IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. 90,323

LEXINGTON INSURANCE COMPANY,

Petitioner,

V.

SIMKINS INDUSTRIES, INC.,

Respondent,

BRIEF OF RESPONDENT ON JURISDICTION

ON DISCRETIONARY REVIEW FROM THE
THIRD DISTRICT COURT OF APPEAL

Patricia M. Silver, Esq.
Florida Bar No. 198919
Silver & Waldrnan, P.A.
800 Brickell Avenue, Suite 902
Miami, Florida 33131
Telephone: (305) 374-4567

Alan T. Dimond, Esq.
Florida Bar No. 111017
Elliot H. Scherker, Esq.
Florida Bar No. 202304
Greenberg, Traurig, Hoffman,
Lipoff, Rosen & Quentel, P. A.
122 1 Brickell Avenue
Miami, Florida 33131
Telephone: (305) 579-0500

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF CITATIONS

INTRODUCTION

In a straightforward decision, the Third District held that the contract of insurance between petitioner Lexington Insurance Company (Lexington) and its insured, WAK Limited, Inc. (WAK Limited), was assigned to respondent Simkins Industries, Inc. (Simkins) by virtue of an assignment clause in loan documents that granted Simkins, as WAK Limited's mortgagee, a security interest in WAK Limited's hotel property and land. ***Simkins Industries, Inc. v. Lexington Insurance Company,*** Case No. 96-314 (Fla. 3d DCA Jan. 8, 1997).[1] In a misguided effort to secure review, petitioner Lexington would have this Court accept, as a fundamental premise, that the Third District "ignore[d] the language of the contract" and "chose to disregard the policy language, " thereby placing itself in conflict with "decisional law from virtually ever jurisdiction . . . which requires that an unambiguous contract be construed in accordance with its plain language. " Petitioner's Brief at 7-8. The premise itself is mistaken: it was, without question, well within the ambit of appropriate appellate review for the Third District to construe the contract of insurance; an appellate court is on the same footing as a trial court in doing so.

Applying established principles of insurance law that the Florida courts have not heretofore had the opportunity comprehensively to address, the Third District ruled that an assignment of an insurance policy as collateral security for the payment of a debt is "outside the scope and purpose of general policy provisions against assignment without the insurer's consent. " (A:4). In so ruling, the Third District neither announced a rule of law that conflicts with a previously-announced rule in Florida, nor disregarded its appropriate role.

STATEMENT OF THE CASE AND FACTS

Simkins loaned WAK Limited approximately $5.5 million. (A:2). WAK Limited executed a promissory note, mortgage, and security agreement in Simkins' favor. ***Id.*** The

[1] A copy of the slip decision is attached as an appendix to this brief. The symbol "A" will designate the appendix.

mortgage and security agreement granted Simkins a security interest in WAK Limited's property, the Monte Carlo Hotel (and the land underneath the hotel) in Miami Beach, as well as a security interest in personal property used in connection with the hotel and "the proceeds of all insurance policies that covered the hotel." *Id.* WAK Limited also agreed to assign all insurance policies to Simkins as additional security for the loan. Id.

WAK procured a $2 million insurance policy from Lexington, which policy included coverage for fire damage. (A:2). The Lexington policy covered damage to the hotel building and personal property, as well as coverage for business income loss. ***Id.*** Simkins is named as the first mortgagee in the Lexington policy's loss-payable clause, ***Id.*** After the hotel was damaged by fire in October of 1993, Simkins filed an action seeking proceeds due under the policy. (A:2-3). On Lexington's motion for summary judgment, the trial court ruled that "Simkins may not recover under the policy for any loss of business income or damage to business personalty." (A: 3).

On Simkins' appeal to the Third District, Lexington asserted that "any assignment was in violation of the policy provisions that prohibit assignment without the consent of the insurer." (A:3) (footnote omitted). The court noted the provision in the policy that "[a]ssignment of this policy shall not be valid except with the written consent" of Lexington, and the clause in the agreement between WAK Limited and Simkins that all "policies of insurance . . . are hereby assigned to [Simkins] as additional security for payment of the indebtedness hereby secured." (A:3). The court determined that "the assignment here involved does not come under the policy provisions prohibiting assignment without Lexington's consent." (A:3-4).

Citing to authoritative treaties on insurance law, the court explained:

> The plain language of the assignment, not to mention the surrounding circumstances, clearly indicate that WAK assigned the policy as collateral security for the payment of its debt to Simkins. Such "assignments" (also referred to "transfers" or "pledges") are regarded, correctly in our view, as being outside the scope and purpose of general policy provisions against assignment without the insurer's consent.

> "The reason generally given for this rule is that the assignee in such a case acquires a mere equity under the policy and the insured is not divested of his or her legal interest in the policy. " "Such a transfer does not affect legal title to or possession of the property involved. " Moreover, the purpose of such nonassignability clauses is "to prevent an increase of risk and hazard of loss by a change of ownership without the knowledge of the insurer." Clearly, that purpose is not implicated by the assignment in this case. Thus, the trial court incorrectly concluded that Simkins was not entitled to recover for the loss of business income and the loss and/or damage to personalty.

