IN THE SUPREME COURT OF FLORIDA

CASE NO.: 75,257

FOURTH DISTRICT COURT OF APPEAL

CASE NO: 88-02140

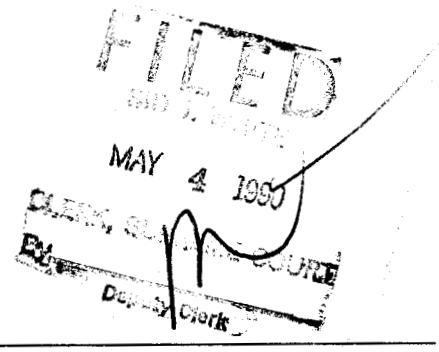
PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY, a foreign corporation,

Defendant/Appellant/Petitioner,

vs

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

Plaintiffs/Appellees/Respondents.



RESPONDENT'S BRIEF ON THE MERITS

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OTHER AUTHORITY

Florida Statute Section 627.727(1)
Florida Statute Section 627.727(3)(b)

STATEMENT OF THE CASE AND FACTS

Respondents adopt the statement of the case and facts as cited by the Petitioner.

ISSUE

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

SUMMARY OF THE ARGUMENT

The primary duty of this Court when interpreting a statute is to determine and effectuate the legislative intent. Ervin v. Peninsular Tel. Co., 53 So.2d 647 (Fla. 1951). The Court can derive the legislative intent from the plain meaning of the Statute only where no conflicts or ambiguities exist in the statutory language. This Court's recent decision in The Shelby Mutual Insurance Company v. Smith, 556 So.2d 393 (Fla. 1990), disregards the clear conflict and confusion that resulted following the Legislature's amendments to Section 627.727 in 1984.

The Court's duty is to harmonize the Statute with the legislative intent. The duty is not to harmonize portions of a statute which are clearly in conflict. State ex rel. Landis v. Crume, 180 So.38 (Fla. 1938). Where patent conflicts arise such as that which exists between Subsections (1) and (3) of the UM statute, the primary and fundamental rule of statutory construction which this Court is compelled to apply is to ascertain and effect the legislative intent; and that intent must be gathered from consideration of the Statute as a whole rather than from any one part thereof. Paskind v. State ex rel. Salcines, 390 So.2d 1198 (Fla. 2DCA 1980).

Reading the Statute as a whole or in pari materia and noting the conflicts that have arisen between the district courts of this state, this Court cannot deny that there is, in fact, an ambiguity on the very face of this Statute. This Court must therefore consider the previously submitted documents which support the

legislative intent that all UM coverage be excess and that there be no offset of the tortfeasor's liability coverage (Appendix A1-32).

This Court's duty is to vindicate the legislative intent. All other rules of statutory construction are subordinate; and no rule of statutory construction should be applied to thwart the legislative intent. American Bakeries Co. v. Haines City, 180 So. 524, (Fla. 1938).

Therefore, Respondents respectfully request that this Court vacate its decision and withdraw the opinion rendered in Shelby, supra, and consistent therewith, affirm the holding of the Fourth District of Appeal in the instant case..

ARGUMENT

The Supreme Court has the duty to ascertain and effectuate the Legislature's intent. Ervin v. Peninsular Tel. Co., 53 So.2d 647 (Fla. 1951). Although this Court has considered lengthy and numerous briefs and argument in addressing the issues that arose following the 1984 amendments to Section 627.727, Fla. Stat., this indisputable fact remains:

> THE LEGISLATIVE HISTORY AND INTENT OF FLORIDA'S UNINSURED MOTORIST STATUTE (1985) CANNOT BE RECONCILED WITH THIS COURT'S INTERPRETATION OR WITH A SIMPLE READING OF THE STATUTE IN PARI MATERIA.

Therefore, inspite of the clear ramification of the decision in The Shelby Mutual Insurance Company v. Smith, 556 So.2d 393 (Fla. 1990), Respondents respectfully refuse to wave the white flag in the face of stare decisis.

The majority's opinion in Shelby notes that the specific examples given in the legislative staff analyses dictate a different result. Shelby, id. at 395. What the Legislature clearly intended in the 1984 Amendments should, therefore, not be deemed "superfluous."

