THE FLORIDA SUPREME COURT

S. Ct. Case No.:
CASE NO.: 3D02-2477

CARLOS FAYAD and DORA FAYAD,
his wife

Petitioners,
v.

CLARENDON NATIONAL INSURANCE COMPANY,

Respondent.
_____/

PETITIONERS' BRIEF ON JURISDICTION

Respectfully submitted,

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STATEMENT OF THE CASE AND FACTS

Carlos and Dora Fayad's home was insured by Clarendon National Insurance Company ("Clarendon") through an "all risk policy". (App. 2.) During the policy period they reported damages caused by explosion/blasting to the structure of their home as well as to their personal property. (App. 2). Clarendon denied coverage asserting that the cause of the loss was not explosion but rather resulted from "settlement, shrinkage and thermal effects[,]" exclusions; damage to the personal property was never addressed by Clarendon. (App. 2,3). Carlos and Dora Fayad ("Fayads") demanded appraisal and, thereafter, Clarendon filed a declaratory action for a determination that there was no coverage. (App. 3). The trial court granted Clarendon's Motion for Summary Judgment on both the structure and personal property based upon the "earth movement" exclusion[1] in the policy. (App.3). The homeowners

[1] Clarendon's earth movement exclusion provides:

> b. Earth Movement, meaning earthquake, including land shock waves or tremors before, during or after a volcanic eruption; landslide; mine subsidence; mudflow; earth sinking, rising or shifting; unless direct loss by:
> (1) Fire; [or]
> (2) Explosion . . .
> ensues and then we will pay only for the ensuing loss. (emphasis added).

Clarendon's personal property coverage provision states:

appealed the Final Summary Judgment. (App. 1).

The Third District issued their opinion on September 24, 2003.(App. 1). Although Judge Green, in writing the opinion for the panel, agreed with the Fayads that the exclusionary language is different and narrower in scope than the "Earth Movement" exclusion contained in State Farm Fire & Casualty Company v. Castillo, 829 So.2d 242 (Fla. 3rd DCA 2002), the panel held that the loss was nonetheless excluded. (App. 4,5,6). Judge Green applied the legal maxim "expressio unius est exclusio alterius" to the exclusionary language broadening the language of the exclusion.(App.6,7). Finally, even though explosion is specifically listed as a covered peril for personal property, the panel held that providing for such coverage would result in interpreting the policy in an inconsistent manner. (App. 9).

STATEMENT OF JURISDICTION

The Fayads seek further review, based on the conflict between the Third District and the Fourth District's decision in Phoenix Insurance Company v. Branch, 234 So.2d 396 (Fla. 4th DCA 1970).

COVERAGE C — PERSONAL PROPERTY

We insure for direct physical loss to the property described in Coverage C caused by a peril listed below unless the loss is excluded in SECTION I-EXCLUSIONS.

* * *

3. **Explosion** (Emphasis supplied).

Moreover, by construing the exclusion broadly, the Third District has misapplied a controlling decision of this Court as well as other district courts, to wit: Demshar v. AAAcon Auto Transport, Inc., 337 So.2d 963, 965 (Fla. 1976) (exclusionary clauses are always strictly construed); Auto-Owners Ins. Co. V. Anderson, 756 So.2d 29, 34 (Fla. 2000); State Farm Mut. Auto Ins. Co. V. Pridgen, 498 So.2d 1245 (Fla. 1986); Westmoreland v. Lumbermens Mutual Casualty Co., 704 So.2d 176 (Fla. 4th DCA 1997 and St. Paul Fire & Marine Ins. Co. v. Thomas, 273 So.2d 117 (Fla. 4th DCA) cert. den., 282 So.2d 638 (Fla. 1973); and Kirsch v. Aetna Casualty and Sur. Co., 598 So.2d 109 (Fla. 2nd DCA 1992). The foregoing creates express, direct conflict.

SUMMARY OF THE ARGUMENT

This Court has discretionary jurisdiction to review a district court's decision which expressly and directly conflicts with a decision of another district court or this Court on the same issue of law. Fla. Const. Art. V., §3(b)(3). Decisional conflict may be created by a conflict in decisions by the district court, legal principles appearing on the face of the decision or the misapplication of a specific holding previously announced by this Court. See Rosen v. Florida Ins. Guar. Ass'n, 802 So. 2d 291, 292 (Fla. 2001); Vest v. Travelers Ins. Co., 753

So. 2d 1270, 1272 (Fla. 2000); Arab Termite and Pest Control of Florida, Inc. v. Jenkins, 409 So. 2d 1039, 1040 (Fla. 1982).

