IN THE SUPREME COURT OF FLORIDA

COMPANION PROPERTY AND CASUALTY INSURANCE COMPANY,	)	
Petitioner,	)	
V.	)	**CASE NO.: SC12-144**
CATEGORY 5 MANAGEMENT GROUP, LLC,	)	
Respondent	)	

RESPONDENT'S BRIEF ON JURISDICTION

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PREFACE

This is Respondent's Brief on Jurisdiction submitted pursuant to Rule 9.120(d), Fla. R. App. Procedure. Throughout this Brief, Petitioner, Companion Property and Casualty Insurance Company, is referred to as Appellee. Respondent, Category 5 Management Group, L.L.C., is referred to as "Cat 5". All references to the First District's decision herein shall be designated "A" (referring to the Appendix filed by Petitioner which consists of the First District's decision herein) followed by the appropriate page number reference in the decision (A., p. ___).

STATEMENT OF THE CASE AND FACTS

Appellee rejected CAT 5's demand for defense and indemnity based solely upon the Auto Exclusion in the policy. (A., p. 3) The Auto Exclusion provides:

> This insurance does not apply to:
> . . .
> **g. Aircraft, Auto or Watercraft**
>
> "Bodily injury" or "property damage" arising out of the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft **owned or operated by or rented or loaned to any insured**. Use includes operation and "loading or unloading."
>
> This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by the insured if the "occurrence" which caused the "bodily injury" or "property damage" involved the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft that is **owned or operated by or rented or loaned to any insured**. (emphasis added) (A., p. 3-4).

The underlying complaint made by the Stewart Family against CAT 5 alleged in part:

> 37. Defendant Joe Edward Johnson was driving a truck owned by Defendant R.D. Construction at the time of the wreck and prior to the wreck and **was an employee of Colonel McCrary Trucking at the time of the wreck**. Defendant Joe Edward Johnson was operating said vehicle **with permissive use on behalf of Colonel McCrary Trucking** and for the benefit and economic well being of all defendants. (emphasis added) (A., p. 3).

The First District issued its opinion on November 16, 2011 finding the Auto Exclusion did not apply and that Appellee wrongly denied a defense to CAT 5.

> By its own terms, the exclusionary clause in this case did not apply to all claims arising out of the ownership, maintenance, use or entrustment to others of any automobile, but only to such claims involving automobiles "owned or operated by or rented or loaned to any insured." The policy defined "insured" as including appellant and its employees. Accordingly, appellant correctly argues the automobile exclusion did not apply in this case because the complaint alleged the pickup truck involved in the collision was owned by R.D. Construction (not appellant) and operated by Joe Johnston, an employee of Colonel McCrary Trucking (not appellant), and there was no allegation the truck was rented or loaned to appellant. See Scottsdale Ins. Co. v. Subscription Plus, Inc., 299 F.3d 618, 620 (7th Cir. 2002). (A., p. 5).
>
> The First District concluded:
>
> In conclusion, because the complaint in the personal injury action against appellant alleged facts that fairly brought the suit outside the automobile exclusion, we reverse the trial court's summary final judgment for appellee and remand for further proceedings consistent with this opinion. In doing so, we note where a liability insurer had notice of a proceeding against its insured and is afforded an opportunity to appear and defend, a judgment rendered against the insured, in the absence of fraud or collusion, is conclusive against the insurer as to all material matters determined therein. Gallagher v. Dupont, 918 So.2d 342, 349 (Fla. 5th DCA 2005). (A., p. 7-8).

CAT 5 expressly disputes that portion of Appellee's Statement of the Case and Facts wherein it asserts the underlying complaint alleged Joe Johnson was an employee of CAT 5. This is untrue. CAT 5 further objects and moves to strike Appellee's numerous references to the "record" and other materials not properly before the Court. Such materials were previously stricken from Appellee's Appendix by this Court's Order of February 7, 2012.

SUMMARY OF ARGUMENTS

Appellee's Petition is due to be denied. The Petition is deficient in that Appellee fails to identify specific precedent with which the First District's decision conflicts. Instead, Appellee reargues its coverage defense and then draws the sweeping conclusion that the First District's decision is not in accord with existing (but unspecified) case law. To bolster this position, Appellee relies almost entirely upon impermissible references to record items not within the four corners of the First District's decision. In fact, the First District's decision fully harmonizes with standing precedent regarding the determination of an insurer's duty to defend. Further, because the tipsy coachman rule necessarily requires a finding of supporting evidence in the *trial record*, it cannot be the basis for conflict jurisdiction.

