

SUPREME COURT OF FLORIDA

SC10-1296

PHILIP B. MARKHAM,

Petitioner,

vs.

**MERCURY INSURANCE COMPANY
OF FLORIDA,**

Respondent.

**ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF
APPEAL, FIRST DISTRICT, L.T. NO. 1D09-2054**

PETITIONER'S JURISDICTIONAL BRIEF

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STATEMENT OF THE CASE AND FACTS

Petitioner Philip P. Markham, appellee below, seeks review of the decision of the District Court of Appeal, First District, in Mercury Insurance Company of Florida v. Philip B. Markham, Case No. 1D09-2054 (Fla. 1st DCA Oct. 27, 2010) (“slip op.”), based on express and direct conflict with decisions of this Court and other district courts of appeal on the same point of law. See Art. V, § 3(b)(3), Fla. Const.

The facts stated in the opinion below indicate that respondent Mercury Insurance Company of Florida issued an automobile liability insurance policy to Michael Roberts. The insurance application signed by Roberts asked: “Is any vehicle rebuilt, salvaged, modified, altered, or specifically built/customized?” Slip op. at 3 (emphasis in court’s opinion). Roberts answered the question “no” even though he had installed larger, wider tires and a lift-kit on the truck as depicted by three photographs reproduced in the opinion below. See slip op. at 3-4. As noted by the district court:

Roberts testified that he did not read the application and that he relied on the broker (who, according to Roberts, was aware of the nature and extent of the modifications to the truck) to fill out the form. Roberts testified that his truck had been “altered in many ways” from the original manufacturer’s specifications, including the tinting of the windows, installation of a stereo, and installation of the larger, wider tires and lift-kit. However, he also testified that he did not know what the terms “modified” or “altered” meant in the context used on the insurance

application and that, to him, “modified” referred to engines and related parts because he previously raced cars and there were modified classes in racing.

Slip op. at 4.

In July, 2002, petitioner suffered injuries when his foot and ankle were run over by a Ford F-250 truck owned by Roberts and insured under the policy issued by Mercury. After petitioner filed a claim for his injuries, Mercury rescinded the policy, returned Roberts’ premium and refused to defend petitioner’s claim based upon an alleged material misrepresentation made by Roberts in the insurance application when he answered “no” to the question whether his vehicle was “modified.” Roberts subsequently settled with petitioner and assigned his claims against Mercury to petitioner. See slip op. at 2.

In his action against Mercury to recover under his settlement with Roberts, petitioner moved for partial summary judgment, arguing the insurer improperly denied coverage to Roberts because the undefined term “modified” in the insurance application was ambiguous. See slip op. at 2. In response, Mercury argued that the disputed question on its application was unambiguous and contended Roberts’ negative response to the question was a material misrepresentation that vitiated coverage under section 627.409(1), Florida Statutes (2002). Mercury filed an affidavit stating the insurer would not have issued the

policy had Roberts answered the question in the affirmative as he allegedly should have. See slip op. at 4-5.

The trial court granted petitioner's motion for partial summary judgment, finding that the "policy wording is ambiguous" and that insurance coverage existed as a matter of law because the ambiguity in the insurance application must be construed in favor of coverage. Slip op. at 2. Specifically, "[t]he trial court found the question at issue ambiguous because the term 'modified' was susceptible to two reasonable interpretations: 1) that it has something to do with racing and non-street legal type vehicles, as argued by Appellee, and 2) that it encompasses any change to a vehicle, as argued by Mercury." Slip op. at 7.

After the trial court granted partial summary judgment, the jury returned a verdict finding that Mercury wrongfully refused to defend petitioner's claim and that the settlement between Roberts and petitioner was reasonable in amount and negotiated in good faith. The trial court entered a final judgment against Mercury which the insurer appealed to the First District. See slip op. at 3.

