IN THE SUPREME COURT OF FLORIDA

FLORIDA INSURANCE GUARANTY ASSOCIATION,

Petitioner,

vs.

DEVON NEIGHBORHOOD ASSOCIATION INC. D/B/A DEVON NEIGHBORHOOD & CONDOMINIUMS A-J ASSOCIATION, INC.

Respondent.

CASE NO.: SC10-347

L.T. NO.: 4D09-377

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ON DISCRETIONARY REVIEW FROM THE FOURTH DISTRICT COURT OF APPEAL

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RESPONDENT'S BRIEF ON JURISDICTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

Respondent, Devon Neighborhood Association, Inc. (Devon), timely filed a claim with its insurer, Southern Family Insurance (Southern), after Devon's property sustained damage when Hurricane Wilma struck in October 2005. Florida Ins. Guar. Ass'n, Inc. v. Devon Neighborhood Ass'n, Inc., 2009 WL 4283084, *1 (Fla. 4th DCA Dec. 2, 2009). Devon submitted a sworn proof of loss for its claim in February of 2006. Id. Southern became insolvent and was placed into receivership in April of 2006. Id. By operation of law, Florida Insurance Guaranty Association (FIGA) assumed responsibility for Devon's claim. Id. Before becoming insolvent, Southern paid Devon approximately $2.5 million. Id.

Devon subsequently submitted a second sworn proof of loss statement, increasing the claimed amount of the loss. Id. FIGA paid Devon an additional $1.7 million. Id. In December of 2007, a contracting company hired by Devon estimated additional damage in the amount of $4.8 or $5 million. Id. The additional damages include three roofs and the replacement of all the sliding glass doors and windows. Id. Devon submitted the report with the $4.8 million in additional claims to FIGA on January 30, 2008, but FIGA refused to make any payment. Id.

On February 11, 2008, Devon filed a lawsuit against FIGA. Id. Count I alleged breach of contractual and statutory duties in failing to fully compensate it

for all losses covered under the policy. Id. Count II sought a declaration of the validity of the insurance contract, a determination of Devon's rights and obligations under the policy, a determination of whether the damages and losses were covered claims, and a declaration that the deductible provisions were void. Id. FIGA's answer alleged numerous affirmative defenses and demanded an appraisal of the damages pursuant to the terms of the Southern policy. Id.

FIGA moved to compel an appraisal. Devon opposed the appraisal process and alleged that FIGA waived its right to appraisal by (1) participating in the lawsuit, and (2) failing to notify Devon of the statutory mediation process set forth in section 627.7015(2) of the Florida Statutes. Id. Under the plain language of section 627.7015(2), the failure to notify Devon of the statutory mediation process prevented FIGA from insisting on the appraisal process as a precondition to legal action. Id. Ultimately, the trial court denied the motion to compel the appraisal, and FIGA appealed the trial court's ruling to the Fourth District Court of Appeal.

On appeal, FIGA argued that applying section 627.7015(2) in this case would amount to an unconstitutional impairment of the insurance contract, which was entered into before the pertinent portion of the statute became effective. Id. The Fourth District analyzed FIGA's argument on appeal by applying the test established in Pomponio v. Claridge of Pompano Condo., Inc., 378 So. 2d 774 (Fla. 1979). Id. at *4. After it conducted a thorough analysis, the Fourth District

held that "the statutory amendment subjecting commercial residential insurance policies to the mediation provisions of section 627.7015 was not an unconstitutional impairment of the existing insurance policy." Id. at *5.

After the Fourth District entered its decision, FIGA filed a motion for rehearing, rehearing en banc, and to certify a question of great public importance to this Court. The Fourth District denied FIGA's motions. FIGA then sought discretionary review with this Court.