I. APPELLEE'S PETITION FAILS TO COMPORT WITH THE PRESCRIBED METHODS FOR ESTABLISHING CONFLICT JURISDICTION

The constitutional limitations on this Court's authority to issue writs of certiorari were succinctly described by it in Nielsen v. City of Sarasota, 117 So.2d 731 (Fla. 1960):

> Under Fla. Const. art. V, the power of the state supreme court to issue writs of certiorari is substantially restricted and drastically circumscribed. While the courts of appeal and circuit courts are endowed with unlimited authority to issue writs of certiorari within the orbit of their own jurisdiction, the power of the state supreme

> court to issue such writs, although unlimited prior to the amendment, is subjected to substantial constitutional restraints when the amendment is adopted. The so-called "conflict jurisdiction" is not conveyed to the state supreme court merely to convert it into a "court of selected errors" whereby the justices of the state supreme court can whimsically select cases for review to satisfy some notion that the case is of such importance as to justify the interest or attention of the state supreme court. On the contrary, in order to sanctify the decisions of the courts of appeal with an aspect of finality, so essential to prevent any imbalance in the several echelons of the appellate process, the jurisdiction of the state supreme court to exercise certiorari powers and to set aside the decisions of the courts of appeal on the conflict theory is expressly limited by the constitution itself. Id. at 734.

Being a court of limited review, the power of the Florida Supreme Court to exercise jurisdiction over a case is strictly construed and there is a heavy burden against the exercise of jurisdiction. Harry Lee Anstead et al., *The Operation and Jurisdiction of the Supreme Court of Florida*, 29 Nova L. Rev. 432, 483 (2005). The Court's determination of conflict jurisdiction is further constrained by the "four corners" rule, that is the conflict must appear within the four corners of the majority decision brought for review. Reaves v. State, 485 So.2d 829, 830 (Fla. 1986). There can be no examination of the record, no second-guessing of the facts stated in the majority decision, and no use of extrinsic materials to clarify what the majority decision means. *See* Anstead, *The Operation and Jurisdiction of the Supreme Court of Florida,* 29 Nova L. Rev. at 512.

The issues proffered by Appellee as a basis for finding conflict jurisdiction run far afoul of the four corners rule. Appellee makes numerous impermissible references to the "record" and to what it purports to be the allegations of the underlying complaint. Plainly, none of these are found within the four corners of the First District's unanimous opinion. This Court recognized the impropriety of Appellee's actions when it struck the extensive appendix filed with the brief. Appellee's petition should be similarly stricken in its entirety or otherwise denied for failure to comply with Rule 9.120(d) and this Court's opinion in Reaves., supra.

Appellee's case for conflict is based upon the rejected notion that the underlying complaint can somehow be read to allege Joe Johnson was employed by Cat 5 and therefore the Auto Exclusion bars coverage. Appellee maintains that by ruling otherwise, the First District did not properly read the complaint. The problem with this argument is twofold: first, it is entirely inappropriate for the purpose of establishing conflict jurisdiction; and second, it is wrong on the merits (as the First District held).

Appellee's Petition and argument is inappropriate to establish conflict jurisdiction because it necessarily views the supreme court as a "court of selected errors." Rather than identify a decision of another court which conflicts with the First District's decision herein, Appellee repeats its entire coverage argument and

supports it with impermissible references to record and evidentiary sources. In other words, rather than establishing an express and direct conflict with another decision, Appellee merely seeks a forbidden second bite at the apple. [1]

The mandated procedure for establishing conflict jurisdiction was prescribed by this Court in Kyle v. Kyle, 139 So.2d 885 (Fla. 1962):

> The test of our jurisdiction in such situations is not measured simply by our view regarding the correctness of the Court of Appeal decision. On the contrary, jurisdiction to review because of an alleged conflict requires a preliminary determination as to whether the Court of Appeal has announced a decision on a point of law which, if permitted to stand, would be out of harmony with a prior decision of this Court or another Court of Appeal on the same point, thereby generating confusion and instability among precedents. We have said that the conflict must be such that if the later decision and the earlier decision were rendered by the same Court the former would have the effect of overruling the latter….. If the two cases are distinguishable in controlling factual elements or if the points of law settled by the two cases are not the same, then no conflict can arise. Id. at 887.

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[1] This case illustrates a common error made in preparing jurisdictional briefs based on alleged decisional conflict. The only facts relevant to our decision to accept or reject such petitions are those facts contained within the four corners of the decisions allegedly in conflict. As we explain in the text above, we are not permitted to base our conflict jurisdiction on a review of the record or on facts recited only in dissenting opinions. Thus, it is pointless and misleading to include a comprehensive recitation of facts not appearing in the decision below, with citations to the record, as petitioner provided here. Similarly, voluminous appendices are normally not relevant. Reaves v. State, 485 So.2d 829, 830 (Fla. 1986).

Appellee refers to no prior conflicting decisions involving facts indistinguishable from those at bar. It has referenced no case where the identical points of law were at issue. Instead, Appellee relies upon a vague contention that the First District relied on something other than the allegations of the complaint to determine a duty to defend, did not consider theories of dual employment, and violated the tipsy coachman doctrine. These arguments cannot form the basis of conflict jurisdiction.

