

In the Supreme Court of Florida

CASE NO.: SC10-1296

PHILIP S. MARKHAM,

Petitioner,

v.

MERCURY INSURANCE COMPANY OF FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW FROM THE
FIRST DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON JURISDICTION

Respectfully submitted,

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SUMMARY OF ARGUMENT

The First District's decision applies well-settled Florida principles of insurance contract construction to reach its holding. The decision does not create any conflict, and discretionary review should accordingly be denied.

ARGUMENT

As this Court noted in *Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980): “This Court may only review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal or the Supreme Court on the same question of law.” Petitioner has shown no such express and direct conflict here.

The issue presented in the case was whether Respondent Mercury Insurance Company's motor vehicle insurance application was ambiguous in asking whether the applicant's vehicle had been “modified” or “altered” by reference to extrinsic evidence. The First District's decision set out the facts of the case, noting that the applicant “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.” (Slip op. at 4). The legal analysis that follows in the decision, far from conflicting with other Florida appellate decisions, is based on entirely commonplace, well-established Florida principles of insurance contract/application construction.

The First District’s decision says that, absent a definition set out in the policy or application itself, “we interpret the word in accordance with its plain and ordinary meaning as reflected in the dictionary.” (Slip Op. at 8). This Court expressed exactly the same principle in *Garcia v. Federal Ins. Co.*, 969 So. 2d 288 (Fla. 2007):

When interpreting insurance contracts, we may consult references commonly relied upon to supply the accepted meanings of words. *See Gov’t Employees Ins. Co. v. Novak*, 453 So. 2d 1116, 1118 (Fla. 1984) (citing Webster’s Third New International Dictionary 11 (1966) to define “accident”); *Beans v. Chohonis*, 740 So. 2d 65, 67 (Fla. 3d DCA 1999) (“One looks to the dictionary for the plain and ordinary meaning of words”).

969 So. 2d at 291-292.

The First District’s decision also notes that “[a] question is ambiguous if it is susceptible to two *reasonable* interpretations”, and that “[a]ny such ambiguity must be construed against the insurer and in favor of coverage.” (Slip Op. at 6, emphasis supplied). These propositions are so firmly entrenched in Florida jurisprudence that citation to case law is hardly necessary. Exemplar decisions from this Court alone include: *Penzer v. Transportation Ins. Co.*, 29 So. 3d 1000 (Fla. 2010); *Fayad v. Clarendon Nat. Ins. Co.*, 899 So. 2d 1082, 1086 (Fla. 2005); *Swire Pac. Holdings, Inc. v. Zurich Ins. Co.*, 845 So. 2d 161, 165 (Fla. 2003); *Auto-Owners Ins. Co. v. Anderson*, 756 So. 2d 29, 33 (Fla. 2000); *State Farm Fire & Cas. Co. v. CTC Dev. Corp.*, 720 So. 2d 1072, 1076 (Fla. 1998); and *Deni*

Assocs. of Florida, Inc. v. State Farm Fire & Cas. Ins. Co., 711 So. 2d 1135, 1138 (Fla. 1998).

Applying these familiar principles, the First District held that there was no ambiguity in the application's question about whether the applicant's vehicle had been "modified" because the Petitioner had not suggested another *reasonable* interpretation in addition to the plain dictionary definitions. The decision sets out Petitioner's suggested alternative meaning for "modified", i.e., "that it has something to do with racing and non-street legal type vehicles, as argued by [Petitioner]." (Slip Op. at 7). The decision describes Petitioner's ambiguity argument:

[Petitioner/Appellee] does not dispute the materiality of the alleged misrepresentation made by Roberts in the application. *Rather, [Petitioner/Appellee] contends that the question was ambiguous when "modified" is read in context of the other types of vehicles listed in the question and the policy's coverage of loss or damage to "custom parts or equipment" and "special equipment or modifications."*

(Slip Op. at 5). Given Petitioner's rather vague suggestions, the First District concluded that no reasonable second interpretation had been shown by the Petitioner:

The interpretation proffered by [Petitioner]/Appellee is not reasonable, even when "modify" is viewed in context of the other types of vehicles listed in the question and certain provisions in the policy. Vehicles that are "rebuilt" or "salvaged" are not, as the trial court found, non-street legal; they simply receive different titles and are subject to additional disclosure requirements upon transfer. *See* §§ 319.14, 319.30, Fla. Stat.