SUMMARY OF THE ARGUMENT

The Court should decline to review the instant case because there is no express and direct conflict between this case and any decision made by this Court or any other District Court of Appeal. None of the "conflict" cases cited in Petitioner's Jurisdictional Brief overruled the test this Court established in Pomponio, nor do they hold that the test is no longer applicable. Since the law is clear that this Court does not intentionally overrule itself *sub silentio*, Petitioner's attempt to create a conflict based upon the Fourth District's use of the Pomponio test should be rejected.

The Court should also decline jurisdiction over this case because nothing within the four corners of the Fourth District's opinion expressly and directly conflicts with any decision made by this Court or any other District Court of Appeal. In addition, all of the "conflict" cases cited in Petitioner's Jurisdictional

Brief are factually distinguishable from this case. When two cases are factually distinguishable, there is no conflict jurisdiction. Accordingly, this Court should decline to exercise its jurisdiction to hear this case.

ARGUMENT

THERE IS NO BASIS FOR DISCRETIONARY REVIEW OF THE FOURTH DISTRICT'S DECISION IN THIS CASE; NO DIRECT CONFLICT EXISTS BETWEEN THE DECISION BELOW AND ANY DECISION OF THIS COURT OR ANY OTHER DISTRICT COURT OF APPEAL

FIGA seeks to invoke the discretionary jurisdiction of this Court pursuant to Article V, section 3(b)(3), of the Florida Constitution. This section grants this Court discretionary jurisdiction to 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." Id.; see also Fla. R. App. P. 9.030(a)(2)(A)(iv). According to Florida Rule of Appellate Procedure 9.120(d), FIGA's brief is limited solely to the issue of jurisdiction. FIGA's brief in this case, however, improperly argues the merits of substantive issues contained in the Fourth District's opinion. (JB. 4-5, 7). The committee notes to Rule 9.120(d) state that "[i]t is not appropriate to argue the merits of the substantive issues involved in the case or discuss any matters not relevant to the threshold jurisdictional issue." Since FIGA's brief raises arguments involving substantive issues, this Court should ignore those portions of FIGA's brief and decline to

accept jurisdiction in this case.

FIGA contends that the Fourth District's application of the test set forth in Pomponio created an express and direct conflict with the following cases: Menendez v. Progressive Express Ins. Co., 2010 WL 375080 (Fla. Feb. 4, 2010), Old Port Cove Holdings, Inc. v. Old Port Cove Condo. Ass'n One, Inc., 986 So. 2d 1279 (Fla. 2008), Metropolitan Dade County v. Chase Fed. Housing Corp., 737 So. 2d 494 (Fla. 1999), Weingrad v. Miles, 2010 WL 711801 (Fla. 3d DCA Mar. 3, 2010), and Coventry First, LLC v. State, Office of Ins. Regulation, 2010 WL 478289 (Fla. 1st DCA Feb. 12, 2010). None of the cases cited by FIGA overruled the test this Court established in Pomponio, nor do they hold that the test was no longer applicable. Although FIGA contends the Pomponio test was supplanted by the Court's decisions in Menendez, Old Port Cove, and Chase Fed. Housing, the law is clear that this Court "does not intentionally overrule itself sub silentio." State v. Ruiz, 863 So. 2d 1205, 1210 (Fla. 2003). The recent application of the Pomponio test in Cohn v. Grand Condo. Ass'n Inc., 26 So. 2d 8 (Fla. 3d DCA 2009) and Coral Lakes Cmty. Ass'n, Inc. v. Busey Bank, N.A., 2010 WL 567251 (Fla. 2d DCA Feb. 19, 2010) demonstrates that Pomponio has not been superseded by "the more recent pronouncements regarding the retroactive application of statutes. . ." (JB. 4).

It is undisputed that "[c]onflict between decisions must be express and

direct, i.e., it must appear within the four corners of the majority decision." Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986). Nothing within the four corners of the Fourth District's opinion expressly and directly conflicts with Menendez, Old Port Cove, Chase Fed. Housing, Weingrad, or Coventry First. Thus, the Court should decline jurisdiction over this case because there is "no express and direct conflict between these opinions within the four corners of [the Fourth District's] decision." Hill v. Hill, 778 So. 2d 967, 967 (Fla. 2001).

