

Supreme Court of Florida

CASE NO. SC09-1701

CATHLEEN AINSWORTH, as parent and
natural guardian of JOSHUA AINSWORTH,

Petitioner,

v.

ZURICH AMERICAN INSURANCE COMPANY,
and COLONIAL AMERICAN CASUALTY
AND SURETY COMPANY,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, THIRD DISTRICT OF FLORIDA

PETITIONER'S JURISDICTIONAL BRIEF

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STATEMENT OF THE CASE AND FACTS

This is a petition for discretionary review of the decision of the Third District Court of Appeal rendered on August 5, 2009 reversing the circuit court's appellate decision reversing a summary judgment in favor of the insurer. That appeal arose from a civil action for coverage under an insurance policy's MedPay provision.

Facts:

This case arises from a dispute as to whether MedPay coverage exists for an automobile accident which occurred on the street in front of the insured's premises.

The MedPay clause of the policy states:

COVERAGE C MEDICAL PAYMENTS

1. Insuring Agreement
 - a. We will pay medical expenses as described below for "bodily injury" caused by an accident:
Because of your operations; provided that:
 - (1) The accident takes place in the "coverage territory" and during the policy period;
 - (2) The expenses are incurred and reported to us within one year of the date of the accident; and
 - (3) The injured person submits to examination, at our expense, by physicians of our choice as often as we reasonably require.
 - b. We will make these payments regardless of fault. These payments will not exceed the applicable limit of insurance. We will pay reasonable expenses for:

Necessary ambulance, hospital, professional nursing and funeral services.

Petition at 3.

On September 4, 2002, Appellant Cathleen Ainsworth was driving her vehicle eastbound on Quail Roost Drive; her son Joshua Ainsworth was a passenger in the vehicle. As she approached SW 114th Avenue, she was struck by a vehicle driven by Christian Fernandez exiting a Burger King. The Burger King driveway is adjacent to the Bank's driveway, separated by a hedge. The five to six-foot high bushes blocked Mr. Fernandez's view of traffic on Quail Roost Drive. Consequently, he had to pull out into traffic. Ms. Ainsworth was traveling on the road directly in front of the Bank as she approached the driveways. Her view of cars exiting the Burger King driveway was obstructed by vehicles exiting from the Bank's driveway.

After Ms. Ainsworth's vehicle was struck by the Fernandez vehicle, she ricocheted into oncoming traffic and was struck by a westbound vehicle driven by Perez. Ms. Ainsworth's vehicle ended up under the Perez vehicle. Both Cathleen Ainsworth and Joshua Ainsworth were injured.

Proceedings Below:

Zurich moved for summary judgment, arguing that the accident did not

occur on “ways next to premises Total Bank rents or owns,” nor as a result of the Bank’s operations. Zurich argued that although the accident happened on Quail Roost Drive (the street in front of the insured’s premises), there was no coverage because the accident did not happen on the insured’s premises or in its parking lot. Zurich argued that the street in front of the bank did not qualify as “ways next to.” Zurich also argued that the clause “due to the bank’s operations” only applied to occurrences away from the premises, such as if the bank was conducting business at a county fair. In other words, that “operations” hinges on location. The trial court agreed with the “locale” argument, that “operations” did not refer to “how the place was being run.”

Ainsworth argued that the portion of Quail Roost Drive in front of the insured’s premises falls within the coverage for incidents occurring in “ways next to” the insured’s premises. Alternatively, Ainsworth argued that coverage existed because the accident occurred “due to the bank’s operations” — that the customers exiting from the drive-through teller lanes onto Quail Roost Drive obstructed Ainsworth’s view, thereby contributing to the accident.

The trial court held that Ainsworth “is not entitled to MedPay coverage because the accident did not occur on ways next to premises Total Bank owns or rents and did not occur because of the Total Bank’s operations.” The holding was

based on the court's finding that "ways next to" applied only if the accident occurred on the bank's premises or involved bank customers. The trial court also held that "due to operations" only provided coverage at a location where the bank was actively engaged in conducting business.

On appeal, Ainsworth argued that the portion of Quail Roost Drive in front of the bank does adjoin the bank's premises and qualifies as "ways next to." Zurich continued to argue that the public roadway cannot abut the premises because there was an intervening parking lot and sidewalk. The issue on appeal was strictly one of interpreting the policy language.

