

SUPREME COURT OF FLORIDA

CASE NO.: SC03-1715

**LINDA RICE, as Personal Representative
of the Estate of CONNIE DEWBERRY, deceased,**

Petitioner,

vs.

ATLANTA CASUALTY COMPANY,

Respondent.

**ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, SECOND DISTRICT
CASE NO. 2D02-5059**

PETITIONER'S JURISDICTIONAL BRIEF

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STATEMENT OF THE CASE AND FACTS

By opinion dated September 12, 2003, the District Court of Appeal, Second District, affirmed the judgment of the Circuit Court, Highland County, by “citation PCA” as follows:

Affirmed. See Infinity Ins. Co. v. Berges, 806 So. 2d 504 (Fla. 2d DCA 2001), review granted, 826 So. 2d 991 (Fla. 2002).

Rice v. Atlanta Cas. Co., Case No. 2D02-5059 (Fla. 2d DCA Sept. 12, 2003) (Appendix).

In the Berges case cited by the district court below as controlling authority, this court accepted jurisdiction based on express and direct conflict by order dated September 10, 2002, and conducted oral argument on February 4, 2003. See Berges v. Infinity Ins. Co., Case No. SC01-2846 (Fla. Sept. 10, 2002).

ISSUE PRESENTED FOR REVIEW

WHETHER THIS COURT SHOULD ACCEPT JURISDICTION BASED ON THE DISTRICT COURT'S "CITATION PCA" OPINION WHEN THE DECISION CITED BY THE DISTRICT COURT AS CONTROLLING AUTHORITY IS PENDING REVIEW IN THIS COURT AND THE CONTROLLING DECISION CONFLICTS WITH DECISIONS FROM THIS COURT AND OTHER DISTRICT COURTS OF APPEAL ON THE SAME QUESTIONS OF LAW

SUMMARY OF ARGUMENT

Based on Jollie v. State, 405 So. 2d 418 (Fla. 1981), this court has jurisdiction to review the “citation PCA” issued by the district court below since the decision cited by the district court as controlling authority, Infinity Ins. Co. v. Berges, 806 So. 2d 504 (Fla. 2d DCA 2001), review granted, 826 So. 2d 991 (Fla. 2002), is pending review in this court based on express and direct conflict.

ARGUMENT

In Jollie v. State, 405 So. 2d 418, 420 (Fla. 1981), this court “conclude[d] that a district court of appeal per curiam opinion which cites as controlling authority a decision that is either pending review in or has been reversed by this Court continues to constitute prima facie express conflict and allows this Court to exercise its jurisdiction.” Because the controlling authority cited by the district court below, Infinity Ins. Co. v. Berges, 806 So. 2d 504 (Fla. 2d DCA 2001), review granted, 826 So. 2d 991 (Fla. 2002), is pending review in this court based on express and direct conflict, this court has jurisdiction to review the instant case. See, e.g., Kelly v. Community Hosp. of Palm Beaches, Inc., 818 So. 469, 470 (Fla. 2002); Jeffries v. State, 770 So. 2d 1157, 1157 (Fla. 2000); Mims v. Lipton Toyota, Inc., 709 So. 2d 106, 106 (Fla. 1998).

Summarizing the arguments which support jurisdiction in the Berges---, 806 So. 2d at 509-10. This holding conflicts with Government Employees Ins. Co. v. Grounds, 311 So. 2d 164, 167-68 (Fla. 1st DCA 1975), cert. discharged, 332 So. 2d 13 (Fla. 1976), in which the first district rejected the same argument and noted that “a settlement of a minor’s claim could never be accomplished if insurance companies took this attitude. All such settlements must necessarily be subject to court approval.”

2. Berges-, 806 So. 2d at 508-09. This holding conflicts with Griffin v. Workman, 73 So. 2d 844, 846 (Fla. 1954), in which this court held that the personal representative’s receipt of letters of administration relates back to the date of death and validates the personal representative’s prior acts which were beneficial to the estate.

3. Berges-, 806 So. 2d 510. This holding conflicts with Boston Old Colony Ins. Co. v. Gutierrez, 386 So. 2d 783, 785 (Fla. 1980), and Powell v. Prudential Prop. &

Cas. Ins. Co., 584 So. 2d 12, 14-15 (Fla. 3d DCA 1991), rev. denied, 598 So. 2d 77 (Fla. 1992), which hold that insurers are obligated to advise their insureds about all settlement discussions and negotiations. On this same point, Berges- which hold that the duty to communicate with the insured is activated, not by a “valid opportunity to settle,” but by evidence that the claimant’s probable recovery will exceed policy limits.

4. Finally, Berges-, 806 So. 2d 510. This holding conflicts with Higgs v. Industrial Fire & Cas. Co., 501 So. 2d 644, 645 (Fla. 3d DCA 1986), rev. denied, 511 So. 2d 298 (Fla. 1987), and Odom v. Canal Ins. Co., 582 So. 2d 1203, 1205 (Fla. 1st DCA 1991), which hold that an insurer can be found liable for bad faith when it accepts a settlement offer but fails to consummate the agreed settlement.

CONCLUSION

Based on the foregoing, this court should accept jurisdiction and decide this case on the merits.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Scot E. Samis, Esquire, and Frank E. Dylong, Jr., Esquire, attorneys for respondent, Post Office Box 1511, St. Petersburg, Florida 33731 by U.S. Mail this 30th day of September , 2003.

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CERTIFICATE OF TYPE SIZE AND STYLE

The undersigned attorney hereby certifies that this brief was prepared using a 14-point Times New Roman font in accordance with Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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