Electronically Filed 09/09/2013 11:18:02 AM ET

RECEIVED, 9/9/2013 11:18:39, Thomas D. Hall, Clerk, Supreme Court

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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC13-1427
L.T. CASE NO. 1D12-0891

JAMON A. JOHNSON and CHAKA JOHNSON,

Petitioners,

v.

UNIVERSAL PROPERTY AND CASUALTY INSURANCE COMPANY,

Respondent.

RESPONDENT'S ANSWER BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Petitioners' Statement of the Case and Facts improperly includes legal argument and "facts" outside the scope of the First District's opinion. The only relevant facts are those set forth in the First District's opinion, which are summarized here, with citation to the page number of the opinion contained in the Petitioners' Appendix.

After an accidental fire destroyed the Johnsons' home, they filed a claim with their insurer, Universal Property and Casualty Insurance Company ("Universal"). Opinion at p. 2. Their claim was denied based on the fact that the Johnsons had falsely answered the following question on their insurance application: "Have you been convicted of a felony in the last ten years?" *Id.* The Johnsons answered "no," despite the fact that Mrs. Johnson had been convicted of five felonies in July 1998 (eight and a half years prior to the application). *Id.*

The Johnsons brought suit seeking damages for breach of contract, and Universal counterclaimed for declaratory judgment, arguing that it was permitted to rescind the contract based on Florida Statute § 627.409(1).[1] *Id.* Prior to trial,

[1] Florida Statute § 627.409 provides, in relevant part:

> (1) … A misrepresentation, omission, concealment of fact, or incorrect statement [in an application for an insurance policy] may prevent recovery under the contract or policy only if any of the following apply:
> (a) The misrepresentation … or statement is fraudulent or is material either to the acceptance of the risk or to the hazard assumed by the insurer.

the Johnsons moved for summary judgment arguing that Universal could not rely on that statute because the insurance contract contained a more stringent standard for rescission based on misrepresentation. *Id.* at 3. The trial court granted partial summary judgment, ruling that the insurance policy controlled and that Universal was entitled to rescind the contract only on the basis of an intentional misrepresentation which was material to the acceptance of the risk. *Id.* at 3-4. The trial court further ruled that Universal was required to prove at trial that the misrepresentation was intentional. *Id.*

At trial, the Johnsons testified that the misrepresentation was unintentional because they were confused about when the convictions were entered. *Id.* at 4. After the trial court denied Universal's motion for directed verdict, the jury found that the Johnsons did not intentionally make a misrepresentation. *Id.* The jury further found that had the true facts been known to Universal it would not have issued the policy to the Johnsons. *Id.* Universal's motions for judgment notwithstanding the verdict and for a new trial were denied, and the Johnsons were awarded $463,158.89 in damages. *Id.* at 4-5.

Universal appealed, and the First District reversed. The First District found that the insurance policy at issue did not impose a more stringent standard for

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> (b) If the true facts had been known to the insurer pursuant to a policy requirement or other requirement, the insurer in good faith would not have issued the policy or contract …

voiding the policy than that found in Florida Statute § 627.409(1). *Id.* at 8. As noted by the First District, the policy provision at issue provided, in relevant part:

> 2. **Concealment or Fraud.** The entire policy will be void if, whether before or after a loss, an "insured" had:
>
> a. Intentionally concealed or misrepresented any material fact or circumstance;
>
> b. Engaged in fraudulent conduct; or
>
> c. Made false statements;
>
> relating to this insurance.

Id. at 9. The First District found that "given the language of subsection 2a, subsection 2c would be superfluous if a 'false statement' under 2c included only intentionally false statements." *Id.* The First District further concluded that under the policy and under Florida Statute § 627.409(1) in order to provide a basis to void a policy, a misrepresentation "need not be fraudulently or knowingly made, but need only affect the insurer's risk or be a fact which, if known, would have caused the insurer not to issue the policy…" *Id.* at 10. Thus, based on the jury's factual finding that Universal would not have issued the policy had it known about the misrepresentation, the First District reversed the trial court's judgment in favor of the Johnsons. *Id.* at 12.

Petitioner moved for rehearing, rehearing en banc and certification, which was denied by the First District on June 21, 2013. Petitioners' Notice to Invoke Discretionary Jurisdiction was served thereafter.