This Court has gone to great lengths to "harmonize" the ambiguity that so clearly exists on the face of Section 627.727, Fla. Stat. (1985). In doing so, the Court has donned its blinders and walked a virtual tightrope in statutory construction.

As its premise, the Court cites the proposition that the first consideration of statutory construction is "the plain meaning" of

the Statute. But the majority in Shelby failed to utilize the overriding precept and an equally fundamental rule of statutory construction in its analysis, i.e., when part of a statute appears to have a clear meaning if considered alone but is inconsistent with other parts of the same statute or others in pari materia, the Court should then examine the entire statute and those parts in pari materia to ascertain the overall legislative intent. Florida State Racing Com'n v. McLaughlin, 102 So.2d 574, (Fla. 1958). Further, where any ambiguity in the meaning or context of the statute exists, the Court's interpretation must yield to the legislative intent. Smith v. City of St. Petersberg, 302 So.2d 756, (Fla. 1974).

Reading the Statute in its entirety, the conflict between subsections (1) and (3) becomes self-evident; and the extent and scope of coverage the Legislature intended to provide is unclear. Section 627.727, Fla Stat. (1985). Further, the confusion and ambiguity that arise from the 1984 Amendments are clearly exemplified in the different opinions rendered by various courts as well as the several legal scholars who have studied the evolution and metamorphosis of this law. "Where reasonable differences arise as to the meaning or application of a statute, the legislative intent must be the polestar of judicial construction." Lowry v. Parole and Probation Com'n, 473 So.2d 1248, (Fla. 1985). Nowhere does this Court resolve the patent incongruities of these subsections; and in fact, the Court even acknowledges in Footnote (2) of the Shelby decision that the

Legislature subsequently readdressed the statutory language and the extent of UM coverage. Chapter 88-370, Laws of Florida. Shelby, supra, at 396.

Florida jurisprudence has always permitted a broader approach to statutory interpretation than the method of strict construction in order to avoid an inequitable result. Adams v. Dickinson, 264 So.2d 17 (Fla. 1DCA 1972). The purpose and intent of a legislative act should therefore be construed so as to fairly and liberally accomplish the beneficial purpose for which it was adopted; and the Court should not apply a rule of strictness which defeats and renders meaningless the legislative intent. Hanson v. State, 56 So.2d 129 (Fla. 1952). In fact, both the majority and dissenting opinions recognize that the Court's role is to effectuate the Legislature's intent. Further, the Court must effectively implement the legislative intent even when that intent contradicts the strict letter of the Statute. State v. Webb, 398 So.2d 820, (Fla. 1981); (Emphasis added). Respondents respectfully submit that this Court must acknowledge the separation of powers that keeps our system both vibrant and enduring; and this Court must remedy the derailment of statutory interpretation that has recently occurred in the Shelby, supra, decision.

The result in Shelby defies both legislative intent and simple logic. Application of the Shelby rule results in a virtual crap shoot for the insured who has paid an increased premium for coverage that may or may not be available when the insured suffers damages that exceed the available liability coverage in an

automobile accident. If the insured is involved in an accident where the tortfeasor's coverage is less than the UM benefits elected and paid for, then the insured receives the benefit of its bargain. However, in the unfortunate case where the tortfeasor's benefits are equal to or exceed the insured's UM benefits, the insurance company pockets the excess premium. In the latter case, the insured is not afforded the additional benefits for which it paid irrespective of the damages sustained. In reviewing the legislative history of these amendments, it was undeniably not the Legislature's intent to tolerate such an inequity in the application of this law.

Undeniably, the Legislature amended Subsection (1) in 1984 and expanded UM coverage so that it should "be over and above ... the benefits available to an insured ... under any motor vehicle liability insurance coverage." The Legislature also provided that "the amount of coverage available under this Section shall not be reduced by a setoff against any coverage, including liability coverage." Section 627.727, Fla. Stat. (1985). Consistent with these amendments, the Legislature deleted subsection (2)(b) of the Statute which compelled the insurer to offer excess UM coverage in addition to the UM coverage which was previously reduced by a setoff against any available liability coverage. In light of these amendments, the Legislature clearly enlarged the scope of UM coverage and the definition of the term "uninsured motor vehicle."

