

IN THE SUPREME COURT OF FLORIDA

CASE NO: SC06-1259

U.S. SECURITY INSURANCE COMPANY,

Petitioner,

vs.

**CARMEN MARIA CONTRERAS, as
Administrator and Personal Representative
of the Estate of FLOR TORRES OSTERMAN
and Guardian for and on behalf of CARMEN
LORENA DUARTE, a minor child, as assignee
of KENNETH A. WELT, Trustee,**

Respondent.

RESPONDENT'S JURISDICTIONAL BRIEF

On Review from the District Court of Appeal, Fourth District, State of Florida

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PREFACE

This is a discretionary review proceeding to review a decision of the Fourth District Court of Appeal based on conflict with a decision of this court and decisions of other Florida courts.

The petitioner, U.S. Security Insurance Company, was the defendant before the trial court and the appellee before the Fourth District Court of Appeal. The respondent, Carmen Maria Contreras, was the plaintiff before the trial court and the appellant before the Fourth District Court of Appeal. In this brief the parties will be referred to as U.S. Security and as Contreras.

STATEMENT OF THE CASE AND FACTS

For the purpose of determining jurisdiction, the relevant facts are those facts contained in the opinion of the District Court of Appeal, Fourth District. *Reaves v. State*, 485 So. 2d 829 (Fla. 1986); *Kincaid v. World Insurance Co.*, 157 So. 2d 517 (Fla. 1963). Those facts are as follows.

This lawsuit arises out of a motor vehicle accident that occurred on July 17, 1992, when the decedent, Flor Torres Osterman, was walking on the side of a road in a residential area in Broward County. A car owned by Deanna Dessanti and driven by Arnold Blair Dale hit and killed Flor Torres Osterman. At the time of the vehicular accident, Arnold Blair Dale was driving at a high rate of speed and had consumed alcoholic beverages. He was subsequently charged with DUI manslaughter and leaving the scene of an accident with injuries.

Dessanti's motor vehicle was insured under an automobile liability policy issued by U.S. Security Insurance Company that provided bodily injury coverage of \$10,000.00. Arnold Blair Dale was not a named insured, but was an additional insured because he was a permissive user of Dessanti's vehicle.

The administrator and personal representative of the Estate of Flor Torres Osterman, Carmen Maria Contreras, retained an attorney named Carlos Velasquez. That attorney wrote a letter to the U.S. Security insurance claims adjuster demanding the \$10,000.00 policy limits. In response, the insurance adjuster

tendered the policy limits along with a general release form discharging both Dessanti and Dale, as well as others who might have claims against them as a result of the accident.

The attorney responded to the insurance adjuster's letter by rejecting the tender of policy limits because of inclusion of Arnold Blair Dale and all others on the release form. The attorney offered to accept the policy limits in exchange for a release of Dessanti and U.S. Security, but not Arnold Blair Dale. The attorney enclosed a general release form releasing only Dessanti and U.S. Security. He advised U.S. Security that because of the gravity of Arnold Blair Dale's misconduct, the personal representative of decedent's estate was unwilling to settle the claim against Arnold Blair Dale and to release him.

U.S. Security failed to settle the claim against its named insured, Dessanti. The case proceeded to trial and resulted in entry of an excess judgment in the amount of one million dollars against both Dessanti and Dale.

Dessanti had filed for bankruptcy prior to entry of the final judgment. The trustee in bankruptcy executed an assignment, assigning Dessanti's cause of action for bad faith to the personal representative of the decedent's estate, Contreras.

The personal representative subsequently instituted this bad faith case, which proceeded to trial. At the conclusion of plaintiff's case, U.S. Security Insurance Company moved for a directed verdict on the bad faith claim. The trial court directed a verdict in favor of the insurer.

The personal representative of decedent's estate appealed. The Fourth District Court of Appeal reversed the final judgment entered on a directed verdict in favor of the insurance company and remanded the cause for a new trial.

U.S. Security Insurance Company filed a timely motion for rehearing, rehearing en banc, and certification. The Fourth District Court of Appeal denied those motions. Thereafter, U.S. Security Insurance Company filed a timely notice to invoke the discretionary jurisdiction of this court.