The district court disagreed with the trial court's conclusion that the undefined term "modified" used in the application was susceptible to more than one reasonable interpretation and therefore reversed the judgment in petitioner's favor with one judge dissenting. Notably, the district court majority found the disputed question on the application unambiguous as a matter of law by relying on

extrinsic evidence outside the language used in the insurance application and policy. Specifically, the district court analyzed the disputed question on the application from the standpoint of the applicant's particular factual circumstances rather than confining its analysis to the four corners of the application and accompanying insurance policy. The district court explained:

The issue is not whether there are two interpretations of “modified” that could render the question ambiguous in the abstract; rather, the issue is whether an objectively reasonable person in Roberts’ situation (i.e., having installed larger, wider tires and a lift-kit on his truck) could truthfully answer the question in either the affirmative or the negative. See State Farm Fire & Cas. Ins. Co. v. Deni Assocs. of Fla., Inc., 678 So. 2d 397 (Fla. 4th DCA 1996) (stating that insurance policy language generally is read as it would be understood by a reasonable person). Thus, the fact that, under the interpretation proffered by Mercury, “modified” might be ambiguous in the context of an applicant who had only added mud flaps, fuzzy dice, or window tinting to his vehicle is irrelevant to the issue of whether the term is ambiguous to an objectively reasonable person in Roberts’ situation.

Slip op. at 7.

SUMMARY OF ARGUMENT

The court below reversed the final judgment in petitioner's favor by erroneously relying on extrinsic evidence to hold that the disputed question on respondent's insurance application was unambiguous as a matter of law. Based on this holding, the decision below expressly and directly conflicts with decisions

from this Court and other district courts of appeal which hold that the question whether a contract is ambiguous is determined from the language in the contract itself without resort to extrinsic evidence.

ARGUMENT

THE DISTRICT COURT DECISION BELOW EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS FROM THIS COURT AND OTHER DISTRICT COURTS OF APPEAL HOLDING THAT THE QUESTION WHETHER A CONTRACT IS AMBIGUOUS IS DETERMINED BY THE COURT FROM THE CONTRACT LANGUAGE WITHOUT RESORT TO EXTRINSIC EVIDENCE.

As with other contracts, the existence of ambiguities in insurance contracts¹ is an issue of law for the court. See Strama v. Union Fid. Life Ins. Co., 793 So. 2d 1129, 1132 (Fla. 1st DCA 2001). An insurance contract is ambiguous when the court finds the disputed language is susceptible to more than one reasonable interpretation. See Auto-Owners Ins. Co. v. Anderson, 756 So. 2d 29, 34 (Fla. 2000). Ambiguous policy language is “construed strictly against the insurer that drafted the policy and liberally in favor of the insured.” Fayad v. Clarendon Nat. Ins. Co., 899 So. 2d 1082, 1086 (Fla. 2005).

When a question on an insurance application is susceptible to more than one reasonable interpretation, one requiring a positive answer and the other requiring a negative answer, the application is ambiguous as a matter of law. See

¹ The “insurance contract” includes both the application and policy. See Gainsco v. ECS/Choicepoint Services, Inc., 853 So. 2d 491, 493 (Fla. 1st DCA 2003).

Comprehensive Benefit Adm'rs, Inc. v. Nu-Cape Constr., Inc., 549 So. 2d 700, 700 (Fla. 2d DCA 1989); Great Oaks Cas. Ins. Co. v. State Farm Mut. Auto. Ins. Co., 530 So. 2d 1053, 1055 (Fla. 4th DCA 1988); Williams v. General Ins. Co., 468 So. 2d 1033, 1034-35 (Fla. 3d DCA), rev. denied, 476 So. 2d 673 (Fla. 1985). When the application is ambiguous, the court must resolve the ambiguity in the insured's favor by summary judgment or directed verdict because the insured's answer to an ambiguous question—whether “yes” or “no”—is not a material misrepresentation that vitiates the policy. See Comprehensive Benefit, 549 So. 2d at 700.

In McGhee Interests, Inc. v. Alexander Nat'l Bank, 102 Fla. 140, 145, 135 So. 545, 547 (1931), this Court emphasized that “[a]mbiguities should arise from the words used in a contract before this court may resort to interpretation or construction to ascertain the intention of the parties to it.” (emphasis supplied). “In other words, ambiguity must exist in the contract, not outside of it.” Id.