FIGA's attempt to manufacture a conflict between the instant case and Menendez must fail because the cases are factually distinguishable. The Menendez case dealt with Florida's Motor Vehicle No-Fault Law and the retroactive application of a substantive statute. Menendez, 2010 WL 375080 at *3. Florida's No-Fault Law, unlike section 627.7015 of the Florida Statutes, abrogated certain common law tort principles in order to provide swift and automatic payment so that the injured insured may get on with his life without undue financial interruption. The statute at issue in Menendez required the insured to provide notice to the insurer before filing an action for overdue PIP benefits and provided an insurer additional time to pay an overdue claim. However, "[b]efore the addition of the statutory presuit notice provision, section 627.736 did not require an insured to provide notice to an insurer before filing an action for overdue benefits." Menendez, 2010 WL 375080 at *3.

In Menendez, this Court dealt with the application of a "presuit notice" requirement of a statute that would harm the insured in a PIP case. The Court was concerned that the statute impaired "the right of the insured to recover in a 'swift and virtually automatic' way," which created "the potential for interfering with the PIP scheme's goal of being a reasonable alternative to common law tort principles." Menendez, 2010 WL 375080 at *3. This Court ruled in favor of the insured and held that the statute could not be applied retroactively.

The instant case, unlike Menendez, involves the application of a procedural statute to a common law breach of a property insurance contract claim. Devon argued that applying the provisions of section 627.7015(2) in this case "would amount to an unconstitutional impairment of contract." Devon, 2009 WL 4283084 at *1. In response to Devon's argument, the Fourth District applied the Pomponio test and concluded that the application of section 62707015(2) in this case did not constitute an unconstitutional impairment of the insurance policy. The Fourth District's ruling in this case, like this Court's decision in Mendedez, favored the insured and the prompt resolution of insurance claims.

A review of the decisions in Devon and Menendez demonstrates that the cases are factually distinguishable. When two cases are factually distinguishable, there is no conflict jurisdiction. Benefield v. State, 160 So. 2d 706 (Fla. 1964); Kyle v. Kyle, 139 So. 2d 885 (Fla. 1962). Accordingly, the Court should not

exercise its discretionary jurisdiction over this case.

FIGA also argues that the Fourth District's decision is in conflict with Old Port Cove, Chase Fed. Housing, Weingrad, and Coventry First, yet none of these cases involved claims for breaches of a property insurance policy. Old Port Cove involved a statute abrogating the common law rule against perpetuities, while Chase Fed. Housing involved the Dry Cleaning Contamination Cleanup Act. The Weingrad case is distinguishable because it addressed a statute that capped noneconomic damages in certain medical malpractice actions at $500,000, and the Coventry First decision involved a claim for injunctive relief, a viatical provider, and the application of an amended statute to "work papers" that were in the possession of the Office of Insurance Regulation. Neither Weingrad nor Coventry First dealt with a breach of a property insurance contract, nor did either case address whether the application of a statute would amount to an unconstitutional impairment of contract. Since Old Port Cove, Chase Fed. Housing, Weingrad, and Coventry First are all distinguishable from the instant case, there is no conflict jurisdiction. Benefield, 160 So. 2d 706; Kyle, 139 So. 2d 885.

CONCLUSION

Based upon the foregoing arguments and authorities, Devon respectfully requests that this Honorable Court decline jurisdiction over this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail to Philip Ward, Jeffrey Kuntz, Roland Schwartz, and Evan Appell, GrayRobinson, P.A., 401 East Las Olas Boulevard, Suite 1850, Fort Lauderdale, Florida 33301, on March 30, 2010.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY pursuant to Florida Rule of Appellate Procedure 9.210 that this Answer Brief has been prepared in Times New Roman 14pt. font.

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