095

1-12

FILED
SID J. WHITE
DEC 21 1992
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

LIBERTY MUTUAL INSURANCE COMPANY,

Petitioner,

v.

LONE STAR INDUSTRIES, INC.

Respondent.

_____/

Case No. 80,899
DCA No. 90-2498

PETITIONER'S JURISDICTIONAL BRIEF

On Review from the District Court
of Appeal, Third District
State of Florida

Steven E.M. Hartz, Esq.
Florida Bar No. 285935
Jorge J. Perez, Esq.
Florida Bar No. 779334
Akerman, Senterfitt & Eidson, P.A.
801 Brickell Avenue
Miami, Florida 33131
(305) 374-5600

Martha J. Koster, Esq.
Lee H. Glickenhaus, Esq.
Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C.
One Financial Center
Boston, MA 02110
(617) 426-4600

Attorneys for Petitioner

TABLE OF CONTENTS

Page

Table of Citations. 1

Statement of the Case 2

Summary of Argument 3

Jurisdictional Statement. 3

Argument. 3

The Decision of the District Court of Appeal in this Matter Expressly and Directly Conflicts with the Decision of this Court in Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Insurance Corporation Case No. 78,293, 17 F.L.W. 579 (September 3, 1992) 3

Conclusion. 7

Certificate of Service. 8

TABLE OF CITATIONS

Cases — Page

Arlt v. Buchanan, 190 So. 2d 575 (Fla. 1966). 4

Consolidated Mutual Insurance Co. v. Ivy Liquor, Inc., 185 So. 2d 187 (Fla. 3d DCA 1966) cert. denied, 189 So. 2d 633 (Fla. 1966). 6

Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp., Case No. 78,293, 17 F.L.W. 579 (September 3, 1992) 2-7

Mancini v. State, 312 So. 2d 732 (Fla. 1975) . . . 7

Sacks v. Sacks, 267 So. 2d 73 (Fla. 1972). . . 4, 7

Spivey v. Battaglia, 258 So. 2d 815 (Fla. 1972). 4

Constitutional Provisions and Statutes

Article V, § 3(b)(3) Fla. Const. (1980). 3

Court Rules

Fla. R. App. P. 9.030(a)(2)(A)(iv) 2, 3

Fla. R. App. P. 9.120(d) 2

STATEMENT OF THE CASE

This brief is submitted pursuant to Rule 9.120(d) of the Florida Rules of Appellate Procedure. Petitioner, Liberty Mutual Insurance ("Liberty Mutual"), requests this Court to exercise its discretionary jurisdiction pursuant to Rule 9.030(a)(2)(a)(iv) because the decision of the District Court of Appeal in this case expressly and directly conflicts with this Court's decision in Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Insurance Corporation, Case No. 78,293, 17 F.L.W. 579 (September 3, 1992) (petition for reconsideration pending) ("Dimmitt").

On September 22, 1992, the Third District Court of Appeal filed its decision affirming, per curiam, the order of the Circuit Court on the basis of the Supreme Court of Florida's September 3, 1992 decision in Dimmitt. The District Court of Appeal's decision was finally rendered on November 10, 1992 when it denied Liberty Mutual's motions for certification, rehearing or reconsideration. Conformed copies of the September 22, 1992 and November 10, 1992 decisions are attached as Exhibits "A" and "B," respectively, to the Appendix to Petitioner's Jurisdictional Brief.

A Notice to Invoke Discretionary Jurisdiction was timely filed on December 8, 1992. An Amended Notice was also timely filed on December 10, 1992. On December 10, 1992, the District Court of Appeal granted Liberty Mutual's motion to stay the issuance of mandate pending the disposition of this case by this Court.

SUMMARY OF ARGUMENT

In this case, the District Court of Appeal affirmed the ruling of the Circuit Court that Liberty Mutual was required to defend Respondent Lone Star Industries, Inc. ("Lone Star") against actions brought against Lone Star for pollution. The District Court of Appeal held that the "pollution exclusion" clause found in the policies issued by Liberty Mutual to Lone Star did not exclude Liberty Mutual's duty to defend Lone Star because the terms "sudden and accidental" in the pollution exclusion clause were ambiguous in view of this Court's decision in Dimmitt. However, the record is clear that Lone Star was an intentional polluter, unlike the insured in Dimmitt. Therefore, the decision of the District Court of Appeal expressly and directly conflicts with the decision of this Court in Dimmitt because that decision applied only to non-intentional polluters.

JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review decisions of district courts of appeal that expressly and directly conflict with decisions of the Supreme Court or other district courts of appeal on the same point of law. See Article V § 3(b)(3) Fla. Const. (1980); Fla. R. App. P. 9.030(a)(2)(A)(iv).

ARGUMENT

The Decision of the District Court of Appeal in this Matter Expressly and Directly Conflicts with the Decision of this Court in Dimmitt Chevrolet, Inc. v Southeastern Fidelity Insurance Corporation Case No. 78,293, 17 F.L.W. 579 (September 3, 1992)

It is well settled that "conflict jurisdiction" arises where a general principle of law contained in an earlier decision of the Supreme Court is applied to a case where it is not applicable

to the particular facts of the case. Spivey v. Battaglia, 258 So. 2d 815 (Fla. 1972); Sacks v. Sacks, 267 So. 2d 73 (Fla. 1972); Arlt v. Buchanan, 190 So. 2d 575 (Fla. 1966). That is precisely what has occurred here.

In its September 22, 1992 decision, the District Court of Appeal affirmed the Circuit Court's ruling that the "pollution exclusion" clause in the insurance policies issued by Liberty Mutual to Lone Star did not exclude Liberty Mutual's duty to defend Lone Star from certain suits brought against it on account of environmental contamination at its former wood treating plant. The District Court of Appeal's decision was based entirely on the opinion of this Court in Dimmitt.[1]

When measured against the facts and allegations of the complaints in the present case, Dimmitt clearly establishes that there is no coverage in the present case and that Liberty Mutual is not obligated to defend Lone Star from the complaints against it because this Court's conclusion in Dimmitt that the pollution exclusion is ambiguous is not dispositive of the present case. Thus, even given the reading of the exclusion articulated by this District Court of Appeal, Liberty Mutual owes no defense to Lone Star.

---

[1] Other than stating that it believed that Dimmitt controls the present case, the District Court of Appeal did not set forth the basis for its ruling. Nonetheless, based on the facts of this case, it is clear that the District Court of Appeal's ruling is inconsistent, and in direct conflict, with Dimmitt. It is apparent that the District Court of Appeal applied Dimmitt to allow coverage under the pollution exclusion even where the discharge of pollution was not unexpected and unintended. In so doing, the District Court of Appeal ignored the holding of Dimmitt and rendered a decision which directly conflicts with it.

This Court noted at the outset of its discussion in Dimmitt that "Dimmitt was not the actual cause of the pollution damage at issue." (Slip Op. at 5). By contrast, as is set forth throughout both Liberty Mutual's briefs filed in the District Court of Appeal and the complaints against Lone Star, Lone Star was the actual cause of the pollution at issue. The crux of this Court's holding in Dimmitt is that "intentionally committed pollution" is not covered. This Court concluded that "the pollution exclusion serves the very real purpose of eliminating coverage for the intentional discharge of pollutants." (Slip Op. at 15, emphasis added). The Dimmitt decision, notably, does not hold that coverage is excluded only if the policyholder expected the pollution damage. Rather, this Court held that if the act of releasing pollution is expected or intended, there is no coverage.

Throughout the Dimmitt opinion this Court has made clear its holding that where the release of pollution is intentional, the pollution exclusion excludes coverage. This Court specifically noted that if the damage producing acts are intentional, there is no coverage even if the resulting damage is entirely unexpected and unintended (Slip Op. at 15). Because this Court concluded that Dimmitt did not intentionally cause the releases of pollution, it found that the exclusion did not operate to bar coverage in that case.

