

IN THE SUPREME COURT OF FLORIDA

CASE NO. : 83,242

FOURTH DISTRICT COURT OF APPEAL

CASE NO. : 93-0238

GOVERNMENT EMPLOYEES
INSURANCE COMPANY,

Petitioner,

vs.

WILLIAM J. DOUGLAS,

Respondent.

FILED

SID J. WHITE

MAR 1 1994

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

PETITIONER'S BRIEF ON JURISDICTION

JAMES K. CLARK, ESQUIRE
FRANCES FERNANDEZ GUASCH, ESQUIRE
CLARK, SPARKMAN, ROBB & NELSON
Counsel for Petitioner
Biscayne Building, Suite 1003
19 W. Flagler Street
Miami, Florida 33130
Telephone: (305) 374-0033 (Dade)
Broward Line: (305) 522-0045

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STATEMENT OF THE CASE AND FACTS

"At the time of the accident in May, 1989, the named insured had two vehicles insured by GEICO¹ (insurer) for liability and uninsured motorist (UM) coverage. A third vehicle, a truck which the insured was occupying at the time of the accident, had previously been insured by GEICO under the same policy, but in 1988, the insured had cancelled the GEICO insurance coverage on the truck and obtained a PIP only policy with another insurance carrier. Insured was rear-ended by an uninsured motorist and sought UM benefits under his existing policy with GEICO. Insurer denied coverage based on its UM coverage policy exclusion for owned, but uninsured vehicles".

Government Employees Insurance
Company v. Douglas, 607 So.2d 102
(Fla. 4th DCA 1993).

At the trial level, the Court granted DOUGLAS's Summary Judgment and found that GEICO's UM policy covered DOUGLAS while operating his owned, but uninsured, truck. GEICO's Motion for Summary Judgment was denied. The Fourth District Court of Appeal², below, held that the UM coverage was provided because GEICO failed to comply with the requirements of §627.727(9). (A.1-4). For controlling authority, the Fourth District cited Nationwide Mutual Fire Insurance Company v. Phillips, 609 So.2d

¹ The Petitioner, GOVERNMENT EMPLOYEES INSURANCE COMPANY, will be referred to as GEICO or as Petitioner. The Respondent, WILLIAM DOUGLAS, will be referred to as Respondent or by name.

² In conformity with Florida Rules of Appellate Procedure 9.120(d), the decision of the Fourth District Court of Appeal is attached hereto as an Appendix. All references to the Appendix will be referred to as (A.) followed by citations to the appropriate page number of the Appendix.

1385 (Fla. 5th DCA 1992), rev. granted, 620 So.2d 761 (Fla. 1993); and, Carbonell v. Automobile Insurance Co. of Hartford, 562 So.2d 437 (Fla. 3rd DCA 1990). On January 19, 1994, the Fourth District denied GEICO's Motion for Rehearing En Banc. (A.5). GEICO then timely filed its Notice to Invoke this Court's discretionary jurisdiction based upon the fact that this Court had accepted jurisdiction to hear Nationwide v. Phillips, a case upon which the lower court relied upon as "controlling authority".

JURISDICTIONAL ISSUE I

WHETHER THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS FROM THIS COURT AND OTHER DISTRICT COURTS OF APPEAL?

JURISDICTIONAL ISSUE II

WHETHER DISCRETIONARY CONFLICT JURISDICTION IS PRESENT WHEN A DECISION OF THE DISTRICT COURT CITES AS CONTROLLING AUTHORITY A CASE WHICH IS PENDING FOR DISPOSITION ON THE MERITS BEFORE THIS COURT?

SUMMARY OF ARGUMENT

In accordance with Article V, §3(b)(3), Florida Constitution (1980), this Court may exercise its discretionary jurisdiction when an appellate decision expressly and directly

conflicts with the decision of another District Court of Appeal or this Court on the same question of law.