SUMMARY OF ARGUMENT

This court does not have jurisdiction to review the decision of the District Court of Appeal, Fourth District, in this cause. There is no direct and express conflict with *Boston Old Colony Ins. Co. v. Gutierrez*, 386 So. 2d 783 (Fla. 1980); *State Farm Fire & Cas. Co. v. Zebrowski*, 706 So. 2d 275 (Fla. 1997); *Berges v. Infinity Ins. Co.*, 896 So. 2d 665 (Fla. 2004); or *Williams v. Infinity Ins. Co.*, 745 So. 2d 573 (Fla. 5th DCA 1999). Because there is no direct and express conflict with the decision of this court or any other Florida appellate court, this court does not have jurisdiction to hear this cause on the merits. Accordingly, this court should deny the application for discretionary review.

ARGUMENT

This court does not have jurisdiction to review the decision of the District Court of Appeal, Fourth District, on the basis of conflict jurisdiction.

This court does not have jurisdiction to hear this case on the merits because there is no direct and express conflict with other Florida appellate decisions. “Conflict” exists when two decisions are wholly irreconcilable or when the decisions collide so as to create an inconsistency or conflict among the precedents. *Williams v. Duggan*, 153 So. 2d 726 (Fla. 1963); *Kincaid v. World Insurance Co.*, 157 So. 2d 517 Fla. 1963). In *Nielson v. City of Sarasota*, 117 So. 2d 731 (Fla. 1960), this court explained that conflict jurisdiction may be invoked where: (1) the District Court of Appeal announces a rule of law that conflicts with a rule previously announced by the Supreme Court or another District Court of Appeal, or (2) the District Court of Appeal applies a rule of law to produce a different result in a case that involves substantially the same controlling facts as a prior decision.

The constitutional standard is whether the decision of the District Court of Appeal on its face collides with a prior decision of this court or another District Court of Appeal on the same point of law so as to create an inconsistency or conflict among the precedents. In this case, there is no inconsistency or conflict among the precedents. Although the Fourth District acknowledged in its opinion that the issue in this case is a question of first impression in the State, it applied

longstanding Florida law regarding what constitutes bad faith in light of the circumstances in this case. The Fourth District correctly found that in this case what constitutes bad faith can be judged upon the principles set forth in *Boston Old Colony, supra*. The Fourth District did not apply a rule of law in this case to produce a different result than was reached in the four cases U.S. Security cites. Moreover, none of the cases it cites involves substantially the same controlling facts as this case.

A. There is no direct and express conflict with *Boston Old Colony Ins. Co. v. Gutierrez*.

In *Boston Old Colony*, the court set forth the principle that in handling the claims against its insured, an insurer has a duty to use the same degree of care and diligence as a person of ordinary care and prudence should exercise in the management of his own business, including investigating the facts, giving fair consideration to reasonable settlement offers and settling, if possible, where a reasonably prudent person would do so. Nothing in the opinion of the Fourth District conflicts with this court's decision in *Boston Old Colony v. Gutierrez*.

Contrary to U.S. Security's assertions, the Fourth District has not held that U.S. Security acted in good faith if it "sold Arnold Blair Dale down the river in order to obtain a release for Ms. Dessanti." The Fourth District stated nothing of that nature. Moreover, as is apparent from the opinion itself, U.S. Security attempted in good faith to obtain a release of Mr. Dale, as well as Ms. Dessanti.

However, when it became abundantly clear that it would be unable to obtain a release for both of those insureds, as well as all other persons, U.S. Security abandoned its named insured and made no efforts to settle this claim against her alone.

B. There is no express and direct conflict with the decision in *State Fire & Cas. Co. v. Zebrowski*.

U.S. Security argues that the decision of the Fourth District in this case violates the concept that an insurer's duty of good faith runs only to the insured, not to third party claimants. It contends the decision somehow allows the claimant to dictate which insured will receive the benefits of an insurance policy, thus allegedly creating a duty to third party claimants. That is not what the decision holds.

