

THE SUPREME COURT OF FLORIDA

FILED

SID J. WHITE

AUG 23 1990

CLERK, SUPREME COURT

By _____
Deputy Clerk

TRAVELERS INSURANCE COMPANY

Petitioner,

SUPREME COURT CASE NO.: 76,432

vs.

2ND DISTRICT CASE NO.: 89-1682

JAMES H. QUIRK and MARIE
QUIRK, Husband and Wife,

Respondents/Cross-Petitioners,

vs.

SOUTHERN AMERICAN INSURANCE CO.

Cross-Respondent.

JURISDICTIONAL BRIEF OF CROSS-RESPONDENT

SOUTHERN AMERICAN INSURANCE COMPANY

CORLETT, KILLIAN, OBER,
HARDEMAN, McINTOSH & LEVI, P.A.
Attorneys for Cross-Respondent
SOUTHERN AMERICAN INSURANCE COMPANY
116 West Flagler Street
Miami, FL 33130
Tel: (305) 377-8931

BY: LOVE PHIPPS
FLA BAR NO.: 508462

TABLE OF CONTENTS

TABLE OF CONTENTS. i
TABLE OF CITATIONS i
STATEMENT OF THE CASE AND OF THE FACTS 1
JURISDICTIONAL ISSUE 2
SUMMARY OF ARGUMENT. 2
ARGUMENT 2
CONCLUSION 6
CERTIFICATE OF SERVICE 7
CORRECTED PORTION OF 2D DCA OPINION. Appendix

TABLE OF CITATIONS

Auto Owners Ins. Co. v. Yates,
368 So.2d 634 (Fla. 2d DCA 1979) 6

Quirk v. Anthony,
15 FLW 1151 (Fla. 2d DCA Apr. 25, 1990), clarifying
in part at 15 FLW 1824 (Fla. 2d DCA July 6, 1990). passim

Pawlik v. Stevens,
499 So.2d 61 (Fla. 5th DCA 1986) passim

STATEMENT OF THE CASE AND OF THE FACTS

This Brief is limited to [Cross-Respondent] Southern American Insurance Company's response to [Cross-Petitioner] Quirk's Jurisdictional Brief.

At trial, the plaintiff Quirk sued a number of defendants, including Southern American. All the defendants were granted summary judgments. Quirk appealed. The Second District reversed all the summary judgments for the defendants, except the summary judgment for Southern American because there were no disputed issues of material fact as to Southern American.

One of Southern American's co-defendants, Travelers Insurance, was the first to petition this court for review. Plaintiff Quirk then cross-petitioned for review. [According to the clerk of the Supreme Court of Florida, both Traveler's Petition and Quirk's Cross-Petition are traveling under the same Supreme Court Case No.: 76,432.]

Southern American has no quarrel with the arguments made by Co-Defendant Travelers in its Petitioner's jurisdictional brief; Southern American's argument is strictly limited to responding to Plaintiff Quirk's Cross-Petitioner's jurisdictional brief. The issues in Petitioner Traveler's jurisdictional brief are totally separate from the issue in Cross-Petitioner Quirk's jurisdictional brief. This court may decide to accept Traveler's petition for review. However, it has no bearing on Quirk's cross-petition; Quirk's cross-petition is without merit and should be denied, regardless of what this court decides to do with Traveler's petition.

The Second District originally issued its opinion on April 25, 1990. Then, on July 6, 1990, in its "Order Denying Motion for Rehearing but Clarifying Opinion in Part," the court amended its opinion to correct a factual inaccuracy in the original opinion. This factual inaccuracy pertained to Southern American. The court did not reprint the corrected opinion in full. Therefore, as a convenience to the court, Southern American has attached as an appendix the last portion of the opinion which was amended. The portion of the opinion in Southern American's Appendix shows how the last section of the opinion will read when it is corrected and printed in So.2d.

