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SID J. WHITE 6-4
MAY 12 1993
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

IN THE SUPREME COURT
STATE OF FLORIDA

S. C. CASE NO. 81,691

DCA CASE NO.: 92-01078

GOVERNMENT EMPLOYEES INSURANCE COMPANY,

Petitioner,

vs.

SUSAN GAIL JENKINS,

Respondent.
_____/

PETITIONER'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Petitioner's request for review by this Court is based upon the issuance by the Fifth District Court of Appeal of a PCA with citation to a case which has been accepted for review by this Court. Accordingly, there are no facts reported in the decision under review. The facts of this case can, however, be briefly summarized as follows.

The instant case involves a controversy whether Petitioner is required to furnish uninsured motorist (UM) benefits to Respondent under an insurance policy issued by Petitioner to her father. Respondent was involved in a motor vehicle accident October 15, 1988 while residing with her father. At the time, she was driving a 1977 Toyota, which she owned, which was not covered by her father's Government Employees Insurance Company (GEICO) policy. Respondent settled her claim with the tort-feasor's liability insurance carrier for its $10,000.00 in liability insurance limits and then sought UM benefits under her father's GEICO policy. The total policy limits available to her were $200,000.00, and the parties stipulated that if coverage existed, Respondent was entitled to the full policy limits of $200,000.00. GEICO denied coverage, however, based upon an exclusion in the UM portion of its policy, which excluded:

> Bodily injury to an insured while occupying, or through being struck by an uninsured auto owned by an insured or a relative is not covered.

The liability portion of the policy stated as follows:

> PERSONS INSURED
> Who is covered.
> Section I applies to the following as insureds with regard to an owned auto:
>
> 1. You and your relatives;
>
> 2. Any other person using the auto with your permission. The actual use must be within the scope of that permission;
>
> 3. Any other person or organization for his or its liability because of acts or omissions of an insured under one or two above.
>
> Section I applies to the following with regard to a non-owned auto:
>
> 1. You and your relatives, when using a private passenger auto or trailer. Such use must be with the permission, or reasonably believed to be with the permission, of the owner and within the scope of that permission;
>
> 2. A person or organization, not owning or hiring the auto, regarding his or its liability because of acts or omissions of an insured under One above.

An "owned" auto is defined in the policy as the vehicle named in the policy; a "non-owned" auto is defined as an auto not owned by the named insured or any relatives.

Respondent took the position that under Mullis v. State Farm Mutual Automobile Insurance Company, 252 So.2d 229 (Fla. 1971), as a resident relative of her father's household, she was an insured under the liability portion of the policy and, therefore, could not be excluded from UM coverage under the same policy. GEICO took the position that since her vehicle was neither an "owned" nor a "non-owned" automobile as defined in the GEICO policy, she was not an insured under the liability portion of the

policy, and therefore could properly be excluded from UM coverage under the same policy.

Respondent asserted, and the Trial Court held, that the UM exclusion was invalid unless Petitioner had followed the requirements of Section 627.727(9), which lists a number of options (including the subject UM exclusion), which can properly be incorporated into a UM policy if the insured has agreed to said restrictions by signing the appropriate form. This procedure was not complied with in the instant case. Petitioner took the position that the provision was inapplicable to this case and that the UM exclusion was valid without regard to the statutory procedure.

In Government Employees Insurance Company v. Wright, 543 So.2d 1320 (Fla. 4th DCA 1989), the Fourth District Court of Appeal agreed with Petitioner's position under circumstances which were essentially identical to the present case, with the exception that the facts of Wright arose prior to the promulgation of the statutory requirements of Section 627.727(9). The Trial Court found in favor of Respondent, and Petitioner appealed. The Fifth District Court of Appeal per curiam affirmed with a cite to Nationwide Mutual Fire Insurance Company v. Phillips, 609 So.2d 1385 (Fla. 5th DCA 1992), in which the Fifth District expressed its disagreement with Wright and similar cases. Shortly before Petitioner filed its Notice of Seeking Supreme Court Review, this Court accepted review of Phillips and Welker v. World Wide Underwriters Insurance Company, 601 So.2d 572 (Fla. 4th DCA 1992),

which involves the issue of the validity of the subject UM exclusion. Phillips has been assigned Case Number 80,986 and Welker has been assigned Case Number 80,478, and oral argument in both cases has been set for October 5, 1993.

JURISDICTIONAL ISSUE

WHETHER THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH OTHER REPORTED APPELLATE DECISIONS FROM THIS COURT AND THE OTHER DISTRICT COURTS OF APPEAL.

SUMMARY OF THE ARGUMENT

The decision of the Fifth District Court of Appeal expressly and directly conflicts with other reported Appellate decisions from this Court, and the other District Courts of Appeal, based upon the issuance of a PCA with citation to Nationwide Mutual Fire Insurance Company v. Phillips, 609 So.2d 1385 (Fla. 5th DCA 1992), review accepted, Case Number 80,986, which has been accepted by review by this Court based upon conflict in decisions. This Court should elect to exercise its discretion and review the instant case, as consideration of this case will assist the Court in resolution of similar issues in cases now pending before this Court. Additionally, consideration of this case by this Court will do justice to the parties and give guidance to Petitioner and its many policyholders as to their respective rights under applicable law.