The circuit court reversed the county court because, as a matter of law, the county court's holding was based on erroneous definitions of the policy language. The circuit court held that coverage "due to operations" may be had anywhere in the coverage territory, not just where the insured is actively conducting business.

The main focus of the circuit court's opinion is whether Quail Roost Drive falls within the meaning of "ways next to." The circuit court correctly determined that the bank does abut and adjoin Quail Roost Drive so that the portion of the roadway in front of the bank is encompassed by "ways next to."

On certiorari review, the district court reversed the circuit court. The Third District held that the circuit court incorrectly interjected liability issues into its

analysis of MedPay coverage, under the “due to your operations” provision, thereby misconstruing the coverage provision. The Third District also held that the circuit court misconstrued the coverage provision of “ways next to premises [the insured] owns or rents.” The Third District undertook a *de novo* review of the meaning of the policy language and determined that Quail Roost Drive was not a “way next to premises.” Therefore, the Third District concluded that there was no coverage under either MedPay provision.

The petition for writ of certiorari was granted and the circuit court decision quashed.

SUMMARY OF THE ARGUMENT

This Court has conflict jurisdiction because the Third District undertook a *de novo* review of a circuit court decision acting in its appellate capacity, contrary to the standard of review for petitions for certiorari set forth by this Court in *Ivey v. Allstate Ins. Co.*, 774 So. 2d 679 (Fla. 2000).

This Court should exercise its discretion and accept jurisdiction because the underlying issue concerning insurance coverage under a policy’s MedPay provision is one of great public importance. There are two issues to be determined: 1) whether an automobile accident in front of the insured’s premises must have a connection to the insured’s business in order for coverage to exist under the

MedPay provision; and 2) whether the “ways next to” language in an insurance policy encompasses the street in front of the insured’s premises.

ARGUMENT

I.

THIS COURT HAS JURISDICTION BECAUSE THE DISTRICT COURT’S EXERCISE OF CERTIORARI JURISDICTION EXCEEDED THE STANDARD OF REVIEW SET FORTH IN *IVEY*

Rather than limiting itself to analyzing whether the circuit court applied the incorrect law, the Third District undertook *de novo* review. When a district court of appeal reviews the decision of a circuit court acting in its appellate capacity, the district court is limited to determining whether there was a lack of procedural due process or a departure from the essential requirements of law. *Ivey v. Allstate Ins. Co.*, 774 So. 2d 679, 682 (Fla. 2000)(citing *Martin County v. City of Stuart*, 736 So. 2d 1264, 1265 (Fla. 4th DCA 1999)). The departure from the essential requirements of law necessary for the issuance of a writ of certiorari is more than a simple legal error. *Id.* The district court should use its discretion to correct an error only when there has been a violation of a clearly established principle of law resulting in a miscarriage of justice. *Id.*

The Third District granted certiorari review because it disagreed with the

circuit court's interpretation of the policy language; other than a plain statement as to incorrect law, the Third District makes no attempt to distinguish or discredit the cases cited by the circuit court.

Mere disagreement with the circuit court's decision is not a basis for certiorari review. It is not enough that the district court disagrees with the circuit court's interpretation of the applicable law; there must be an application of incorrect law or a miscarriage of justice before a writ of second-tier certiorari may issue. *See Haines City Community Development v. Heggs*, 658 So. 2d 523 (Fla. 1995). "A decision made according to the form of law and the rules prescribed for rendering it, although it may be erroneous in its conclusion as to what the law is as applied to facts, is not an illegal or irregular act or proceeding remediable by certiorari." *Id.* at 525. Therefore, a writ of certiorari does not issue to correct legal error.

Certiorari should not be used to grant a second appeal. *Allstate Ins. Co. v. Kaklamanos*, 843 So. 2d 885, 889 (Fla. 2003). "It is well-established that certiorari should not be used as a vehicle for a second appeal in a typical case tried in county court." *Ivey* at 682. (*citing Martin County*, 736 So. 2d at 1265). As in *Ivey*, it is clear in this case that the Third District granted certiorari because it disagreed with the circuit court's conclusions. Although the decision grants certiorari "on grounds

that the Circuit Court did not apply the correct law,” Opinion at 5, it is only as to the first issue—whether coverage existed due to the bank’s operation—that the district court finds legal error. The issue is very abbreviatedly dispatched in one paragraph.

