IN THE SUPREME COURT OF FLORIDA

CARLOS FAYAD AND DORIS FAYAD

Appellants,

CASE NO: SC03-1808
Lower Tribunal Case No: 3D02-2477

v.

CLARENDON NATIONAL INSURANCE COMPANY

Appellee
_____/

RESPONDENT'S BRIEF ON JURISDICTION

Respectfully submitted,
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STATEMENT OF THE CASE AND FACTS

This claim arises out of a claim for insurance benefits made by Petitioners, Carlos Fayad and Doris Fayad ("FAYAD"), pursuant to a homeowners insurance policy issued by CLARENDON NATIONAL INSURANCE COMPANY ("CLARENDON") to FAYAD.

FAYAD claimed that property owned by them suffered losses due to "explosion" (and/or other covered perils involving damage to the property/buildings). (App. 2.)

After FAYAD reported this alleged loss to the property, CLARENDON conducted an investigation into the claim.

As part of its investigation, CLARENDON hired Pepper Engineering to determine the cause of the damages at FAYAD'S property. Pepper concluded that the cracks and other problems at the FAYAD property were not the result of blasting operations because the levels of vibrations at the home were below the minimum thresholds required for even cosmetic damages to the materials in question. (App. 2)

CLARENDON further determined the damages to the home were caused by non covered perils and that even accepting FAYAD'S theory of causation are true, blasting and/or explosion, that the policy did not provide coverage for the loss since typical earth movement such as settling, subsistence, rising and shifting

either caused or contributed to the damages claimed by FAYAD and that the policy's earth movement exclusion precluded coverage for the loss. (App. 2.)

Based upon the earth movement exclusion and other applicable excluded perils, CLARENDON moved for summary judgment. (App. 4.) The trial court granted CLARENDON'S Motion for Summary Judgment based upon the earth movement exclusion of the policy. (App. 4.) FAYAD thereafter appealed this final summary judgment. (App. 4.) Oral argument was held before the Third District Court of Appeal and the Third District issued their opinion on September 24, 2003. (App. 2 through 9.)

Prior to the trial court's determination on CLARENDON'S Motion for Summary Judgment, the Third District Court of Appeal rendered the decision in State Farm Fire and Casualty Company v. Castillo 829 So. 2d 242 (Fla. 3rd DCA 2002) wherein the Third District Court of Appeal held that a homeowner's claim for blasting damage was precluded by the policy's earth movement exclusion that contained a lead in provision negating Florida's concurrent causation doctrine.

The Third District Court of Appeal concluded that as a matter of law, even accepting the FAYAD's blasting theory as true, that under the plain language of CLARENDON'S earth movement exclusion provision, there would be no coverage for the claimed losses in the case that included damage to the dwelling. (App. 5 through 6.)

The Third District further held that according to the plain language that in order for damages caused to personal property by explosion to be covered, it would have had to ensue or follow one of the enumerated perils contained in the policy's earth movement exclusion. (App. 6 through 7).

SUMMARY OF THE ARGUMENT

Discretionary jurisdiction is inappropriate in this case since, the decision of the Third District Court of Appeal does not expressly and directly conflict with a decision on another District Court of Appeal or of the Supreme Court on the same question of law pursuant to Fla. R. of App. Proc. 9.030(a)(2)(A)(iv). The case relied upon by Petitioner as the purported conflicting case did not address the same question of law that was addressed by the court below. Specifically, in the case of Phoenix Insurance Company v. Branch 234 So. 2d 396 (Fla. 4th Dist. 1970), the court did not construe the language that appears in the Clarendon Policy that was the subject of the Lower Court's decision.

In the Phoenix case, the language of the Phoenix policy appears in the decision but no treatment of its construction appears in the case. In any event, the language of the policy exclusion in the Phoenix case in completely different from the language that appears in the Clarendon policy. Most notably, the exclusionary language in the Phoenix case does not contain the material "lead in clause" that appears before the Clarendon earth movement exclusion and that appeared in the

Castillo case, supra. The lead in language in both cases was the most operative provisions in the Third District's decisions since the language served to negate Florida's concurrent causation doctrine. This is not surprising since the Phoenix case was decided in 1970, and the policy language at issue before the Fourth District related to a 1990 Insurance Services Office approved form that specifically amended the earlier version of the earth movement exclusion to include the lead in language that appears in the Clarendon policy.