SUMMARY OF ARGUMENT

Petitioners have failed to set forth any express and direct conflict warranting review by this Court. In support of their claim of express and direct conflict, Petitioners cite to a number of cases from this Court, as well as a few cases from the First District Court of Appeal. Since the opinion in this case was rendered by the First District, any supposed conflict between the opinion in this case and opinions in other First District cases do not show a conflict between "decisions of district courts … and ***a decision of another district court***." Further, Petitioners have failed to show that the opinions they cite are actually in conflict, where the cases cited by Petitioners either fail to set forth the specific contractual provisions at issue, or involve contractual provisions that are different than the one at issue in this case.

Petitioners' additional argument that this Court should accept discretionary jurisdiction based upon the First District's "misconstu[ing] [of] the rules of construction as established by this Court" does not provide a basis for invoking this Court's discretionary jurisdiction. Further, the First District's decision is entirely consistent with the rules of contract interpretation set forth in the cases cited by Petitioners.

Petitioners' argument that the First District's opinion conflicts with *Green v. Life & Health of America*, 704 So. 2d 1386 (Fla. 1998) lacks merit, where the issue

in that case related to the standard of knowledge adopted by the application for insurance, and did not even touch on the meaning of "false statement." Finally, Petitioners' argument that "the First District's opinion misapplies Section 627.409," fails because the First District was free to disregard the law of other states, since the law of those other states does not control. And, since the First District concluded that the contract provision at issue did not provide for a more stringent standard for voiding an insurance policy than was provided in Florida Statute § 627.409, the First District appropriately applied both the contract provision and the statute in reversing the judgment in favor of the Johnsons.

ARGUMENT

THE FIRST DISTRICT'S DECISION DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH A DECISION OF ANOTHER DISTRICT COURT OF APPEAL OR OF THE SUPREME COURT.

In their Jurisdictional Brief, Petitioners first argue that the First District's opinion in this case expressly and directly conflicts with the following cases: *Am. Ins. Co. of Newark, N.J. v. Robinson*, 120 Fla. 674, 163 So. 17 (Fla. 1935), *Strickland Imports, Inc. v. Underwriters at Lloyds, London*, 668 So. 2d 251 (Fla. 1st DCA 1996), and *Gainsco v. ESC/Choicepoint Servs., Inc.*, 853 So. 2d 491 (Fla. 1st DCA 2003). As a threshold matter, discretionary review of this Court is proper only in cases involving "decisions of district courts of appeal that expressly and directly conflict with a decision of another district court of appeal or of the supreme court on the same question of law." Fla. R. App. P. 9.030(a)(2)(A)(iv). Aside from this Court's decision in *American Insurance Company v. Robinson*, Petitioners claim that the First District's opinion conflicts with two opinions ***of the same*** District Court, rather than, as required, a different district court of appeal, which is not a basis for discretionary jurisdiction.

Petitioners argue that the First District's opinion is in conflict with the cases they cite in that it "fails to apply the plain meaning of the phrase 'false statement' as one which requires a showing of intentionality." Pet. Brief at p. 5. However, none of the cases cited by Petitioners involve the interpretation of a contractual

provision identical or substantially identical to the one in this case. None of the cases cited by Petitioners involve a court's construction of the phrase "false statement," which was the phrase at issue in the contract in this case. *See Am. Ins. Co.*, 163 So. at 680 (involving an insurance policy provision which used the terms "fraud or false swearing"); *Strickland*, 668 So. 2d at 253 (involving an insurance policy provision which used the terms "fraud or false swearing"); *Gainsco*, 853 So. 2d at 493 (noting that the policy provision at issue voided coverage "only if the insured 'intentionally' conceals or misrepresents a material fact").

Additionally, in *Strickland,* the First District did not even opine upon the meaning or interpretation of the contract provision at issue, but rather, reversed and remanded for a new trial, stating that the trial court "did not consider the contract term and its effect on Lloyds' ability to void the policy under the statute." 668 So. 2d at 254. Further, the First District's opinion in *Gainsco* does not set out the policy provision being interpreted by the court, so it is impossible to tell whether the provision was substantially similar to the one involved in this case. 853 So. 2d 491. Finally, as it appears in the reported decision, the policy provision at issue in *American Insurance Company v. Robinson* was straightforward and allowed for voiding the policy ***only*** "in case of any fraud or false swearing." 120 Fla. at 680. Thus, there was no need for the Court in that case to consider the sub-section at

issue in the larger context of the policy as a whole, and that case cannot control, since the applicable policy provision was so different from the one in this case.