The Third District held that the "Earth Movement" exclusion contained in a homeowner's all risks policy excluded damages caused by blasting/explosion. The Fourth District Court held, to the contrary, that damages caused by blasting/explosion do not fall with the "Earth Movement" exclusion contained in a homeowners' all risks policy. Moreover, the Third District, in order to reach their holding, broadly construed the language of the exclusionary provision contrary to established law in both this Court and other district courts. Finally, the construction applied by the Third District in analyzing the "Earth Movement" exclusion would necessarily result in other typically covered losses being excluded (e.g., fire losses); such effect would create a harmful coverage gap in the State of Florida if applied. Accordingly, there is express, direct conflict warranting the further exercise of this court's jurisdiction.

ARGUMENT

THE DISTRICT COURTS ARE IN DIRECT CONFLICT AS TO INSURANCE COVERAGE FOR A HOME DAMAGED BY EXPLOSION/BLASTING AND THE THIRD DISTRICT FAILED TO FOLLOW FLORIDA LAW BY NARROWLY CONSTRUING AN EXCLUSION AND BROADLY CONSTRUING COVERAGE.

The Fourth District Court of Appeals in Phoenix, supra,

interpreted a similar homeowners all risks policy involving damages caused by blasting. The insureds sought recovery for damages to their home "by reason of *blasting activities*, which resulted in the cracking of the walls, roof and ceilings," Id. at 236. The exclusionary language in Phoenix provided:

> This policy does not insure against loss:
>
> (b) caused by, resulting from, contributed to or aggravated by **any** earth movement, **including but not limited to** earthquake, landslide, mudflow, earth sinking, rising or shifting; unless loss by fire, explosion or breakage of glass constituting a part of the building(s) covered hereunder, including glass in storm doors and storm windows, ensues, and this Company shall then be liable only for such ensuing loss; [Emphasis supplied].[3] Id. at 235.

The Fourth District also discussed the interpretation applied to all risks policies, as follows:

> In recent years, the so-called "all risks" insurance policy has been used with increasing frequency. Such a policy is to be considered as creating a special type of coverage extending to risks not usually covered under other insurance, and recovery under the "all risks" policy will as a rule be allowed for all fortuitous losses not resulting from misconduct or fraud unless the policy contains a specific provision expressly excluding the loss from coverage. 13 Couch on Insurance 2d, § 48.138 (1965). Thus a policy against "all risks" ordinarily covers every loss that may happen except by the fraudulent acts of the insured.[fn1] See also Sun Insurance Office, Limited v. Clay, Fla. 1961, 133 So.2d 735. We must, therefore,

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[3] The Phoenix language is actually even more restrictive than the exclusion contained in the Clarendon policy by the inclusion of "any" and "including but not limited to".

> conclude that the very nature of the term "all risks" must be given a **broad and comprehensive meaning** as to the covering of any loss other than a willful and fraudulent act of the insured. Id. at 235.

The Fourth District Court directly held that the blasting "loss does not fall within the exclusionary provisions of the insurance policy." Id. at 236. Therefore, an insured homeowner who resides in the jurisdiction of the Fourth District has such coverage while another residing in the Third District does not.

Not only is the Third District in direct conflict with the Fourth District on the coverage issue, the Third District's analysis of the "Earth Movement" exclusion effectively turns the exclusion on its head; if such analysis is followed as to fire (or other losses[4]) then there would be a severe coverage gap in the State of Florida resulting in substantial harmful consequences to homeowners, mortgage lenders, builders and the like. Specifically, the Third District stated in its opinion:

> According to the plain language in the Clarendon policy, there is no coverage for losses caused by earth movement. Reading the plain language of the policy and applying the legal maxim "expressio unius est exclusio alterius," (i.e. "the enumeration of particular covered acts should be construed to exclude all of those not expressly mentioned."[fn4]), we conclude that there is no coverage for damages resulting from earth movement

[4] The opinion only listed fire and explosion omitting the additional language as reflected by the designation "...".

> caused by the policy's enumerated natural disasters or perils. **Under Clarendon's policy, however, there would be coverage for damages from a fire or explosion which ensued or followed these enumerated natural disasters or perils.[fn5] That is, in order for the policy to cover damages caused by explosion, the explosion must "ensue" or follow one of the previously mentioned natural events.**[fn6] If it does not, there is no coverage. (App. 6,7). [Emphasis Supplied].