Due to this crucial distinction, there is no conflict between the Phoenix case and the case decided below since the same question of law was not presented in each case and since no conflict appears from the face of the decision.

Furthermore, there is no conflict between the principles of contract construction utilized by the court below with other District Courts of Appeal. The court did not reach a new principle of policy construction that would conflict with general rules of policy construction that exist in this State. To the contrary, the court merely utilized bed rock principles of contract construction in the elaboration of its holding once having first determined that the earth movement exclusion was unambiguous.

ARGUMENT

THERE IS NO DIRECT CONFLICT AS TO CASE LAW REGARDING INSURANCE COVERAGE FOR A HOME DAMAGED BY EXPLOSION/BLASTING AND THE THIRD

DISTRICT DID NOT FAIL TO FOLLOW FLORIDA LAW REGARDING POLICY CONSTRUCTION.

In order for this court to have discretionary jurisdiction, the appellate decision must "expressly and directly" conflict with a decision of another District Court of Appeal or the Supreme Court. Article V Section 3(b)(3) Fla. Const. The opinion itself must directly and expressly ***on its face***, conflict with another opinion. Paddock v. Chacko 553 So.2d 168 (Fla. 1999). It is well settled that the Florida's Supreme Court's discretionary jurisdiction should not be invoked to review decisions of District Court's of Appeal to determine whether a District Court's presentation of facts is correct and/or where it may disagree with the final outcome of the case. Paddock Id. at 168. The power of the Supreme Court to review decisions of the District Court's of Appeal is limited and strictly prescribed. Diamond Berk Insurance Company, Inc. v. Goldstein, 100 So.2d 420 (Fla. 1958); Sinnamon v. Fowlkes, 101 So.2d 375 (Fla. 1959).

It is also now well accepted that the Florida Supreme Court functions as a supervisory body in the judicial system for the state, exercising appellate power in certain specified areas essential to the settlement of issues of public importance and the preservation of uniformity of principal and practice, with review by the District Courts in most instances being final and absolute. Sanchez v. Wimpey 409 So.2d 20 (Fla. 1981).

In this case, there is no express and direct conflict between the decision below and the Phoenix case as suggested by Petitioner.

In the decision below, there is absolutely no mention of the Phoenix case let alone any treatment distinguishing it from the case that was considered. The focus of the District Court's opinion is upon the policy language that appeared in the Clarendon policy and whether it was somehow distinguishable from the policy language that appeared in the Castillo case that was urged as controlling precedent in the District.

In the lower court, Clarendon relied upon the following earth movement exclusion and its lead in provision, especially noted by the Court at page 1 of the opinion. See Fayad v. Clarendon National Insurance Company, 2003 WL 22187865 (Fla. App. 3 Dist):

> SECTION 1 – EXCLUSIONS
>
> 1. We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss.
>
> 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).

The court then framed the issue on appeal and as such:

"At the hearing on the Motion for Summary Judgment, Clarendon relied upon our decision in State Farm Fire & Casualty Company v. Castillo 829 So.2d 242 (Fla. 3d DCA 2002) and argued that even assuming *arguendo* that blasting was the cause of the structural damage to the Fayad's home coverage was still excluded under the earth movement exclusion. Clarendon claimed that our holding regarding the lead in provision in Castillo was directly on point here and therefore, blasting activity, as well as the natural phenomena specifically listed in its policy, is excluded under Clarendon's earth movement exclusion. The Fayads responded that the holding in Castillo was limited to the unique language contained in State Farm lead in provision, and was not applicable the language in Clarendon's policy.

The trial court granted Clarendon's Motion for Summary Judgment and this appeal followed." Fayad at page 1.

