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IN THE SUPREME COURT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA

CASE NO. 81,691

GOVERNMENT EMPLOYEES
INSURANCE COMPANY,

Petitioner,

vs.

SUSAN GAIL JENKINS,

Respondent.
_____/

RESPONDENT'S BRIEF ON THE MERITS

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and
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CITATIONS

AUTHORITIES

I.

INTRODUCTION

The parties will alternately be referred to herein as they stand before this Court and as follows: petitioner as "GEICO;" and respondent as "JENKINS." GEICO'S scheduled named insured, JENKINS' father, will be referred to as "BEAIRSTO." The symbol "R" shall stand for the record on appeal.

All emphasis appearing in this brief is supplied by counsel unless otherwise noted.

II.

STATEMENT OF CASE AND FACTS

The pertinent facts of this case are undisputed. JENKINS accepts the statement of case and facts contained in GEICO'S brief as correct insofar as it goes. For the sake of emphasis and completeness, JENKINS would call the Court's attention to the following additional pertinent facts.

At the hearing on the parties' cross-motions for summary judgment, the following facts were also stipulated to:

* * *

> "MR. SISSERSON: [JENKINS' counsel] Well, we can agree that we also have a stipulation of fact that Mr. Beairsto, who was the father of the young lady, had never executed any written selections of anything.
>
> "MR. WRIGHT: That's correct.
>
> "MR. SISSERSON: He's been insured by GEICO since 1964.
>
> "MR. WRIGHT: That's correct.
>
> "MR. SISSERSON: He made no informed selection of any lower limits; he made no informed selection of any restrictions on his uninsured motorist coverage.

"MR. WRIGHT: That's correct." (R. 9)

* * *

The subject policy of insurance is attached to JENKINS' complaint (R. 29-62) as Exhibit A. The basic liability section of the policy--Section I--contains the following pertinent provisions:

* * *

"We, the Company named in the declarations attached to this policy, make this agreement with you, the policyholder. Relying on the information you have furnished and the declarations attached to this policy and if you pay your premium when due, we will do the following:

"SECTION I

"Liability Coverages

* * *

"Bodily Injury Liability

* * *

"DEFINITIONS:

"The words italicized in Section I of this policy are defined below. Whenever 'he,' 'his,' 'him' or 'himself' appears in this policy, you may read 'she,' 'her,' or 'herself.'

* * *

"2. 'Bodily injury' means bodily injury to a person, including resulting sickness, disease or death.

* * *

"4. 'Insured' means a person or organization described under 'persons insured.'

"5. 'Non-owned auto' means a private passenger auto or trailer not owned by or furnished for the regular use of either you or a relative, other than a temporary substitute auto. . . .

"6. 'Owned auto' means:

"(a) a vehicle described in this policy for which a premium charge is shown for these coverages:

* * *

"8. 'Relative' means a person related to you who resides in your household, including your ward or foster child.

"LOSSES WE WILL PAY FOR YOU

"Under Section I, we will pay damages which an insured becomes legally obligated to pay because of:

1. bodily injury, sustained by a person, and

2. damage to or destruction of property,

arising out of the ownership, maintenance or use of the owned auto or a non-owned auto. We will defend any suit for damages payable under the terms of this policy. We may investigate and settle any claim or suit.

* * *

"PERSONS INSURED

"Who Is Covered

"Section I applies to the following as insureds with regard to an owned auto:

"1. you and your relatives;"

* * *

It is thus seen that JENKINS, a resident in household relative of BEAIRSTO, is included as insured against liability by the basic liability coverage provisions of the GEICO policy. At the very least, the policy is ambiguous in this regard.

The uninsured motorist coverage section of the policy--SECTION IV--contains the following pertinent provisions:

* * *

"SECTION IV

* * *

"Uninsured Motorists Coverage

"Protection for You and Your Passengers For Injuries Caused by Uninsured and Hit and Run Motorists

"DEFINITIONS

"The definitions of terms for Section I apply to Section IV, except for the following special definitions:

* * *

"2. 'Insured' means:

"(a) the individual named in the declarations and his or her spouse if a resident of the same household;

"(b) relatives of (a) above if residents of his household;

* * *

"3. 'Insured Auto' is an auto:

"(a) described in the declaration and covered by the bodily injury liability coverage of this policy.

