IN THE SUPREME COURT OF FLORIDA

CASE NO. 81,740

Florida Bar No: 184170

STATE FARM FIRE & CASUALTY COMPANY,

Petitioner,

vs.

ROBERT PETERSEN,

Respondent.

FILED
SID J. WHITE
MAY 17 1993
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

ON PETITION FOR DISCRETIONARY REVIEW FROM THE THIRD DISTRICT COURT OF APPEAL OF FLORIDA

BRIEF OF PETITIONER ON JURISDICTION
STATE FARM FIRE & CASUALTY COMPANY

(With Appendix)

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TABLE OF CITATIONS

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POINT ON APPEAL

THERE IS CLEAR AND UNEQUIVOCAL DIRECT AND EXPRESS CONFLICT BETWEEN PETERSEN AND GRANT BASED ON THE SAME FACTS, LAW, AND INSURANCE POLICIES WITH EACH COURT REACHING THE EXACT OPPOSITE LEGAL RESULT.

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STATEMENT OF THE FACTS AND CASE

Michael Grant and Robert Petersen each owned motorcycles which were involved in accidents with uninsured motorists. Each was insured with the same identical State Farm policy. Each sued to obtain uninsured motorist coverage. In both cases the trial courts found there was no coverage for the motorcycles since they were not listed under Grant's policy or Petersen's policy. The Fourth District Court of Appeal affirmed the finding of no coverage; while the Third District reversed, finding coverage; under identical facts, identical policy language, and with the identical case law argued to both courts. Based on this classic example of direct and express conflict, this court has jurisdiction to review the two decisions and to resolve the conflict existing between Petersen v. State Farm Fire and Casualty Company, 18 Fla. L. Weekly D624 (Fla. 3d DCA March 2, 1993) and Grant v. State Farm Fire and Casualty Company, 18 Fla. L. Weekly D905 (Fla. 4th DCA April 7, 1993).

Petersen filed a claim against his State Farm policy, which listed only his truck and State Farm denied the claim, on the ground that the motorcycle was not a listed vehicle under Petersen's policy (R 21; SR 10). Petersen agreed his motorcycle was not insured under the State Farm policy (R 11; 16). However, he argued that the term "motor vehicle" found in the U3 exclusionary clause did not include his motorcycle, and therefore there was coverage for his motorcycle.

Petersen argued that the policy by its clear unambiguous

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express terms did not exclude his motorcycle from UM coverage (R 13). He further argued that the policy was not ambiguous and must be given full effect (R 13). Petersen asserted that the term "motor vehicle" found in the PIP/No-Fault Section should control over whether there was UM coverage or not (R 12-13). State Farm asserted on the other hand that the limited UM U3 coverage expressly chosen by Petersen, precluded UM coverage, especially where the applicable Florida Statutes define "motor vehicle" to include a motorcycle. State Farm also asserted that the definition contained in the PIP section of the State Farm policy, which simply tracked the PIP statutory language, did not apply to the UM provision. Therefore, the court had to simply look at the ordinary use of the term motor vehicle, as well as all the relevant statutes, to see that the term motor vehicle would include and was intended to include motorcycles. The trial court agreed and granted State Farm's motion and entered a Final Judgment finding no coverage for the motorcycle accident (R 32-35). The trial judge expressly relied on Florida Statute §627.727(9), which permits insurers to offer policies of UM coverage containing conditions and limitations which the insured has the option to accept, and which Petersen did accept (R 32-35).

In the Third District, State Farm asserted that under the Third District's own decision in Indomenico v. State Farm Mutual Automobile Insurance Company, 388 So. 2d 29 (Fla. 3d DCA 1980) and cases like Standard Marine Insurance Company v. Allyn, 333

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So. 2d 497 (Fla. 1st DCA 1976), as well as the UM statutes and all the statutes defining motor vehicle, it was clear that motorcycles were included in the term motor vehicle and excluded from UM coverage.

In spite of the fact that Petersen argued both in the trial court and on appeal that the State Farm policy was clear and unambiguous and should be construed based on its clear and unambiguous terms, the Third District apparently in order to find coverage, found the term ambiguous. Petersen, D625. The court stated that the ambiguity arose concerning the term "motor vehicle," as used in the UM Section, and that it was unclear whether the term was intended to mean a vehicle with four wheels or more, as stated in the PIP section of the policy, or whether it should be given its normal everyday usage "which arguably would include motorcycles." Petersen, D625. The Third District then went on to construe the ambiguity in favor of the insured to find UM coverage. Petersen, D625. The Fourth District apparently rejected Petersen, which Grant relied on and found no coverage.