As evidenced from the above quoted portion of the decision, the issue of law presented to the District Court was whether the precise language contained in the Clarendon Policy that contained a lead in provision was at all distinguishable from the State Farm Fire & Casualty Company policy's earth movement exclusion that also contained an earth movement exclusion with a lead in provision. Fayad did not argue in the lower tribunal that the Castillo case was in conflict with the Phoenix case and/or suggest that language that appeared in the Phoenix case was akin to the language in the Clarendon policy.

The language that appeared in the Phoenix policy is detailed below.

'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;' Phoenix at 398.

Clearly, the Clarendon earth movement exclusion and the earth movement exclusion in the Phoenix case are materially different since the Phoenix language does not contain Section 1 of the Clarendon earth movement exclusion, which is known as the "lead in clause" that negates loss caused directly or indirectly by earth movement regardless or any other cause or event contributing concurrently or in any sequence to the loss.

A fair reading of the Phoenix case clearly demonstrates that there was little to no treatment of the policy language and whether the doctrine of concurrent causation formed the basis of the Court's opinion as one can only assume that it did. Based upon well established jurisdictional rules, since there is no apparent conflict ***on the face of the decision*** of the District Court with the Phoenix case relied upon by Petitioner, this Court may not invoke its discretionary jurisdiction.

There is also no conflict between the legal maxim applied in the District Court's opinion of "*Expressio unius est exclusio alterius* (i.e. the enumeration of a particular covered acts should be construed to exclude all of those non expressly

mentioned) and the rule of construction that ambiguity in exclusionary clauses should be construed against the drafter. The rule of policy construction described by Petitioner was not contradicted in the District Court's opinion. Specifically, this rule of law applies ***when an ambiguity is deemed to exist***. Even the cases cited by Petitioner concede that this rule of construction is only implicated when an ambiguity is deemed to exist. See page 9 of Petitioner's brief. The Third District did not significantly depart from this fundamental concept. To the contrary, the Third District held that the plain language of the Clarendon policy ***was not ambiguous***. Having found that it was unambiguous, there was no cause to resort to this rule of construction. The opinion states at page 2 as follows:

> "***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 "e*xpressio unius est exclusio alterius,* (i.e., the enumeration of particular covered acts should be construed to exclude all of those not expressly mentioned," we conclude that there is no coverage for damages resulting from earth movement caused by the policy's enumerated natural disasters or perils." [Emphasis Added].

Therefore, it is clear that the Third District ***first*** held that the language of the policy was plain and unambiguous and thereafter applied the legal maxim regarding the enumeration of particular covered acts to be construed to exclude all those not expressly mentioned. Essentially, Petitioner is putting the cart before the horse by arguing that the Third District somehow failed to follow established law regarding construction of exclusionary provisions since that rule applies once

ambiguity has been deemed to exist, which was not the case with respect to the language considered by the Third District. Accordingly, there is no conflict between the Third District's opinion in its treatment of the exclusionary language with the body of law relied upon by Petitioner. Also, again, there is no express conflict on the face of the decision itself with the cases cited by Petitioner therefore eliminating the possibility that discretionary jurisdiction could be exercised in this case.

CONCLUSION

For all the foregoing reasons, Respondent, CLARENDON NATIONAL INSURANCE COMPANY, respectfully requests that this Court decline to exercise its discretionary jurisdiction since there is no express and direct conflict with a decision of another District Court of Appeal or of the Supreme Court on the same question of law that was presented to the Third District Court of Appeal.

Respectfully, submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to: Harold B. Klite Truppman, Esq., 201 West Flagler Street, Miami, FL 33130 and Lauri Waldman Ross, Esq. Two Datran Center, Suite 1612, 9130 S. Dadeland Boulevard, Miami, Florida 33156 this _____ day of December, 2003.

By:_____
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CERTIFICATE OF TYPE SIZE AND STYLE

The undersigned counsel certifies that the size and style of type used in the foregoing Answer Brief is 14 pt. Times New Roman.

By:_____
Nancy I. Stein-McCarthy