Likewise, the other terms in the question - “altered” and “specifically built/customized” - do not refer to non-street legal vehicles or racing vehicles. *Cf.* § 320.0863, Fla. Stat. (2009) (providing special registration for “custom vehicles” that meet applicable safety requirements). Moreover, the fact that the policy covers certain “custom parts or equipment” and “special equipment or modifications” does not render “modified” ambiguous because the coverage provided in the policy for loss or damage to such parts is limited to \$1,000 unless the equipment is disclosed in the application and an additional premium is paid, which did not occur in this case.

(Slip Op. at 9).

In reaching its holding, the First District “look[ed] to the dictionary for the plain and ordinary meaning of words,” *Garcia v. Federal Ins. Co.*, 969 So. 2d 288, 292 (Fla. 2007), and then determined that Petitioner had failed to show an ambiguity because Petitioner had no reasonable alternative interpretation. The reasoning set out in the decision was in accord, not conflict, with established Florida law.

Petitioner argues that the First District’s decision “impermissibly looked at 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.” (Petitioner’s Jurisdictional Brief, pp 7-8). In fact, the First District expressly reiterated that an **objective** standard applies, noting only that the factual specifics as to this case and the insured’s own testimony demonstrated that no injustice was being worked here:

We conclude that there is no ***objectively reasonable*** interpretation of “modify” that would justify Roberts’ negative answer to this question. Where, as here, neither the application form, nor the policy incorporated by reference therein, defines “modify,” we interpret the word in accordance with its plain and ordinary meaning as reflected in the dictionary. *See Garcia v. Federal Ins. Co.*, 969 So. 2d 288, 291-92 (Fla. 2007). The dictionary defines “modify” to mean “to make minor changes in” and “to make a basic or important change in; alter.” *See Webster's Seventh New Collegiate Dictionary*, at 544 (1967). One only needs to look at the pictures of Roberts’ truck to conclude that his negative answer to the question was inaccurate under either of these definitions.

Moreover, although ***an objective standard applies***, it is significant that Roberts acknowledged in his testimony that his truck had been “*altered* in many ways” (emphasis added), which in and of itself would have required an affirmative answer to the question. *See id.* at 24 (defining “alter” to mean “to make different without changing into something else”); *cf. Carter v. United of Omaha Life Ins.*, 685 So. 2d 2, 6 (Fla. 1st DCA 1996) (explaining that an applicant’s belief of the truth of his answer must be accepted “only so far as that belief is not clearly contradicted by the factual knowledge on which it is based”) (quoting *Skinner v. Aetna Life & Casualty*, 804 F.2d 148, 151 (D.C. Cir. 1986)), *approved in pertinent part by, Green v. Life & Health of Am.*, 704 So. 2d 1386 (Fla. 1998).

(Slip Op. at 8)(emphasis added).

The First District’s decision does not, in short, create a new principle of law in conflict with other Florida appellate decisions requiring ambiguity to be determined either from the subjective standpoint of an individual applicant or from extrinsic evidence. The decision applied the settled principles of construction, and no conflict has been created that would require resolution by this Court.

In the end, Petitioner impermissibly relies on the dissent to make his conflict

argument. Specifically, Petitioner concludes his brief by quoting paragraphs from the dissenting opinion, saying that the conflict is “explained by the dissent.” (Petitioner’s Jurisdictional Brief, p 8). This Court has long since advised that a dissent cannot be used to establish conflict:

Conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision. Neither a dissenting opinion nor the record itself can be used to establish jurisdiction. *See Jenkins v. State*, 385 So. 2d 1356 (Fla. 1980).

Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986).

Respondent respectfully submits that no conflict has been shown, and that accordingly there is no basis for exercise of conflict jurisdiction.

CONCLUSION

Based on the foregoing facts and authorities, Respondent respectfully submits that the Court should decline to exercise conflict jurisdiction in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the Respondent's Brief on Jurisdiction was sent by U.S. mail this 28th day of July, 2010 to: Thomas T. Demas, Esquire, P.O. Box 1933, Lake City, Florida 32056-1933; T. Bradley McRae, Esquire, 318 East Duval Street, Lake City, Florida 32055; and Louis K. Rosenbloum, Esquire, Louis K. Rosenbloum, P.A., 4300 Bayou Boulevard, Suite 36, Pensacola, Florida 32503.

ELIZABETH K. RUSSO

CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

Undersigned counsel hereby respectfully certifies that the foregoing Brief on Jurisdiction complies with Fla. R. App. P. 9.210 and has been typed in Times New Roman, 14 Point.

ELIZABETH K. RUSSO