Petitioners also argue that this Court should accept discretionary jurisdiction because the First District's opinion "misconstrues the rules of construction as established by this Court" in a number of cases cited by Petitioners. Pet. Brief at p. 5. However, a court's "misconstru[ing] [of] the rules of construction" is not a basis for the exercise of this Court's discretionary jurisdiction. Fla. R. App. P. 9.030(a)(2)(A).

Nevertheless, the First District's decision is entirely consistent with those cases cited by Petitioners, and the First District even cited two of those cases – *Taurus Holdings, Inc. v. United States Fidelity and Guaranty Company*, 913 So. 2d 528 (Fla. 2005) and *Flores v. Allstate Insurance Company*, 819 So. 2d 740 (Fla. 2002) – in its opinion. As this Court stated, in one of the cases cited by Petitioners, "when analyzing an insurance contract, it is necessary to examine the contract in its context and as a whole, and to avoid simply concentrating on certain limited provisions to the exclusion of the totality of others." *Swire Pac. Holdings, Inc. v. Zurich Ins. Co.*, 845 So. 2d 161, 165 (Fla. 2003). In interpreting the policy provision at issue in this case, the First District adhered to the rules of contract interpretation set forth in *Swire Pacific Holdings* and the other cases cited by Petitioners – the First District afforded the provision at issue its plain meaning,

while taking into consideration the policy as a whole, and not simply that one provision in isolation. Opinion at pp. 9-10. This is entirely consistent with the rules of contract interpretation set forth in the cases cited by Petitioners and in the (often overlapping) cases relied upon by the First District.

Petitioners also argue that the First District's opinion conflicts with *Green v. Life & Health of America*, 704 So. 2d 1386 (Fla. 1998). In its opinion in this case, the First District recognized the argument made by the Petitioners that "parties are free to 'contract-out' or 'contract around' state or federal law with regard to an insurance contract." Opinion at pp. 7-8. However, the issues in *Green* are entirely different than those in this case. In *Green*, this Court found that the parties to that case had agreed to a lesser knowledge standard than that imposed by Florida Statute § 627.409 and that, having agreed to that lesser standard, the insurer could not "claim refuge in the stricter statutory standard."[2] 704 So. 2d at 1391. *Green* is thus entirely inapposite to the facts in this case, and cannot serve to form the basis for jurisdiction.

Finally, as to Petitioners' argument that "the First District's opinion misapplies Section 627.409," the First District was free to disregard the law of other states, particularly where that law conflicts with Florida law, since the law of

[2] The insurance application at issue in *Green* provided that the answers given therein were "true and complete to the best of [the insured's] knowledge and belief." 704 So. 2d at 1388. The issue in this case does not relate to the standard of knowledge adopted by the insurance policy here.

other jurisdictions does not control. A conflict between Florida law and the law of Michigan or Maryland does not give rise to discretionary jurisdiction. And, once the First District concluded that the contract provision at issue did not provide for a more stringent standard for voiding a policy than was provided in Florida Statute § 627.409, the First District appropriately applied the contract provision and the statute and reversed the judgment in favor of the Johnsons.[3]

CONCLUSION

For all of the foregoing reasons, the Respondent Universal Property and Casualty Insurance Company respectfully requests that this Court deny jurisciton to consider this case.

[3] Petitioners' brief is replete with improper legal argument directed at the merits of this issue, *i.e.*, whether the contract provision at issue requires that a "false statement" be intentional before it can form the basis for voiding the insurance contract. *See, e.g.*, Pet. Brief at pp. 1-3, 6-8. Those merits arguments are not proper in a jurisdictional brief. Fla. R. App. P. 9.120(d). Nevertheless, Respondent submits that the First District's opinion represents a correct interpretation of the contract provision at issue, as it appropriately affords that provision its plain meaning, while also considering the provision in the context of the insurance policy as a whole and not in isolation. *See Swire Pac. Holdings,* 845 So. 2d at 165.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Phillip Warren, esquire, Attorney for Appellees, Jamon A. Johnson and Chaka Johnson, pwarren@twwlawfirm.com, thendrix@twwlawfirm.com; Stephanie Taylor, Esq., Counsel for Appellee's, Jamon A. Johnson & Chaka Johnson, staylor@twwlawfirm.com, kstoltz@twwlawfirm.com; Phill Hall, Esq., cphiliphall@yahoo.com by electronic mail on this 9th day of August, 2013.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief is filed in compliance with the requirements set forth in Rule 9.210 of the Florida Rules of Appellate Procedure. The brief is presented in Times New Roman, 14-point font.

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