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CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

AMERICAN FINANCE
ADJUSTERS, INC and
BOBBIE STEVENS,

Petitioners,

Case No.: 85,457

v.

AMERICAN BANKERS INSURANCE
COMPANY OF FLORIDA,

Respondent.

IN THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, FLORIDA
CASE Nos.: 94-746 and 94-1547

JURISDICTIONAL BRIEF OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
STATEMENT OF THE FACTS	1
SUMMARY OF THE ARGUMENT	1
QUESTION PRESENTED	
WHETHER THIS COURT SHOULD ACCEPT JURISDICTION UNDER ARTICLE V SECTION 3(b)(3) OF THE FLORIDA CONSTITUTION TO RESOLVE THE EXPRESS AND DIRECT CONFLICT IN THIS CAUSE BETWEEN THE THIRD DISTRICT COURT OF APPEAL AND A PRIOR DECISION OF THE FOURTH DISTRICT COURT OF APPEAL?	1
ARGUMENT	2
CONCLUSION	3
CERTIFICATE OF SERVICE	5
APPENDIX	
APPENDIX TABLE OF CONTENTS	A-i
<u>BOBBIE STEVENS and AMERICAN FINANCE ADJUSTERS, INC. v.</u> <u>AMERICAN BANKERS INSURANCE COMPANY OF FLORIDA ,</u> ___ So. 2d ___ (Fla. 3d DCA, March 1, 1995).	A-1-3

TABLE OF CITATIONS

Atkins v. Bellefonte, 342 So.2d 837 (Fla. 3d DCA 1977) passim

Dodi Publishing Company v. Editorial America, S.A., 385 So. 2d 1369 (1980). 2

Smith v. General Accident Insurance Company of America,
641 So.2d 123 (Fla. 4th DCA 1994). passim

I.

STATEMENT OF THE FACTS

The Third and Fourth District Courts of Appeal have both acknowledged that there exists an express and direct conflict regarding whether or not an insurance carrier's duty to defend is greater than its duty to pay. The Third District Court of Appeal stated that the duties to defend and pay are equal; the while Fourth District Court has determined that an insurance carrier's duty to defend is separate and more extensive than its duty to pay.

II.

SUMMARY OF THE ARGUMENT

The Florida Supreme Court should exercise its discretion to accept jurisdiction under Article V, Section 3(b)(3) of the Florida Constitution. There exists an express and direct conflict which has been acknowledged by both the Third and Fourth District Courts of Appeal.

III.

QUESTION PRESENTED

WHETHER THIS COURT SHOULD ACCEPT JURISDICTION UNDER ARTICLE V SECTION 3(b)(3) OF THE FLORIDA CONSTITUTION TO RESOLVE THE EXPRESS AND DIRECT CONFLICT IN THIS CAUSE BETWEEN THE THIRD DISTRICT COURT OF APPEAL AND A PRIOR DECISION OF THE FOURTH DISTRICT COURT OF APPEAL?

IV.

ARGUMENT

A.

JURISDICTION OF THE COURT

The jurisdiction of this Court in this cause is controlled by section 3(b) (3) of article V of the Constitution of the State of Florida, as amended March 11, 1980, effective April 1, 1980, which provides that the Supreme Court: "May review any decision of a district court of appeal...that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." Dodi Publishing Company v. Editorial America, S.A., 385 So. 2d 1369 (1980). In this case, the District Court stated:

"As to the duty to defend, the judgment is affirmed on the authority of Atkins v. Bellefonte Ins. Co., 342 So. 2d 837 (Fla. 3d DCA 1977). But see Smith v. General Accident Ins. Co., 641 So. 2d 123, 126 (Fla. 4th DCA 1994) (expressly disagreeing with Atkins) ..."

B.

THE EXPRESS AND DIRECT CONFLICT
BETWEEN THE DISTRICT COURTS OF APPEAL

The existence of express and direct conflict has been acknowledged by both the Third and Fourth district courts.

In the instant cause the Court stated:

"As to the duty to defend, the judgement is affirmed on the authority of Atkins v. Bellefonte Ins. Co., 342 So. 2d 837 (Fla. 3d DCA 1977). But see Smith v. General Accident Ins. Co., 641 So. 2d 123, 126 (Fla. 4th DCA 1994) (expressly disagreeing with Atkins)..."(A- 3).

Previously the Fourth District Court stated:

"In light of the established rule that the duty to defend is separate and more extensive than the duty to pay, we disagree with third district in Atkins v. Bellefonte Ins. Co., 342 So. 2d 837 (Fla. 3d DCA 1977), and acknowledge conflict to the extent Atkins conflicts with our opinion. Smith v. General Accident Ins. Co., 641 So. 2d 123, 126 (Fla. 4th DCA 1994)."