The decision of the Fourth District Court of Appeal conflicts with the decision of this Court in Valiant Insurance Co. v. Webster, 567 So.2d 408 (Fla. 1990). There, this Court stated that since its decision in Mullis, courts have consistently followed the principle that if the liability portions of an insurance policy would be applicable to a particular accident, the UM provisions would likewise be applicable. Whereas, if the liability provisions do not apply to a given accident, the UM provisions of that policy also would not apply. The Fourth District rejected this rule and failed to follow the dictates of Valiant and the Mullis rule. The Court ruled that UM coverage follows a Class I insured regardless of that person's location. The decision not only conflicts with the ruling in Valiant, but clearly misapplies the rule stated in Mullis. The decision in Mullis limits UM coverage to only those people who are likewise required to be insured under the Financial Responsibility Law.

The Fourth District's decision also conflicts with the decision of the Second District of Appeal in Bolin v. Massachusetts Bay Insurance Co., 518 So.2d 393 (Fla. 2nd DCA 1987). In Bolin, on virtually identical material facts, the Court stated that the appropriate rule in determining whether UM coverage applied was to inquire whether liability coverage would be available to the injured person for the accident. The

Second District enforced the UM exclusion because no liability coverage was provided to the injured person for the accident. Here, the Fourth District failed to acknowledge this stated principle of law and its application by another Florida Court. The conflict in decisions, is apparent, and this Court should review the case on the merits.

Additionally, this Court may exercise its discretionary jurisdiction when a decision of a District Court cites as its controlling authority a case which is currently pending for disposition on the merits before this Court. In Jollie v. State, 405 So.2d 418 (Fla. 1981), this Court held that this constituted "prima facie" grounds for conflict jurisdiction. In the present case, the Fourth District cited Nationwide Mutual Fire Insurance Co. v. Phillips, 609 So.2d 1385 (Fla. 5th DCA 1992), rev. granted, 620 So.2d 761 (Fla. 1993) as controlling authority for its decision. Phillips is currently pending before this Court on the merits. The present case raises the same issues addressed in Phillips and as such, this Court should accept conflict jurisdiction.

ARGUMENT I

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS FROM THIS COURT AND OTHER DISTRICT COURTS OF APPEAL.

Pursuant to Article V, §3(b)(3), Florida Constitution (1980), this Court may exercise its discretionary jurisdiction when an appellate decision expressly and directly conflicts with the decision of another District Court of Appeal or this Court on the same question of law. That conflict must be expressed and contained within the written rule announced by the Court. Jenkins v. State, 385 So.2d 1356 (Fla. 1980); Dodi Publishing Co. v. Editorial America, S.A., 385 So.2d 1369 (Fla. 1980). Two principles of law apply. The first is that conflict jurisdiction exists when the decision announces a rule of law which conflicts with the rule previously announced by another appellate court. The second is where there has been an application of a rule of law which produces a different result in a case which involves substantially the same controlling facts as a prior case decided by another appellate court. Nielson v. City of Sarasota, 117 So.2d 731, 735 (Fla. 1960). In the case at bar, the decision of the Fourth District expressly and directly conflicts with decisions of other Florida Courts.

In Valiant Insurance Co. v. Webster, 567 So.2d 408 (Fla. 1990), the court cited to Mullis v. State Farm Mutual Automobile Insurance Co., 252 So.2d 229 (Fla. 1971), in establishing that, "...the words 'person insured' as used in the uninsured motorist statute are the same persons who are insured under the liability policy required by the Financial

Responsibility Law". Id. at 410. This Court explained the rule of law as follows:

"Since our decision in Mullis, the Courts have consistently followed the principle that if the liability portions of an insurance policy would be applicable to a particular accident, the uninsured motorists provisions would likewise be applicable. Whereas, if the liability provisions did not apply to a given accident, the uninsured motorists provisions of that policy also would not apply...".

Supra, at 410.