* * *

"LOSSES WE PAY

"Under the Uninsured Motorists Coverage we will pay damages for bodily injury caused by accident which the insured is legally entitled to recover from the owner or operator of an uninsured auto arising out of the ownership, maintenance or use of that auto.

"We will also pay damages the insured is legally entitled to recover for bodily injury caused by accident and arising out of the ownership, maintenance or use of an underinsured auto. However, we will not pay until the total of all bodily injury liability insurance available has been exhausted by payment of judgments or settlements.

"EXCLUSIONS:

"When Section IV Does Not Apply

* * *

"2. 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."

* * *

If the subject exclusion is enforceable under Florida law, it is thus seen that JENKINS would be excluded from coverage.

III.

POINTS INVOLVED

POINT I

WHETHER UNDER FLORIDA LAW THE UNINSURED MOTORIST EXCLUSION CONTAINED IN THE SUBJECT POLICY IS VALID AND ENFORCEABLE.

POINT II

WHETHER THE 1987 AMENDMENT TO FLORIDA'S UM STATUTE INVALIDATES THE UM EXCLUSION CONTAINED IN THE SUBJECT POLICY.

IV.

SUMMARY OF ARGUMENT

JENKINS contends that:

1. She is covered by the basic liability coverage provisions contained in the GEICO policy. At the very least the policy is ambiguous in this regard and the ambiguity must be construed in JENKINS' favor.

2. Since JENKINS is insured under the basic liability provisions, GEICO cannot, as a matter of Florida law, exclude her from coverage in the uninsured motorist coverage section of the policy.

3. Alternatively, the 1987 amendment to the Florida uninsured motorist law, Section 627.727(9), Florida Statutes, required that GEICO obtain a selection in writing of the particular exclusionary language relied upon by GEICO to deny coverage to JENKINS.

V.

ARGUMENT[1]

POINT I

UNDER FLORIDA LAW THE UNINSURED MOTORIST EXCLUSION CONTAINED IN THE SUBJECT POLICY IS INVALID AND UNENFORCEABLE.

POINT II

THE 1987 AMENDMENT TO THE UM STATUTE INVALIDATES THE UM EXCLUSION CONTAINED IN THE SUBJECT POLICY.

A.

PREFACE

The eventual decision here may be controlled by the decision(s) to be rendered by this Court in: NATIONWIDE MUTUAL FIRE INS. CO. v. PHILLIPS, 609 So. 2d 1385 (Fla. 5 DCA 1992), Supreme Court Case No. 80,986; and/or WELKER v. WORLDWIDE UNDERWRITERS' INS. CO., 601 So. 2d 572 (Fla. 4 DCA 1992), Supreme Court Case No. 80,478. The cases will be argued before this Court on the merits on October 5, 1993.

JENKINS adopts as her own argument:

1. The opinions rendered by the District Court of Appeal, Fourth and Fifth Districts, in PHILLIPS and WELKER, supra;

2. The arguments by the insureds in PHILLIPS and WELKER, supra; and

3. The arguments advanced by amicus Florida Academy of Trial Lawyers in the case at Bar.

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[1]The points involved will be argued together.

B.

APPLICABLE LAW--RE: CONSTRUCTION OF INSURANCE POLICIES

Under Florida law the construction to be placed upon an insurance contract is a question of law to be resolved by the court and not an issue of fact to be determined by the jury. E.g., JONES v. UTICA MUTUAL INS. CO., 463 So. 2d 113 (Fla. 1984); GAULDEN v. ARKWRIGHT-BOSTON MFG'S MUT. INS. CO., 358 So. 2d 267 (Fla. 3 DCA 1978); WILLIS v. WILLIS, 245 So. 2d 302 (Fla. 1 DCA 1971); and cases cited therein. Assuming arguendo construction of an insurance contract is required, the following principles are well established:

1. An insurance policy should receive reasonable, practical and sensible interpretation consistent with the intent of the parties--and the dominant purpose of insurance--not a strained, forced or unrealistic interpretation. E.g., UNITED STATES FIRE INS. CO. v. PRUESS, 394 So. 2d 468 (Fla. 4 DCA 1981); AMERICAN MANUFACTURERS MUT. INS. CO. v. HORN, 353 So. 2d 565 (Fla. 3 DCA 1978); UNITED STATES FIDELITY & GUARANTY CO. v. HAZEN, 346 So. 2d 632 (Fla. 2 DCA 1977); and numerous cases cited thereat.