The major focus of the opinion concerns itself with a *de novo* review of the policy provisions, specifically the interpretation of “ways next to.” After construing the facts, and never once analyzing or rejecting the case law utilized by the circuit court, the district court found “as a matter of law, that the meaning of ‘ways next to premises’ does not afford coverage for this accident.” The district court states that it quashes the decision based on the circuit court’s need for a determination of liability, a liability factor which the Third District held as contrary to law for Med Pay provisions. However, the circuit court made no such finding in its interpretation of “ways next to” and the district court did not find that the circuit court applied the incorrect law to determine that the location of the accident met the policy provision. Instead, the district court applied its own analysis and quashed the decision because it disagreed with the circuit court as to whether the accident location was not immediately adjoining the insured’s premises.

The district court has therefore exceeded its limitations for certiorari review and is in conflict with this Court’s decisions as well as the other district courts of

this state.

II.

THIS COURT SHOULD EXERCISE ITS JURISDICTION BECAUSE THE ISSUE OF COVERAGE UNDER MEDPAY PROVISIONS IS OF GREAT PUBLIC IMPORTANCE AND LIKELY TO RE-OCCUR

Once this Court recognizes the existence of conflict jurisdiction, it should exercise its discretion and consider this case on the merits due to the existence of very serious public policy concerns resulting from the Third District's decision.

The District has narrowed coverage under MedPay provisions by constricting the meaning of policy language common to standard insurance policies—"due to your operations" and "ways next to premises you own or rent." Restricting policy language to the Third District's very narrow interpretation will adversely affect inestimable numbers of Florida citizens.

Issues as to insurance coverage have always been of great public importance. *See, e.g., State Farm Mut. Auto Ins. Co. v. Roach*, 945 So. 2d 1160 (Fla. 2006)(Florida public policy to protect its citizens and afford UM coverage). *See also, Young v. Progressive Southeastern Ins. Co.*, 753 So. 2d 80 (Fla. 2000)(provisions in uninsured policies which provides less than coverage required by statute are invalid); *State Farm Mut. Auto. Ins. Co. v. Sevearingen*, 590 So. 2d

506 (Fla. 4th DCA 1999)(limitation on MedPay coverage invalid when in conflict with MedPay statute); *Bolden v. State Farm. Mut. Auto. Ins. Co.*, 689 So. 2d 339, 341 (Fla. 4th DCA 1997)(interpretation of MedPay provisions of great public importance where exclusionary language was prevalent throughout insurance industry).

It will be argued that Petitioner is seeking to expand MedPay coverage beyond any circumstances to which it applies—that Petitioner’s view of the policy language would open the flood gates to litigation to collect MedPay against any business in the general vicinity of an auto accident. This argument emphasizes the importance of this case and the important public policy reasons why this Court should exercise its discretion and accept jurisdiction.

CONCLUSION

WHEREFORE, this Court has jurisdiction due to the Third District’s use of *de novo* review for a petition for certiorari which is in conflict with the standard of review this Court outlined in *Ivey*. The underlying insurance coverage issue being one of great public importance, this Court should exercise its discretion and accept jurisdiction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief has been computer generated
in 14 point Times New Roman and complies with the requirements of Rule 9.210.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail upon Hinda Klein, Conroy Simberg, Ganon, Krevans, Abel, Lurvey, Morrow, & Schefer, P.A., 3440 Hollywood Boulevard, Second Floor, Hollywood, Florida 33021, Brett Weinberg, The Law Offices of Brett A. Weinberg, P.A., Co-Counsel for Plaintiff, 201 Alhambra Circle, Coral Gables, Florida 33134, and Rosemarie Wilder, Marlow Connell Valerius Abrams Adler Newman & Lewis, Amicus Curiae on behalf of Audubon, 4000 Ponce de Leon Boulevard, Suite 570, Coral Gables, Florida 33146 on this the 14th day of September, 2009.

By: _____
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