QUIRK'S STATEMENT OF THE ISSUE

WHETHER THE TRIAL COURT ERRED IN ENTERING SUMMARY JUDGMENT FOR SOUTHERN AMERICAN INSURANCE CO. WHERE DISPUTED FACT EXISTS AS TO WHETHER "KEY AGENCY" WAS ACTING AS A BROKER FOR WEST COAST

RESTATED ISSUE Re: JURISDICTION

Whether Pawlik conflicts with Quirk.

SUMMARY OF ARGUMENT

There is no conflict with Pawlik.

ARGUMENT

First of all, this case has had a long and confusing course, there are many parties involved, and many issues of law. Fortunately, for the purpose of this brief, most of what has happened is irrelevant. Quirk's petition for discretionary review of the part of the decision which pertains to Southern American involves a very simple, a very narrow issue.

Unfortunately, Quirk apparently misapprehends the use of a jurisdictional "conflict" brief because, in his brief, Quirk goes beyond the limited scope of permissible argument. For example, both Quirk's statement of the Issue and his Summary of Argument are not proper "conflict" arguments, instead they go to the merits of the case. For another, in his Appendix, Quirk provides the court with the trial court's order which granted the defendants' motion for summary judgment. The trial court's order is irrelevant to a determination of whether this court has conflict jurisdiction.¹

As this court has emphasized many times, conflict must be shown on the face of the opinion; the petitioner cannot rely upon the record to show conflict. See, e.g., Hardee v. State, 534 So.2d 706, 708 n.1 (Fla. 1988) ("for purposes of determining conflict jurisdiction, this Court is limited to the facts which appear on the face of the opinion. White Constr. Co. v. Dupont, 455 So.2d 1026 (Fla. 1984)."); Reaves v. State, 485 So.2d 829, 830 (Fla. 1986) (conflict must be based on facts contained "within the four corners of the decisions allegedly in conflict").

And, as is stated in the rules, the petitioner's brief is "limited solely to the issue of the Supreme Court's jurisdiction and accompanied by an appendix containing a conformed copy of the decision of the district court of appeal" Fla. R. App. P. 9.120(d). Quirk's brief goes beyond this jurisdictional issue.

¹ A trial court's order is relevant only when the decision of the district court was without opinion, or otherwise does not set forth the basis of decision with sufficient clarity to enable this Court to determine whether grounds for jurisdiction exist. Fla. R. App. P. 9.120(d) Committee Notes. The Second District's opinion is more than sufficient.

This is why Quirk's brief is confusing. When these briefs are properly confined to the narrow, jurisdictional issue, the case is not difficult and it is clear that there is no conflict.

A. QUIRK ARGUES PAWLIK'S HOLDING CONFLICTS WITH OUR CASE

Quirk says Pawlik "held":

that the issue of whether an insurance agent or insurance agency was acting as an agent of the insured when the insurance agent signed the insured's name to a form selecting lower uninsured motorist limits creates a genuine issue material fact precluding summary judgment against the insured.

Quirk's [Cross-Petitioner's] Brief at 3 (relying upon Pawlik v. Stevens, 499 So.2d 61 (Fla. 5th DCA 1986)).

This is an incorrect characterization of what Pawlik "held." All it is, in fact, is a characterization of what West Publishing said Pawlik said -- It is a characterization of what West Publishing's summary of the case said, and a characterization of what the West Publishing's headnote said. Unfortunately for Quirk, the opinion did not say what the summary and headnote said. And, as is well-known, the summary of the case and the headnotes do not constitute a part of the opinion of the court. If you read the actual opinion, all Pawlik said was that, in its particular case, the depositions on file disclosed issues of material fact which precluded summary judgment:

We reverse the summary judgment entered against the insured because the depositions on file disclose issues of material fact (Fla.R.Civ.P. 1.510(c)) as to ... whether the insurance agent or insurance agency was acting as an agent of the insured when the insurance agent signed the insured's name to a form selecting lower limits

Pawlik, 499 So.2d at 61.