2. The language used in an insurance policy should be read in the light of the skill and experience possessed by ordinary people and resort should not be made to uncommon meanings nor to contextual distortion. See STEWART v. STATE FARM MUT. INS. CO., 316 So. 2d 598 (Fla. 1 DCA 1975); and

FONTAINEBLEAU HOTEL CORP. v. UNITED FILIGREE CORP., 298 So. 2d 455 (Fla. 3 DCA 1974).

3. Contracts of insurance must be construed liberally in favor of the insured and strictly against the insurer and that interpretation which will sustain coverage must be adopted. RABATIE v. U.S. SECURITY INSURANCE CO., 581 So. 2d 1327 (Fla. 3 DCA 1991), cert. dis., 589 So. 2d 294 (Fla. 1992); CERON v. PAXTON NAT. INS. CO., 537 So. 2d 1090 (Fla. 3 DCA 1989); HERRING v. FIRST SOUTHERN INS. CO., 522 So. 2d 1067 (Fla. 1 DCA 1988); see TROPICAL PARK, INC. v. U.S. FIDELITY & GUARANTY CO., 357 So. 2d 253 (Fla. 3 DCA 1978), and cases cited therein.

4. A policy may not give a right in one section thereof and retract it in another unless the limitation is clearly expressed, and, where such provisions are repugnant and one provision is general in nature and the other specific, the specific provision governs. TIRE KINGDOM, INC. v. FIRST SOUTHERN INSURANCE CO., INC., 573 So. 2d 885 (Fla. 3 DCA 1991), cert. den., 589 So. 2d 290 (Fla. 1992); FONTAINEBLEAU HOTEL CORP. v. UNITED FILIGREE CORP., 298 So. 2d 455 (Fla. 3 DCA 1974); see also--MOORE v. CONNECTICUT GENERAL LIFE INS. CO., 277 So. 2d 839 (Fla. 3 DCA 1973); and HORTON v. AMERICAN HOME ASSUR. CO., 245 So. 2d 136 (Fla. 3 DCA 1971). In TIRE KINGDOM, INC. v. FIRST SOUTHERN INSURANCE CO., INC., supra, this court, in this regard, stated and held:

* * *

> "We find there was coverage under the insurance policy even though there were conflicting provisions that created an ambiguity concerning the question of

coverage. An insurance policy cannot grant rights in one paragraph and then retract the very same rights in another paragraph called an 'exclusion'. Moore v. Connecticut General Life Insurance Company, 277 So. 2d 839 (Fla. 3d DCA 1973), cert. denied, 291 So. 2d 204 (Fla. 1974). The policy in this case attempts to provide coverage for certain advertising activities and then exclude those same activities. Such inconsistencies must be resolved in favor of the insured, Id. at 842, as liability limiting exclusions are interpreted strictly against the insurer and liberally in favor of the insured. Poole v. Travelers Insurance Company, 140 Fla. 806, 179 So. 138 (1937); Oliver v. United States Fidelity & Guaranty Company, 309 So. 2d 237 (Fla. 2d DCA), cert. denied, 322 So. 2d 913 (Fla. 1975). Inconsistent language in a liability policy requires the adopting of the construction that will afford the most coverage. Id. at 238."

* * *

C.

APPLICABLE LAW--RE: UNINSURED MOTORIST COVERAGE

In LEWIS v. CINCINNATI INSURANCE CO., 503 So. 2d 908 (Fla. 5 DCA 1987) the court squarely held that where resident in household relatives were included as covered in the basic liability coverage provisions of the involved policy, they could not be restricted to a special class of vehicles and the insurer could not, pursuant to a policy exclusion contained in the uninsured motorist provisions of the policy, deny coverage to such a family member for injuries suffered while occupying a motor vehicle owned by a family member, but not insured under the policy. The Court reasoned as follows:

* * *

"As analyzed succinctly in Auto-Owners Insurance Company v. Bennett, 466 So. 2d 242 (Fla. 2d DCA 1984), the basic issue in such cases is whether the family member is entitled to 'basic liability coverage' under the insurance policy involved. In Bennett, like this case, the family member was covered for liability while driving a car owned by his father, which was

scheduled in the policy; although he was excluded from liability as well as uninsured motorist coverage when driving or in an automobile not owned by the insured. Bennett held that the first provision was controlling in determining whether or not the family member had basic liability coverage, and therefore under Mullis v. State Farm Mutual Automobile Insurance Company, 252 So. 2d 229 (Fla. 1971), it was not permissible for the insurance company to restrict or limit uninsured motorist coverage.