Given the clear language of this Statute's very first subsection, the result in Shelby is offensive. In its introductory

language, the Legislature set forth the unequivocal purpose of the UM coverage provided in Section 627.727, Fla. Stat., which is to afford protection to persons insured thereunder. (Emphasis added). The Legislature's intent throughout the transformation of this Statute has been to protect the insured. This intent is further evidenced by its initial mandate that uninsured motorist coverage be "delivered or issued for delivery" in every motor vehicle liability policy. Section 627.727(1), Fla. Stat. (1985); and the Shelby decision has exalted "form over substance to frustrate" that purpose. Shelby, supra, at 398.

Even assuming that no ambiguity exists in the Statute, this Court's emphasis on an isolated reading of Subsection (3)(b) may very well be misplaced. The Court should not employ statutory definitions where obvious inconsistencies result in the statutory language which diminish the purpose and effect of the statute. Ferre v. State ex rel. Reno, 478 So.2d 1077 (Fla. 3DCA 1985); and Lawson v. Suwanee Fruit & S.S. Co., 69 S.Ct. 503 (U.S. Fla. 1949).

The subsection as amended in 1979 and at all times material to this argument provided:

> (3) For the purpose of this coverage, the term "uninsured motor vehicle" shall, subject to the terms and conditions of such coverage, 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.

Section 627.727(3)(b), Fla. Stat. (1985); (Emphasis added).

Subsection (3) initially refers to "the purpose" of this coverage which, as set forth in Subsection (1), is to provide protection to persons whose damages may exceed the tortfeasor's available liability limits. Further, Subsection (3) clearly states that, for the purpose of the coverage provided, the definition of an uninsured motor vehicle shall be subject to the terms and conditions of the coverage provided in the Statute as a whole. In addition, Subsection (3) provides that the term "uninsured motor vehicle" shall be deemed to include the circumstances as set forth in subsections (a) and (b) of part (3). Nowhere does the Legislature limit the definition of an uninsured motor vehicle to only those two defined circumstances. Statutory definitions do not control the meaning of statutory words where obvious incongruities in the language result and the legislative intent and purpose are destroyed. Lawson, id. Therefore, the definitions of an uninsured motor vehicle as provided in Subsection (3) are clearly not exhaustive.

With or without an ambiguity, the majority opinion in Shelby frustrates the clear and self-evident legislative intent of the Statute. In its narrow reading of the Statute, the Court has unnecessarily limited the coverage which the Legislature has otherwise made available to protect the insured. As stated in the Honorable Judge Shaw's dissenting opinion, "In the instant case, the Legislature's intent that UM coverage be stacked upon liability coverage, no matter what the UM limits, is not just "clearly discernible"; evidence of such intent is overwhelming." Shelby,

id. at 397. (Emphasis added).

In conclusion, the Court should not employ the rules of statutory construction to eviscerate the manifest legislative intent. U.S. v. Insco, 496 F.2d 204 (C.A. Fla. 1974). As explicitly stated in the house and senate's staff summaries and analyses, all UM coverage became excess with the enactment of the 1984 amendments; and this Court should vacate the Shelby decision and affirm the Fourth District Court of Appeal's holding in this case.

CONCLUSION

WHEREFORE, Respondents respectfully request that this Court once again reconsider this issue and submit that this Court convene en banc in so doing. Respondents further request that this Court affirm the opinion of the Fourth District Court of Appeal in the instant case, that the Court vacate the recent decision of The Shelby Mutual Insurance Company v. Smith, 556 So.2d 393, (Fla. 1990) and reinstate the decision of the Fourth District Court of Appeal, that the Court also vacate its decision in Gladys Marquez v. Prudential Property and Casualty Insurance Company, 15 FLW S209 (April 20, 1990) and reverse the lower court directing that an order be entered consistent with this opinion.

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CERTIFICATE OF MAILING

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 3rd day of May, 1990 to: Shelley H. Leinicke, Esq., Wicker, Smith, Blomqvist, Tutan, O'Hara, McCoy, Graham & Lane, P.A., P.O. Box 14460, Ft. Lauderdale, Florida 33402.

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