Following the Third District's rationale, since fire is also listed within the exclusion, "in order for the policy to cover damages caused by [fire], the [fire] must "ensue" or follow one of the previously mentioned natural events" in order for there to be coverage. Although, it is not perhaps an intended result of the Third District, the foregoing is illustrative of the egregious and perhaps devastating effect of the misapplication of the legal maxim, "expressio unius est exclusio alterius," when construing an exclusion so broadly relative to an **all risks** insurance policy[5]. The aforementioned legal maxim is clearly meant to apply to "particular covered acts," not to enumerated

[5] "There is no reason why such policies cannot be phrased so that the average person can clearly understand what he is buying. And so long as these contracts are drawn in such a manner that it requires the proverbial Philadelphia lawyer to comprehend the terms embodied in it, the courts should and will construe them liberally in favor of the insured and strictly against the insurer to protect the buying public who rely upon the companies and agencies in such transactions." Hartnett v. Southern Insurance Company, 181 So.2d 524, 525 (Fla. 1965). Clarendon (and other carriers) has had over thirty years since the Phoenix decision to draft an exclusion relative to blasting/explosion.

exclusions, as incorrectly applied by the Third District. The subject provision does not exclude from coverage earth movement damage resulting from man-made disasters and perils. Accordingly, the Third District's broadening of the plain meaning of the policy to exclude same by misapplying the legal maxim in favor of the insurer is contrary to Florida law. If language in a policy is plain and unambiguous, there is no occasion to construe it, but if uncertainty is present, the instrument should be construed against the insurer and in favor of the insured. Rakoff v. World Ins. Co., 191 So.2d 476 (Fla. 3rd DCA 1966); see also Rigel v. National Cas. Co., 76 So.2d 285 (Fla. 1954)and Eagle American Ins. Co. v. Nichols, 814 So.2d 1083 (Fla. 4th DCA 2002).

Such legal maxim has historically been applied by this Court and other district courts to construe a particular statute to actually broaden coverage, not to broaden exclusions. See Young v. Progessive Southeastern Insurance Co., 753 So.2d 80, 84 (Fla. 2000). Aetna Insurance Company v. Webb, 251 So.2d 321, 322 (Fla. 1st DCA 1971); Perkins v. A. Perkins Drywall, 615 So.2d 187, 191 (Fla. 1st DCA 1993). Florida law is clear that insurance coverage must be construed broadly and its exclusions narrowly. Hudson v. Prudential Property & Cas. Ins. Co., 450 So. 2d 565, 568 (Fla. 2nd

DCA 1984). Exclusionary clauses are construed more strictly than coverage clauses. Demshar, Anderson, Pridgen, Westmoreland, Thomas, Kirsch, supra. The application by the Third District of such a maxim, misapplies Florida law as to interpretation of exclusions in such homeowners all risks insurance policies.

Under Florida law, if relevant language in an insurance policy is susceptible to more than one reasonable interpretation, one providing coverage and another limiting coverage, an ambiguity is deemed to exist by definition and the court is bound to adopt the interpretation which favors coverage. Adolfo House Distributing Corp. v. Travelers Property and Cas. Ins. Co., 165 F.Supp.2d 1332 (S.D. Fla. 2001); see also Graber v. Clarendon Nat. Ins. Co., 819 So.2d 840 (Fla. 4th DCA 2002). The Third District significantly departed from these fundamental concepts.

Finally, explosion is specifically listed in the policy as a named peril and the Third District, by excluding coverage for personal property damaged by explosion, has simply voided coverage that was specifically listed in that part of the policy[6]. Apparently, the Third District's rationale was to avoid the possibility of interpreting two policy provisions in an

[6] Although the Building/Structure portion of the policy is "all risks", the personal property coverage is "named peril".

inconsistent manner. Although the Court correctly determined that provisions in a contract that appear to be in conflict should be reconciled and harmonized if possible to do so, the Court misapplied Florida law by resolving the apparent inconsistency in favor of the insurer instead of the insureds. Ultimately, reconciling the structure and personal property provisions in favor of the insurer contradicts Florida law. Conflict between clauses in an insurance policy should be resolved in favor of the policyholder. See Dyer v. Nationwide Mut. Fire Ins. Co., 276 So.2d 6 (Fla. 1973).

Accordingly, this Court also has jurisdiction based on the conflict between the district courts and the Third District's misapplication of Florida law. As such, further review is warranted.

CONCLUSION

For all of the foregoing reasons, petitioners respectfully invoke this Court's jurisdiction under Fla. Const. Art. V., §3(b)(3) and request the Court to (1) accept jurisdiction; (2) establish a briefing schedule on the merits; and (3) quash the decision of the District Court of Appeal, Third District.

CERTIFICATE OF TYPE SIZE AND STYLE

Undersigned counsel certifies that the size and style of type used in this brief is 12 pt. Courier New.

Respectfully submitted,

By: _____
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via U.S. Mail this 20th day of October, 2003 to:

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