Moreover, U.S. Security mischaracterizes this court's decision in *State Farm v. Zebrowski*. *Zebrowski* is factually distinguishable from this case in that it involved a statutory bad faith claim pursuant to §624.155(1)(b)1, Florida Statutes. That case, unlike this one, did not involve an excess judgment entered against the insured.

Zebrowski sustained personal injuries at a shopping plaza owned by Haysfield Enterprises, which was insured by State Farm Fire & Casualty. Ms. *Zebrowski* and her husband filed a personal injury action against Haysfield, which

included a claim against State Farm for violating §624.155(1)(b)1 by not attempting in good faith to settle the Zebrowski's third party liability claim.

The trial court stayed prosecution of the third-party liability claim pending resolution of the personal injury claim. The Zebrowskis obtained a judgment within policy limits against State Farm's insured, which judgment was satisfied by State Farm.

The Zebrowskis then pursued their statutory bad faith claim. The trial court entered summary judgment in favor of State Farm on the basis that an injured claimant does not have a statutory bad faith claim against the third-party tortfeasors insurer when there is not an excess judgment.

The facts in Zebrowski are substantially different from the facts in this case; thus, there can be no direct and express conflict.

C. There is no direct and express conflict with this court's decision in *Berges v. Infinity Ins. Co.*

Once again, U.S. Security mischaracterizes the decision of the Fourth District in this case. Relying on this court's decision in *Berges*, the Fourth District stated that "the focus in a bad faith case is not on the actions of the claimant, but rather on those of the insurer in fulfilling its obligation to the insured." This statement does not conflict with, but rather adheres to, this court's decision in *Berges*.

D. There is no direct and express conflict with the decision in *Williams v. Infinity Ins. Co.*

The Fourth District Court of Appeal has not announced a rule of law that conflicts with a rule announced by the Fifth District in *Williams v. Infinity Ins. Co.* Moreover, the Fourth District has not applied a rule of law to produce a different result in a case that involves substantially the same controlling facts as *Williams v. Infinity Ins. Co.* *Williams* is factually distinguishable.

In *Williams*, an automobile accident victim's surviving spouse and child brought a bad faith action against the tortfeasor's insurer, contending that it acted in bad faith in refusing unilaterally to settle a wrongful death claim with two of the decedent's statutory survivors, to the exclusion of three other children. The decedent was survived by his wife and their son. In addition, he was survived by three other children who were born of another mother and were all under the age of 25 at the time of his death. The decedent's widow demanded the policy limits to settle her claim and that of her minor son, to the exclusion of other statutory beneficiaries of the decedent. The insurer tendered policy limits on condition that the tender satisfy the claims of the entire estate, rather than just the claims of two beneficiaries of the estate. The issue in that case was whether an insurer is obligated to settle with the first beneficiary who claims insurance proceeds. That is not the issue in this case. Thus, there is no conflict with the *Williams* decision.

CONCLUSION

The petitioner, U.S. Security Ins. Co., has failed to establish direct and express conflict between the decision of the Fourth District in this case and other

Florida appellate decisions. The decision of the Fourth District is totally reconcilable with the cited decisions. There is no irreconcilable conflict or inconsistency among precedents. Accordingly, this court should deny the application for discretionary review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by **U.S. mail** this **29th** day of **September, 2006** to: **Mark R. Boyd and Valerie Shea**, Heinrich Gordon Hargrove Weihe & James, 500 East Broward Boulevard, 10th Floor, Fort Lauderdale, FL 33394-3092 (counsel for defendant); **Joseph S. Kashi**, Sperry Shapiro & Kashi, 1776 N. Pine Island Road, Suite 324, Plantation, FL 33322-5235 (co-counsel for plaintiff); **Diego C. Asencio**, 636 U.S. Highway One, Suite 115, North Palm Beach, FL 33408 (co-counsel for plaintiff); and **David B. Pakula**, 2500 Weston Road, Suite 220, Weston, FL 33331 (counsel for appellee U.S. Security).

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief is written in 14 point “Times New Roman” font.

By: _____
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