By contrast, the record before the District Court of Appeal and the Circuit Court clearly established that Lone Star was the cause of the polluting releases in this case and that it fully intended and was aware of these releases. The underlying

complaints against Lone Star allege that the discharges of contaminants were committed by Lone Star "wantonly and willfully," that Lone Star "knew" of the discharges of pollution and that Lone Star "knowingly" allowed its site to be used as a dump for "dangerous chemical waste." These allegations, of intentional discharges of pollution, fall squarely within the scope of the pollution exclusion as defined by Dimmitt. These allegations are borne out by the actual facts in this case which establish that, not only did Lone Star know of the release of pollution, but observed them frequently enough to quantify them.[2] Liberty Mutual respectfully submits that the District Court of Appeal's decision is therefore in direct conflict with Dimmitt. The District Court of Appeal ignored the actual holding of Dimmitt and found coverage even where the allegations against Lone Star specified known and intentional releases of pollution. Accordingly, the Supreme Court has jurisdiction to hear this

---

[2] The allegations of the complaints against Lone Star, which concern discharges of pollution, bring them within the pollution exclusion. There are no allegations which bring the complaints within the "sudden and accidental" exception to the exclusion. Only unexpected releases of pollution qualify for coverage. The absence of any allegation that these releases were unexpected establishes that there is no coverage for these complaints. Florida law requires this result. In Consolidated Mutual Ins. Co. v. Ivy Liquor, Inc., 185 So. 2d 187 (Fla. 3d DCA 1966) cert. denied, 189 So. 2d 633 (Fla. 1966), the insurance policy at issue provided coverage only for harm caused by "accident." The court in that case expressly found that the carrier did not have a duty to defend its insured when the complaint against the insured failed to allege an accident. This case is directly on point with the present action and established that, where there is an absence of an allegation of an essential element of coverage, a carrier has no duty to defend. The District Court's decision was thus also in direct conflict with Ivy Liquors and Liberty Mutual requests this Court to exercise its jurisdiction on this basis as well as on the other grounds set forth in this Memorandum.

matter given the conflict of the Third District Court of Appeal's decision in this matter with Dimmitt. See, e.g., Mancini v. State, 312 So. 2d 732 (Fla. 1975); Sacks v. Sacks, supra (conflict jurisdiction exists where district court of appeal misapplies prior Supreme Court precedent).

Dimmitt is currently sub judice in this Court, a motion for rehearing having been filed. However, even if the Dimmitt decision is allowed to stand as it has been previously issued, the instant case clearly conflicts with that decision. It is extremely important to the insurance industry that the lower courts not construe Dimmitt to require the defense of the actions of intentional polluters. This Court never intended that construction; and, were the lower courts to construe Dimmitt in that manner, a large and unexpected cost would be imposed on the insurance industry.

CONCLUSION

Because the decision of the District Court of Appeal in this case is in express and direct conflict with the Dimmitt decision, Liberty Mutual requests that this Court exercise its discretionary jurisdiction over this matter and consider the merits of Liberty Mutual's argument.

Respectfully submitted,

Steven E.M. Hartz, Esq.
Florida Bar No. 285935
Jorge J. Perez, Esq.
Florida Bar No. 779334
Akerman, Senterfitt & Eidson, P.A.
801 Brickell Avenue
Miami, Florida 33131
(305) 374-5600

Martha J. Koster, Esq.
Lee H. Glickenhaus, Esq.
Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C.
One Financial Center
Boston, MA 02110
(617) 426-4600

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by U.S. Mail upon all counsel on the attached service list this 18th day of December, 1992.

Steven E.M. Hartz, Esq.

SERVICE LIST

EUGENE R. ANDERSON and
MARK F.C. BERNER, ESQ.
Anderson Russell Kill
& Olick, P.C.
Of Counsel for Plaintiff
666 Third Avenue
New York, N.Y. 10017
(212) 850-0700

THOMAS W. BRUNNER, ESQ.
JAMES M. JOHNSTONE, ESQ.
FREDERICK S. ANSELL, ESQ.
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

JOHN CAVILIA, ESQ.
Environmental Litigation
Association
Wiley, Rein & Fielding
1776 K Street, NW
Washington, D.C. 20006

RONALD L. KAMMER, ES.Q
Hinshaw, Culbertson, Moelmann,
Hoban & Fuller
200 South Biscayne Boulevard
Miami, Florida 33131

R. HUGH LUMPKIN, ESQ.
Keith, Mack, Lewis, Allison & Cohen
111 N.E. 1st Street, Suite 500
Miami, FL 33132-2596
(305) 358-7605/921-2596

JAMES TRIBBLE, ESQ.
CHARLES P. FLICK, ESQ.
Blackwell, Walker, et al.
Attorney for AETNA CASUALTY
1 S.E. 3rd Avenue, 24th Floor
Miami, FL 33131

[JJP]LIBERTY-LONESTAR-006
873-46586