(A:4-5) (citations omitted).

SUMMARY OF ARGUMENT

Lexington's case for discretionary review jurisdiction rests upon an entirely-erroneous premise, i.e., that the Third District had no *power* to interpret the anti-assignment clause of the insurance contract. It is well within the proper ambit of appellate review to construe a written agreement in the first instance, and an appellate court does no violence to the rule that a contract must be enforced as written by so doing. The unique issue addressed by the Third District, involving the interrelationship of a general anti-assignment clause and an insured's assignment of an equitable interest in an insurance policy to its mortgage creditor, does not appear previously to have been addressed by the Florida appellate courts. The court resolved that issue in accordance with well-established principles of insurance law; no conflict on a question of law exists.

ARGUMENT

Lexington claims that the Third District "obviously misapplied well-established decisional rules of contract construction" in holding that anti-assignment clause did not bar the equitable assignment to the insured's mortgagee, because the court "chose to disregard the policy language. " Petitioner's Brief at 6-7. One is hard-pressed, however, to find such a reckless departure from the rules that govern contractual construction in the *text* of the Third District's opinion, The *legal* question presented by the case was whether the anti-assignment clause in the contract of insurance applied to WAK Limited's equitable assignment of the insurance policy to Simkins, as mortgagee. (A:3-5). Acknowledging the express language of the contract of insurance, the Third District, citing authoritative insurance-law treatises, held

that an assignment of insurance proceeds as collateral security for the payment of a debt is beyond the scope of general anti-assignment clauses. (A:4).

Nowhere in the opinion does the court announce ***any*** rule of law that conflicts with the canon upon which Lexington relies, ***i.e.,*** that a court may not resort to rules of contractual construction absent an ambiguity in the contract. Petitioner's Brief at 6-7.[2] Rather, the court announced ***a rule of law:*** an assignment of an insurance policy as collateral security for the payment of debt transfers to the assignee "a mere equity under the policy," rather than the legal interest of the insured, and is therefore, "outside the scope and purpose of general policy provisions against assignment without the insurer's consent." (A:4) (citations omitted). Applying that rule of law, the Third District held that WAK Limited's assignment to Simkins was valid. (A:5).

Lexington, of course, cannot evade the rudimentary principle that the construction and interpretation of a written contract is a matter of law, ***e.g., DEC Electric, Inc. v. Raphael Construction Corporation,*** 558 So. 2d 427, 428 (Fla. 1990), and that, accordingly, "an appellate court is not restricted in its ability to reassess the meaning and effect of a written instrument to reach a conclusion contrary to that of the trial court." ***Angell v. Don Jones***

---

[2] Indeed, ***no*** rules of construction ***are mentioned*** — much less ***applied*** — in the Third District's decision. Lexington's argument is essentially that, because the Third District disagreed with its position, the court ***necessarily*** must have misapplied a rule of construction, an argument that could be advanced by virtually every unsuccessful litigant before a district court of appeal. ***Ford Motor Company v. Kikis,*** 401 So. 2d 1341 (Fla. 1981), upon which Lexington relies for the proposition that a court's "discussion of legal principles" may provide a "sufficient basis for the exercise of the Supreme Court's jurisdiction," Petitioner's Brief at ***6, actually*** stands for the unremarkable proposition that a district court need not "identify a direct conflict of its decision with any other Florida appellate decision[]" to warrant the exercise of this Court's jurisdiction; rather, where the opinion sets forth a "discussion" of the "legal principles which the court applied," and the requisite express conflict appears therein, "[i]t is not necessary that a district court explicitly identify conflicting district court or supreme court decisions in its opinion in order to create an 'express' conflict," ***Id.*** at 1342. Lexington's reliance on this proposition is obviously misplaced: the Third District's "discussion" of legal principles reveals ***no*** conflict with the proposition that an appellate court must construe a contract as written, absent a finding of ambiguity.

Insurance Agency, 620 So. 2d 1012, 1014 (Fla. 2d DCA 1993) (citation omitted). Thus, Lexington must demonstrate an "express and direct conflict" with another Florida decision "on ***the same question of law,*** " Art. V, § 3(b)(3), Fla. Const. (emphasis supplied), to make a case for discretionary review.[3] Lexington's only effort to satisfy this stringent requirement fails.