SUMMARY OF ARGUMENT

State Farm seeks certiorari review as classic conflict exists between the decisions in Petersen and in Grant, where under identical facts, law and insurance policies, the two District Courts reached the absolute opposite legal result.

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ARGUMENT

THERE IS CLEAR AND UNEQUIVOCAL DIRECT AND EXPRESS CONFLICT BETWEEN PETERSEN AND GRANT BASED ON THE SAME FACTS, LAW, AND INSURANCE POLICIES WITH EACH COURT REACHING THE EXACT OPPOSITE LEGAL RESULT.

In identical cases with the same facts, the exact same policy language, and the exact same legal issue, two District Courts of Appeal arrived at the exact opposite legal result. This is the classic case of direct and express conflict and there is no question that this court has jurisdiction to resolve the conflict between Grant and Petersen.

Robert Petersen owned a 1988 Ford pick-up truck which he had insured under a State Farm policy, for which he had selected limited U3 uninsured motorist coverage and paid a lower premium rate for this coverage. Michael Grant owned a 1978 Corvette, which was listed under an identical State Farm U3 uninsured motorist provision. Both Grant and Petersen were injured while riding motorcycles that were not listed under their State Farm policies. Both sought uninsured motorist coverage. In both cases, the trial courts found that uninsured motorist coverage was excluded from the State Farm policies for the accidents involving the unlisted motorcycles. In Grant, the Fourth District, based on the identical cases argued to the Third District, found no uninsured motorist coverage. Grant, D906. However, under the same case law and the same facts and the same legal argument, the Third District found UM coverage, reversing the trial court, based on its sua sponte determination that the term "motor vehicle" was ambiguous. Petersen, D624-625.

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Petersen had argued both in the trial court and on appeal that the term motor vehicle and its definition contained in the PIP portion of the policy were clear and unambiguous and had to be given its full force and effect. Apparently, in order to find coverage the Third District decided the term was ambiguous and therefore construed the policy in favor of Petersen. Petersen, supra.

In direct and express conflict, in Grant, the Fourth District found no problem with any of the terms used in the identical State Farm policy and found that the policy effectively excluded UM coverage for the named insured's accident, while driving his own motorcycle which was not listed on the State Farm policy. Grant, supra. In finding no uninsured motorist coverage under the express terms of the policy, the Fourth District set forth the same legal argument made by State Farm in the Petersen case, but which was rejected by the Third District. The Fourth District began by noting that Chapter 324 Florida Statutes (1991) the Financial Responsibility Law, which required persons operating motor vehicles to maintain a minimum amount of insurance, defined a motor vehicle as: "Every self-propelled vehicle which is designed and required to be licensed for use upon a highway." It then contrasted that definition with Florida's PIP Statute §627.732, which defined motor vehicle as "any self-propelled vehicle with four or more wheels which is of a type both design and required to be licensed for use on the highways of this state." Grant, D906. Both the policies in

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Grant and Petersen in their PIP section track the PIP Statute's definition of motor vehicle. In Grant, he made the same argument that Petersen made, that his motorcycle was not a motor vehicle under the PIP Statute, and thus he was not excluded from receiving UM benefits, even though he was driving a motor vehicle owned by him, which was not listed on the subject policy. Grant, D906. Similarly, State Farm asserted both in Grant and in Petersen that the term "motor vehicle" as defined by the financial responsibility law, clearly included motorcycles in the provision "any self-propelled vehicle." Furthermore, State Farm relied on Chapter 324 for support of this argument and definition and also asserted that the definition in the subject policies applied only to section II *No-Fault* and not to Section III *UM Benefits*. Grant, D906.

The Fourth District identified the legal question as centering on what definition should be given to the term "motor vehicle" in the context of the case and the accompanying insurance policy. The court first relied on Allyn, which of course was also cited to the Third District. In Allyn, the insured was injured by an uninsured motorist operating a motorcycle and the First District held that a motorcycle was included in the term "motor vehicle" under the Financial Responsibility Law.