This is in contrast to the present case. In Quirk, the Second District discusses Southern American's unique position only at the very start and at the very end of its opinion. Only twice does the Second District say anything in its opinion which is even related to the issue in Pawlik. First, the court states:

We affirm the summary judgment concerning the surplus lines umbrella policy issued by Southern American Insurance Company. The undisputed facts establish that Key acted as an insurance broker for that transaction. [Quirk, slip op. at 1]

Second, at the end of its opinion, the court states: "We agree with the trial court that Key was West Coast's insurance broker concerning the application for the umbrella policy."

Neither of these statements amount to conflict with Pawlik. In fact, by its opinion, the Second District makes it clear that it does not conflict with Pawlik when it states that "the undisputed facts establish that Key acted as an insurance broker." This is contrary to the facts in Pawlik, where the court stated that the depositions on file disclosed that there were issues of material fact; therefore, in Pawlik, summary judgment was precluded. Summary judgment was not precluded in the present case where the facts were undisputed. THESE CASES ARE NOT IN CONFLICT --

THEY ARE IN HARMONY.

Again, if you look at what the Second District said in the present case, there is nothing the court says which conflicts with Pawlik. What Quirk is really trying to argue is that Quirk and Pawlik came to inconsistent results. However, that is not what must be shown for this court to be able to accept jurisdiction.

There must be direct and express conflict. The conflict must be on the face of the two opinions. The two cases are different factually, thus, they came to different results, but the fact the two cases came to different results does not mean they conflict.

B. QUIRK ARGUES IT "APPEARS" THE 2D DCA MADE A FACTUAL DETERMINATION

Quirk argues that it "appears" that the Second District has "made a factual determination" that Key Agency was acting as a broker, "but the Fifth District in Pawlik v. Stevens has held that this is a question of fact which cannot be determined on summary judgment." Quirk's [Cross-Petitioner's] Brief at 3-4. This statement is incorrect for two reasons:

First, an opinion where it "appears" the court acted in some fashion, is insufficient to show direct and express conflict. Inferring conflict or making inferences about what the court did is insufficient.

Second, as we have already argued, Pawlik made no such holding.

C. QUIRK ARGUES YATES AND PAWLIK CONFLICT

In his brief, Quirk actually argues that it is Yates and Pawlik which conflict, and that this court must address that conflict. Quirk's [Cross-Petitioner's] Brief at 3 [last full sentence]. Again, this is irrelevant. Quirk misapprehends the function of a conflict brief. If Quirk wants this court to review this case, Quirk must establish that our case conflicts with Pawlik. And, as has already been shown, there is nothing on the face of the Pawlik opinion which conflicts with anything on the face of the Second District's Quirk decision.

In any case, Auto-Owners Ins. Co. v. Yates, 368 So.2d 634 (Fla. 2d DCA), cert. denied, 378 So.2d 351 (Fla. 1979), does not conflict with Pawlik, for the same reason Quirk does not conflict with Pawlik. Each case turned on its own particular facts; there is no conflict in the cases as to the law.

CONCLUSION

There is no conflict -- express, direct, or otherwise. This court should decline to exercise its discretionary jurisdiction of Quirk's Cross-Petition.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 22d day of August 1990 to: **ROBERT JACKSON MCGILL, ESQ.**, Attorney for Respondent/Cross-Petitioner QUIRK, 1101 South Tamiami Trail, Suite 101, Venice, FL 34285; and **RAYMOND T. ELLIGETT, JR., ESQ., & BRETT J. PRESTON, ESQ.**, SCHACKLEFORD, FARRIOR, STALLINGS & EVANS, P.A., Attorneys for Petitioner TRAVELERS, Post Office Box 3324, Tampa, FL 33601.

CORLETT, KILLIAN, OBER,
HARDEMAN, McINTOSH & LEVI, P.A.
Attorneys for Cross-Respondent
SOUTHERN AMERICAN INS. CO.
116 West Flagler Street
Miami, FL 33130
Tel: (305) 377-8931

BY: Love Phipps
LOVE PHIPPS