The Court below, in its decision, failed to follow the dictates of the Valiant majority and "misstated" the Mullis rule. (A.1). In "overruling" the Valiant court, the Fourth District relied on Mullis in holding that UM coverage follows a Class I insured regardless of that person's location. In refusing to follow Valiant and Mullis, the Fourth District determined that the applicability of UM coverage was based on whether the injured person is a Class I insured instead of whether liability coverage would apply to that person for the accident.

The rule of law implemented by the Fourth District also expressly and directly conflicts with the opposite rule of law announced by the Second District in Bolin v. Massachusetts Bay Insurance Co., 518 So.2d 393 (Fla. 2nd DCA 1987). In this case, the Second District held that a Class I insured was not entitled to uninsured motorist coverage when they are operating their own vehicles which were not insured for purposes of liability coverage under the named insured's policy.

Therefore, under the "rule" type of conflict identified in Nielson, supra, the decision of the Fourth District expressly and directly conflicts with other reported decisions and confers upon this Court the authority to exercise its discretionary jurisdiction.

ARGUMENT II

THE DISCRETIONARY CONFLICT OF THIS COURT IS INVOKED WHEN A DECISION OF THE DISTRICT COURT CITES AS CONTROLLING AUTHORITY A CASE, AS HERE, NATIONWIDE MUTUAL FIRE INSURANCE CO. V. PHILLIPS, 609 So.2d 1385 (Fla. 5TH DCA 1992), REV. GRANTED, 620 So.2d 762 (Fla. 1993), WHICH IS PENDING BEFORE THIS COURT ON THE MERITS.

In accordance with Article V, §3(b)(3), Florida Constitution (1980), this Court may exercise its discretionary jurisdiction when a decision cites as controlling authority a case that is currently pending review in this Court. This is said to constitute "prima facie" grounds for conflict jurisdiction. Jollie v. State, 405 So.2d 418 (Fla. 1981); and, State v. Lofton, 534 So.2d 1148, 1149 (Fla. 1988).

This Court will exercise its discretionary conflict jurisdiction where a cited authority is a case in which jurisdictional review has actually been granted and the case is pending for disposition on the merits. See, Harrison v. Hyster Co., 515 So.2d 1279 (Fla. 1987).

In the present case, the Fourth District cited Nationwide Mutual Fire Insurance Co. v. Phillips, 609 So.2d 1385 (Fla. 5th DCA 1992), rev. granted, 620 So.2d 761 (Fla. 1993), as the controlling authority for its decision. This Court has invoked its discretionary jurisdiction to hear the Phillips case, however. Oral argument was conducted in Phillips on October 5, 1993, and a decision on the merits is currently pending before the Court. The opinion in the case sub judice was issued while Phillips was pending before this Court.

The present case raises the exact same issues addressed in Phillips, and as such, this Court should accept jurisdiction based upon the "prima facie" conflict identified above.

CONCLUSION

The decision of this Court in Valiant and the Second District Court's decision in Bolin provides this Court with sufficient basis to invoke its discretionary jurisdiction. Likewise, the Fourth District Court of Appeal in citing Phillips as controlling authority while it is pending review before this Court constitutes "prima facie" conflict jurisdiction. This Petitioner respectfully requests this Court to exercise that jurisdiction and review this case on the merits.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was mailed this 28th day of February, 1994, to: CHRISTOPHER M. CANNON, ESQUIRE, 633 South Andrew Avenue, Box 14519, Fort Lauderdale, Florida 33302. Telephone: (305) 463-0585; and, DANIEL D. DYKEMA, ESQUIRE, Young & Dykema, P.A., Suite 1730 - The 110 Tower, 110 Southeast Sixth Street, Fort Lauderdale, Florida 33301. Telephone: (305) 779-1105.

CLARK, SPARKMAN, ROBB & NELSON
19 West Flagler Street
Suite 1003, Biscayne Building
Miami, Florida 33130
Telephone: (305) 374-0033
Broward : (305) 522-0045

By: James K. Clark
JAMES K. CLARK
Florida Bar No. 161123

By: Frances L. Guasch
FRANCES FERNANDEZ GUASCH
Florida Bar No. 775762