The issue in conflict is whether an insurance carrier's duty to defend is equal to, or more extensive than, its duty to pay. In Atkins the court determined that there was no duty to defend if there was no duty to pay. In Smith, the court recognized the duty to defend as independent and more extensive than the duty to pay.

C.

COMMONALITY OF FACTS

This cause, Atkins, and Smith, all involved motor vehicle accidents in which a person was injured and in which insurance policies of each of the owners contained automobile exclusions.

V.

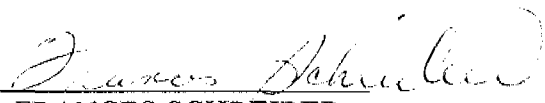
CONCLUSION

The conflict is real, express and direct. A jurisdictional basis for review exists. Review of this cause is needed in order to promote consistency and harmony in the decisions of the appellate courts of this State. This Court should exercise of its discretionary authority, take jurisdiction and resolve the acknowledged conflict.

Respectfully submitted,
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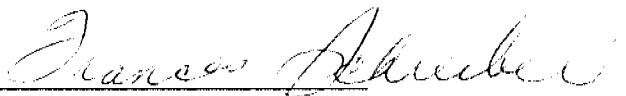
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail this 10th day of April, 1995 to: Sheila Moylan, attorney at Law, Suite 300, 44 W. Flagler Street, Miami, Fl 33130 and John Virgin, Esq., Suite 1200, 44 w. Flagler Street, Miami, Fl 33130.

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APPENDIX - TABLE OF CONTENTS

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AMERICAN BANKERS INSURANCE COMPANY OF FLORIDA,
___ So. 2d ___ (Fla. 3d DCA, March 1, 1995). A-1-3

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JANUARY TERM, A.D. 1995

BOBBIE STEVENS and AMERICAN **
FINANCE ADJUSTORS, INC., a **
Florida corporation, **

Appellants, **

vs. **

CASE NOS. 94-746
94-1547

AMERICAN BANKERS INSURANCE **
COMPANY OF FLORIDA, **

Appellee. **

Opinion filed March 1, 1995.

Appeals from the Circuit Court for Dade County, Jon I. Gordon,
Judge.

H. Virgin & Son and John Virgin; Thomas P. Murphy; Jerry B.
Schreiber, for appellants.

Sheila W. Moylan, for appellee.

Before BASKIN, COPE and GREEN, JJ.

PER CURIAM.

In these consolidated appeals Bobbie Stevens and American
Finance Adjustors, Inc., appeal declaratory judgments finding no

coverage under a comprehensive general liability policy issued by appellee American Bankers Insurance Company in Florida. We affirm.

As to the first issue, the Florida Department of State, as the responsible regulatory agency, has determined that the subject insurance policy conforms to the statutory requirements in effect at the time of the accident. See § 493.31, Fla. Stat. (1985). We see no basis on which to disturb that determination.

As to the second issue, appellants contend that there should be coverage for the tow truck involved in the present case. They reason that the tow truck qualifies as "mobile equipment"; mobile equipment is covered under the policy. Insofar as pertinent here, the policy definition states:

"mobile equipment" means a land vehicle (including any machinery or apparatus attached thereto), whether or not self-propelled, . . . (4) designed or maintained for the sole purpose of affording mobility to equipment of the following types forming an integral part of or permanently attached to such vehicle: power cranes . . .

(Emphasis added).

In our view this terminology refers to a land vehicle which transports a crane to the site or sites at which it is to perform its work. We do not think it applies to a tow truck lifting apparatus where, after it is engaged, the tow truck is then employed to transport the towed vehicle to the intended destination. See Williams v. Galliano, 601 So. 2d 769 (La. Ct. App.), writ denied, 604 So. 2d 1306 (La. 1992); Truck Ins. Exchange

v. Transamerica Ins. Co., 104 Cal. Rptr. 893 (Cal. Ct. App. 1972).

As to the duty to defend, the judgment is affirmed on authority of Atkins v. Bellefonte Ins. Co., 342 So. 2d 837 (Fla. 3d DCA 1977). But see Smith v. General Accident Ins. Co., 641 So. 2d 123, 126 (Fla. 4th DCA 1994) (expressly disagreeing with Atkins). In view of the ruling on coverage and duty to defend, the trial court correctly dismissed Stevens' remaining claims.

Affirmed.