Based on this principle, the district courts uniformly hold that the question whether a contract is ambiguous is determined by the court solely from the contract language without resort to extrinsic evidence. See, e.g., Peach State Roofing, Inc. v. 2224 South Trail Corp., 3 So. 3d 442, 445 (Fla. 2d DCA 2009) (“‘[B]efore a trial court can consider such extrinsic evidence in interpreting a contract, the words used must be unclear such that an ambiguity exists on the face of the contract.’”) (quoting Emergency Assocs. of Tampa, P.A. v. Sassano, 664 So. 2d 1000, 1002

(Fla. 2d DCA 1995)) (emphasis supplied); Newport Seafood, Inc. v. Neptune Trading Corp., 555 So. 2d 376, 378 (Fla. 3d DCA 1989) (“No ambiguity appeared on the face of the instrument, as in this case, which would have rendered extrinsic evidence admissible.”) (emphasis supplied); Boat Town U.S.A., Inc. v. Mercury Marine Div. of Brunswick Corp., 364 So. 2d 15, 17 (Fla. 4th DCA 1978) (“The ambiguity must exist on the face of the document itself before extrinsic matters may be considered by the court.”) (emphasis supplied).

District courts also have applied this principle to interpret insurance applications. See GRG Transp., Inc. v. Certain Underwriters at Lloyd’s, London, 896 So. 2d 922, 925 (Fla. 3d DCA 2005) (finding no ambiguity “[a]fter reviewing the entire insurance application and specifically question 19”); St. Paul Guardian Ins. Co. v. Canterbury School of Fla., Inc., 548 So. 2d 1159, 1161 (Fla. 2d DCA 1989) (finding no ambiguity after considering “the entire policy along with the application for insurance”).

The First District decision under review expressly and directly conflicts with McGhee and the district court cases cited above because the court below relied on extrinsic evidence to hold that the disputed question on Mercury’s insurance application was unambiguous as a matter of law. Rather than determining the existence of an ambiguity from the four corners of the document as required by McGhee and its progeny, the court below impermissibly construed the disputed

question from the standpoint of the individual insurance applicant based on extrinsic evidence such as photographs of the applicant's vehicle and the applicant's deposition testimony. As the district court explained,

the fact that, under the interpretation proffered by Mercury, "modified" might be ambiguous in the context of an applicant who had only added mud flaps, fuzzy dice, or window tinting to his vehicle is irrelevant to the issue of whether the term is ambiguous to an objectively reasonable person in Roberts' situation.

Slip op at 7. In other words, according to the district court's erroneous case-by-case approach, the disputed question on the application might be ambiguous for some applicants while unambiguous for others, depending on extrinsic evidence peculiar to each applicant's vehicle. This approach directly conflicts with the cases cited above which require the court to determine the existence of an ambiguity from the four corners of the instrument. As explained by the dissent:

The majority concedes that the term "modified" might be ambiguous if the insured had merely added "mud flaps, fuzzy dice, or window tinting" to his vehicle. But it seems to me that this kind of reasoning puts the court in the position of making *ad hoc* decisions about the situations in which the term "modify" is ambiguous.

It is fair to assume, as the majority evidently has in this case, that the insurance company might be less concerned about changes in appearance than it would be about changes that affect safety or performance. However, we must decide the issue based on the language of the policy, not on the basis of our own assumptions.

Slip op. at 15-16 (Padovano, J., dissenting) (emphasis supplied).

CONCLUSION

This Court should accept jurisdiction, resolve the conflict and decide the 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 Elizabeth K. Russo, Esquire, Russo Appellate Firm, P.A., 6101 Southwest 76th Street, Miami, Florida 33143, attorneys for respondent; Kathy J. Maus, Esquire, and Julius F. Parker III, Esquire, Butler Pappas Weihmuller Katz Craig LLP, 3600 Maclay Boulevard, Suite 101, Tallahassee, Florida 32312, attorneys for respondent; and Thomas T. Demas, Esquire, Thomas T. Demas, P.A., Post Office Box 1933, Lake City, Florida 32056, attorney for Michael W. Roberts, by U.S. Mail this 6th day of July, 2010.

CERTIFICATE OF TYPE STYLE AND SIZE

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

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