II. THE FIRST DISTRICT'S DECISION DOES NOT CONFLICT WITH ANY PRIOR DECISIONS REGARDING DETERMINATION OF AN INSURER'S DUTY TO DEFEND OR CONCURRENT EMPLOYMENT

Appellee argues that the complaint "repeatedly" alleges an employment relationship between Cat 5 and Joe Johnson. It plainly does **not**. The First District addressed that very contention holding:

> While this allegation might acknowledge a more generalized principal-agent relationship between appellant and Johnson, there is **nothing** that explicitly indicates the existence of an employer-employee relationship, especially in light of the complaint's earlier allegation that Johnson was an employee of Colonel McCrary Trucking. (emphasis added) (A., p. 6).

Even if the complaint did allege an employer-employee relationship (concurrent or otherwise) between Cat 5 and Johnson, which it did not, those allegations cannot be considered by this Court because they fall outside the four

corners of the First District's decision. Reaves v. State, 485 So.2d 829, 830 (Fla. 1986); See also Rule 9.120(d), Fla. R. App. Procedure.

The First District's decision is in complete harmony with this Court and the other Courts of Appeal when it held a duty to defend arises when the complaint alleges facts that even *potentially* bring the suit within policy coverage and that all doubts must be resolved in favor of finding coverage. (A., p. 5). The First District further harmonized with precedent in ruling that if a complaint alleges facts partially within and partially outside of coverage, the insurer is required to defend the entire suit. (A, p. 5).

Contrary to Appellee's contention, it was allowed to rely on the allegations of the complaint to determine coverage. Unfortunately, as the First District concluded, Appellee failed to consider Paragraph 37 of the complaint and its *explicit* statement that Johnson was employed by Colonel McCrary Trucking (and no others) at the time of the accident. Appellee then failed to consider the full implications of that allegation to its coverage duties. Appellee's disagreement with the First District is merely that, a disagreement. It does not implicate decisional conflict necessary to bestow jurisdiction on this Court because it does not constitute a decision which if compared to a prior decision of the same court would

result in one overruling the other. For this reason, Appellee has failed to establish conflict jurisdiction.

III. THE TIPSY COACHMAN RULE CANNOT SERVE AS THE BASIS FOR CONFLICT JURISDICTION

The tipsy coachman rule provides if a trial court reaches the right result, but for the wrong reasons, it will be upheld if there is any basis which would support the judgment *in the record.* Dade County Sch. Bd. v. Radio Station WQBA, 731 So.2d 638, 644 (Fla. 1999) (emphasis added). That was the opinion of this Court and is argued today by Appellee as a basis for establishing conflict jurisdiction. (see p.9 of the Petition). Even Appellee admits that to be applicable, tipsy coachman requires a detailed review of the trial record to determine if evidence exists to support Appellee's estoppel and geographic scope defenses.[2]

Both this Court and Appellee recognize that tipsy coachman is only applicable if the trial record contains evidence which supports the previously omitted defenses. "Tipsy coachman does not rescue parties from their own inattention to important legal detail." E.K. v. Dept. of Children and Family Services, 948 So.2d 54, 57 (3rd DCA 2007). However, Florida law expressly prohibits any consideration of such a record in evaluating conflict jurisdiction

[2] Because Appellee asserted these coverage defenses for the first time in its Answer Brief, the First District refused to consider them. (A., p. 7).

issues. See Reaves v. State, 485 So.2d at 830 supra.; See also Rule 9.120(d), Fla. R. App. Procedure. Absent a finding in the trial record that the omitted defenses are supported, tipsy coachman cannot apply. Dade County at 644. Accordingly, the tipsy coachman rule cannot be the basis for a finding of conflict jurisdiction.

The fact of the matter is the First District considered Appellee's tipsy coachman argument at the Motion for Rehearing and found it unavailing. There is no evidence in the trial record to support the omitted defenses. Even if there were, the defenses would be statutorily barred by the notice requirements of Fla. Stat. 627.426(2). Appellee's tipsy coachman argument cannot form the basis for conflict jurisdiction. Appellee's Petition is due to be denied.

CONCLUSION

Appellee's Petition should be stricken for failure to comply with the standards established by this Court in Reaves v. State, 485 So.2d 829 (Fla. 1986) and Rule 9.120(d). Alternatively, the Petition should be denied because Appellee has failed to establish decisional conflict necessary to trigger discretionary review by this Court. Moreover, CAT 5 requests this Court to enter an Order pursuant to Rule 9.400 taxing costs and attorneys' fees for these proceedings as to be determined by the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the below-named parties and attorneys by email and U.S. Mail on this the 20th day of February, 2012.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is filed in Times New Roman 14-point font, in compliance with the requirements of Fla. R. App. P. 9.210(a)(2)

/s/ KEVIN F. MASTERSON
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