The decision in ***Classic Concepts, Inc. v. Poland,*** 570 So. 2d 331 (Fla. 4th DCA 1990), ***review denied,*** 58 1 So. 2d 163 (Fla, 1991), which decision is touted by Lexington as having addressed "an almost identical 'no assignment' clause," fails to evidence ***any*** decisional conflict, much less an "express and direct" conflict of decisions. Petitioner's Brief at 5-6. In that case, Classic Concepts insured a shipment of ceiling fans under a point-to-point transportation inland marine floater policy that insured the cargo while in transit from the factory to a warehouse. ***Id.*** 311. Poland (a Lloyds underwriter) insured Casado Transport, which was engaged to transport the cargo to the retailer. The policy issued by Poland was an indemnity policy, pursuant to which Casado Transport would be indemnified "only to the amount which they are obligated to pay and do pay. " ***Id.*** at 311-12. This indemnity policy had an anti-assignment clause that prohibited assignment without the insurer's written consent. ***Id.*** at 312. The ceiling fans were stolen while in the keeping of Casado Transport, ***Id.***

---

[3] Such conflict, of course, "must appear within the four corners" of the district court's decision. ***Department of Health and Rehabilitative Services v. National Adoption Counseling Service, Inc.,*** 498 So. 2d 888, 889 (Fla. 1986); ***accord, e.g., Hardee v. State,*** 534 So. 2d 706, 708 (Fla. 1988). The ***only*** facts relevant to the Court's jurisdiction "are those facts contained within the four corners of the decisions allegedly in conflict, " and the Court firmly has stated that "we are not permitted to base our conflict jurisdiction on a review of the record." ***Reaves v. State, 485 So.*** 2d 829, 830 n.3 (Fla. 1986). In perhaps the most telling indicium of the threadbare state of its jurisdictional case, Lexington engages in wholesale violations of these fundamental precepts, e.g., arguing that the Third District "incorrectly characterize[d]" the insurance policy, urging that the Third District's decision is unsupported by the record, and — in an apparent effort to influence the Court, including extraneous and inappropriate documents in the appendix, such as Lexington's Motion for Rehearing and an ***unsuccessful*** motion by an association of defense lawyers to appear as ***amicus curiae*** on rehearing. Petitioner's Brief at 1 n.1, 3 n.2, 7 n.4; Petitioner's Appendix at 7-27.

Classic Concepts filed a claim with its insurer, Ohio Casualty, for the loss and was paid for a portion thereof, *Id.* at 312. Ohio Casualty thereafter brought a subrogation action against Casado Transport; this action was resolved by an agreement that Casado Transport would assign its claim against Poland and thereby be excused from any liability to Ohio Casualty or Classic Concepts, *Id.* Upon securing this assignment, Classic Concepts and Ohio Casualty sued Poland. ***Id.*** Because the policy issued to Casado Transport was an "indemnity for loss policy, " under which "the indemnitee cannot recover until he has made payment or otherwise suffered actual loss or damage" and the second of these conditions had not been met, ***i.e.,*** Casado Transport had not actually paid the loss, Poland had no duty to pay Casado Transport. ***Id.*** at 312-13.

To protect against an apparent effort "to circumvent the built-in safeguards of the indemnity for loss policy, " the court enforced the anti-assignment clause of the Poland policy because "the policy was clear and unequivocal in its prohibition of assignment without the insurer's permission. " ***Id.*** at 3 13. Lexington thus goes far astray in suggesting that ***Classic Concepts*** involved "an almost identical 'no assignment' clause," and, therefore, that there is an express and direct conflict between the decision in this case and ***Classic Concepts.*** Petitioner's Brief at 5-6.

The critical distinction, of course, facially appears in the texts of the two decisions: ***Classic Concepts*** did ***not*** involve an assignment of an equitable interest in the proceeds of an insurance policy as collateral for a loan, and the Third District fully recognized and appreciated the rule — upon which ***Classic Concepts*** squarely rests — that ***general*** anti-assignment clauses prevent an insured from assigning rights under a contract of insurance. (A:3-5). There is, accordingly, ***absolutely no conflict of decisions,*** and no basis for the exercise of this Court's jurisdiction,

CONCLUSION

Simkins requests the court to deny Lexington's application for discretionary review.

Respectfully submitted,

Patricia M. Silver, Esq.
Florida Bar No. 198919
Silver & Waldman, P.A.
800 Brickell Avenue, Suite 902
Miami, Florida 3313 1
Telephone: (305) 374-4567

Alan T. Dimond, Esq.
Florida Bar No. 111017
Elliot H. Scherker, Esq.
Florida Bar No. 202304
Greenberg, Traurig, Hoffman,
Lipoff, Rosen & Quentel, P.A.
122 1 Brickell Avenue
Miami, Florida 33 13 1
Telephone: (305) 579-0500

Counsel for Respondent

By: 
Alan T. Dimond

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Brief of Respondent on Jurisdiction was mailed on May , 2 1997 to:

Daniel S. Pearson, Esquire
Holland & Knight
701 Brickell Avenue
Miami, Florida 33131
Co-Counsel for Petitioner

Hinda Klein, Esquire
Conroy, Simberg & Ganon, P.A.
3440 Hollywood Boulevard
Second Floor
Hollywood, Florida 33021
Co-Counsel for Petitioner