This exact argument was made to the Third District in Petersen. Interestingly, the Fourth District then goes on to affirm the trial court's finding of no coverage relying on

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another Third District case, State Farm Mutual Automobile Insurance Company v. Kuhn, 374 So. 2d 1079 (Fla. 3d DCA 1979), cert. denied, appeal dismissed, 383 So. 2d 1197 (Fla. 1980), which had used similar reasoning to deny coverage to the policy holder. Grant, D906. Robert Kuhn had two separate insurance policies, one for his truck and one for his motorcycle. The policy for his truck included UM coverage, but he had rejected it in the policy on his motorcycle. Kuhn, 1080; Grant, D906. While riding the motorcycle, Kuhn was involved in an accident with an uninsured motorist and submitted a claim for UM benefits under his truck policy with State Farm. Again, these Third District facts are identical to the Third District's case in Petersen and the Fourth District's case in Grant. State Farm denied coverage to Kuhn and the trial court granted summary judgment in favor of the insured. On appeal, the Third District reversed the summary judgment, holding that Kuhn was restricted to the coverage in the policy issued on the motorcycle, since the motorcycle was involved in the accident not the truck. Kuhn, 1081; Grant, D906. In Petersen, the Third District does not mention its previous decision in Kuhn.

The Fourth District in Grant went on to note that, citing §627.4132 Florida Statutes (1977), which prohibits the stacking of UM coverage, the Kuhn court had held "having rejected uninsured motorist coverage thereon (his motorcycle), he is not entitled to the uninsured motorist benefits provided for his truck policy under the plain terms of the statute." Kuhn, 1081.

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The Fourth District then cited Indomenico, which was also another Third District case cited to the Third District, but rejected in Petersen. Grant, D906.

The Fourth District then noted in passing that Indomenico and Kuhn were decided before §627.4132 had been amended to remove reference to UM coverage in the stacking statute. Grant, D906. However, the Fourth District expressly went on to state that the reasoning in the foregoing cases and the public policy considerations of Allyn remain viable and continue to be applicable to the situation presented by the instant case. Grant, D906.

The Fourth District also noted that in a slightly different context, the Fifth District in Nationwide Mutual Fire Insurance Company v. Phillips, 609 So. 2d 1385 (Fla. 5th DCA 1992) (currently pending review on the merits in Case No. 80,986) resolved the issues involved in that case, on the unstated assumption that a motorcycle was a motor vehicle for purposes of UM coverage. Grant, D906.* The Fourth District then concluded that based on the statutory definition of motor vehicle, public policy and precedent including Third District's cases, it would affirm the summary final judgment finding no uninsured motorist coverage for Grant's motorcycle accident. Grant, supra.

While all the same case law, public policy, statutes, etc.

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* Phillips is currently scheduled for Oral Argument on October 5, 1993, along with a companion uninsured motorist coverage case Welker v. World Wide Underwriters Insurance Company, 601 So. 2d 572 (Fla. 4th DCA 1992), Supreme Court Case No. 80,478.

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were argued to the Third District, the Third District simply found that the term "motor vehicle" was ambiguous, even though it was defined by all the relevant applicable statutes and case law. The Third District reversed the trial court's finding of no uninsured motorist coverage for the accident involving Petersen's motorcycle which was not listed in Petersen's State Farm policy. Petersen, D626.

There is absolutely no question that there is direct and express conflict between Grant and Petersen, where both cases are based on identical facts, identical insurance policies, identical public policy, identical case law, and the two appellate courts came to the exact opposite legal conclusion--one finding uninsured motorist coverage--the other denying uninsured motorist coverage. In light of this undisputed direct and express conflict, this court has jurisdiction to review the cases and resolve the conflict.

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CONCLUSION

Petersen and Grant involve the identical facts, insurance policy, case law, public policy, and statutes; but each court has arrived at the exact opposite conclusion on uninsured motorist coverage. There is undisputedly express and direct conflict sufficient to invoke this court's jurisdiction.

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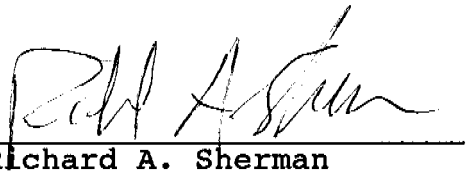
By: 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 13th day of May, 1993 to:

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