"Mullis held that a family member who was covered under the liability portion of the policy could not be restricted or limited in the policy's uninsured motorist coverage to injury occurring in certain vehicles. In Mullis, the exclusion sought to deny uninsured motorist coverage to a resident relative of an insured, while occupying a vehicle owned by the relative or the insured, which was not insured under the policy. The court held that the exclusion was invalid under this state's public policy. If resident relatives are covered under the liability provisions, they must be covered by the uninsured motorist section.

> "'They may be pedestrians at the time of such injury, they may be riding in a motor vehicle of others or in public conveyances and they may occupy motor vehicles (including Honda motorcycles) owned by but which are not 'insured automobiles' of named insured.'

Id. at 233. Mullis is apparently still the controlling authority in this state, despite recent and interim statutory changes and rewording."

* * *

Accord--NATIONWIDE MUTUAL FIRE INS. CO. v. PHILLIPS, supra; WELKER v. WORLDWIDE UNDERWRITERS INS. CO., supra; AUTO-OWNERS INSURANCE CO. v. BENNETT, 466 So. 2d 242 (Fla. 2 DCA 1984); and AUTO-OWNERS INSURANCE CO. v. QUEEN, 468 So. 2d 498 (Fla. 5 DCA 1985); cf.--GOVERNMENT EMPLOYEES INSURANCE CO. v. WRIGHT, 543 So. 2d 1320 (Fla. 4 DCA 1980).

D.

APPLICABLE LAW--SECTION 627.727(9), FLORIDA STATUTES

Effective October 1, 1987, Section 627.727, Florida Statutes, was amended to include the following pertinent provisions:

* * *

> "(9) Insurers may offer policies of uninsured motorist coverage containing policy provisions in language approved by the Department establishing that if the insured accepts this offer:
>
> * * *
>
> "(d) The uninsured motorist coverage provided by the policy does not apply to the named insured or family members residing in his household who are injured while occupying any vehicle owned by such insureds for which uninsured motorist coverage was not purchased."
>
> * * *
>
> In connection with the offer authorized by this subsection insurers shall inform the named insured, applicant, or lessee, on a form approved by the Department of the limitations imposed under this subsection and that such coverage is an alternative to coverage without such limitations. If this form is signed by a named insured, applicant, or lessee, it shall be conclusively presumed that there was an informed, knowing acceptance of such limitations."

* * *

To the effect that insurers must comply with the provisions of this Act, see CARBONELL v. AUTOMOBILE INS. CO. OF HARTFORD, CONN., 562 So. 2d 437 (Fla. 3 DCA 1990).

E.

LAW APPLIED

It is respectfully submitted that for the reasons which follow, the arguments advanced by GEICO are without merit and the summary final judgment appealed must be affirmed:

1. Under the terms and provisions of the subject policy of insurance JENKINS, a resident in household relative of BEAIRSTO, is included as an insured against liability by the basic liability coverage provisions of the GEICO policy. At the very least, the policy is ambiguous in this regard.

2. Since JENKINS is insured under the basic liability provisions of the subject policy, GEICO cannot, as a matter of Florida law, exclude her from coverage in the uninsured motorist section of the policy.

3. Any ambiguity in the basic liability provisions of the policy must be resolved in favor of JENKINS.

4. Alternatively, there is nothing contained in this record which would indicate that GEICO ever notified BEAIRSTO of the options available under the provisions of Section 627.727(9), Florida Statutes. It is stipulated that BEAIRSTO never gave GEICO a written selection of the particular exclusionary language relied upon by GEICO to deny coverage to JENKINS. <u>This alternative argument may not be considered or determined by this Court in PHILLIPS and/or WELKER, supra.</u>

5. GEICO'S analysis of the provisions of Section 627.727(9), supra, and the legislative intent underlying the amendment to the uninsured motorist law is purely and simply erroneous.

VI.

CONCLUSION

It is respectfully submitted that for the reasons stated herein, the decision sought to be reviewed must be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true copy of the foregoing Brief of Respondent was mailed to the following counsel of record this 27 day of September, 1993.

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