ARGUMENT

The decision of the Fifth District Court of Appeal expressly and directly conflicts with other reported Appellate decisions from this Court and the other District Courts of Appeal.

Article V, Section III(b)(3), Florida Constitution, 1980, provides that this Court may exercise its discretionary jurisdiction to review an Appellate decision which expressly and directly conflicts with a decision from another Florida Court. Although a PCA without citation to authority does not establish jurisdiction in this Court, this Court has also held that a PCA which cites as controlling authority a decision pending review in this Court constitutes prima facie express conflict for jurisdictional purposes. State v. Lofton, 534 So.2d 1148 (Fla. 1988); Jollie v. State, 405 So.2d 418 (Fla. 1981). See also Harrison v. Hyster Company, 515 So.2d 1279 (Fla. 1987).

The PCA issued in this instance cited Nationwide Mutual Fire Insurance Company v. Phillips, 609 So.2d 1385 (Fla. 5th DCA 1992) for authority. Phillips has been accepted for review by Order dated April 26, 1993 and has been assigned Case No. 80,986. Oral argument in Phillips is scheduled for October 5, 1993. Additionally, by another Order dated April 26, 1993, this Court accepted jurisdiction in Welker v. World Wide Underwriters Insurance Company, 601 So.2d 572 (Fla. 4th DCA 1992), Case No. 80,478, and set oral argument in that case for October 5, 1993.

The instant case thus meets the requirements for establishing conflict jurisdiction.

Having established that this Court has jurisdiction to review the decision under review, Petitioner would submit that it is appropriate that this Court exercise its discretion to do so. On the same day that this Court accepted review of Nationwide, it also accepted review of Welker v. World Wide Underwriters Insurance Company, 601 So.2d 572 (Fla. 4th DCA 1992). As the Fifth District Court of Appeal recited at page 1388 of Phillips, the Fifth District disagrees with the analysis of the Fourth District as described in Government Employees Insurance Company v. Wright, 543 So.2d 1320 (Fla. 4th DCA 1989), review denied, 551 So.2d 464 (Fla. 1989). In Wright, the Fourth District held that where the insurance company defines the terms "insured" so as not to include a resident relative driving his or her own vehicle which is not an insured vehicle, that person is not a Class One insured for liability purposes and therefore can properly be excluded from UM coverage. Where, on the other hand, the definition of "insured" includes all resident relatives operating any automobile, and a liability exclusion found elsewhere in the policy excludes a resident relative operating his or her own vehicle not listed as an insured vehicle, the Fourth District holds that Mullis applies to require that uninsured motorist coverage be furnished to the resident relative. In Divine v. Prudential Property & Casualty Insurance Company, (Fla. 5th DCA) 18 FLW D642 (Fla. 5th DCA March 5, 1993), the Fifth District specifically clarified that it rejects

this analysis, stating that Mullis does not permit coverage to be limited in such a fashion, regardless of whether the limitation is found in an exclusion or in a definition of who is insured. In Welker, the Court held that the subject UM exclusion was invalid.

The policy language found in the present case is identical to that found in GEICO v. Wright, producing direct conflict between the result in the present case and the result reached in GEICO v. Wright. Acceptance of this case for review in conjunction with review of Phillips and Welker will therefore assist this Court in determining and clarifying exactly how the uninsured motorist statute impacts upon various different types of insurance policies issued in Florida. Petitioner would add that GEICO issues a very large number of automobile insurance policies in Florida, which are identical in wording to the policy at issue in the present case and in Wright. A construction by this Court of policy terms in said policy which have produced differences of opinion in the Appellate Judiciary of this state would be of great assistance to GEICO and its many Florida policy holders in clarifying their respective rights under Florida law.

Additionally, it is appropriate that this Court accept jurisdiction so that justice may be done to the parties to the present case. The Judiciary of Florida is presently in conflict as to the appropriate resolution of the present case, and acceptance of review by this Court will insure that when the conflict is resolved, the parties to this action will receive the benefit of their rights under the applicable law.

CONCLUSION

The PCA decision issued by the Fifth District Court of Appeal in this case, on the authority of Nationwide v. Phillips, establishes jurisdiction in this Court based upon this Court's acceptance of review of Phillips. It is appropriate for this Court to exercise its jurisdiction and review the present case in that doing so will assist this Court in consideration of the difficult issues raised by this case and similar cases, will provide guidance to GEICO and its numerous policyholders on their respective rights, and will do justice to the parties to this case in accord with the applicable law. Accordingly, GEICO requests that this Court exercise its discretion to accept review of the present case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by mail this 10th day of May, 1993 to EDWARD A. PERSE, ESQ., 410 Concord Building, Miami, Florida 33130.

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