

IN THE SUPREME COURT OF FLORIDA

OLD REPUBLIC INSURANCE
COMPANY,

Petitioner,

vs.

CHRIS G. HUBNER, ET. AL.,

Respondents.

CASE NO.: SC14-1274

5TH DCA No: 5D13-1350

L.T. No.: 2012-CA-455

5th Circuit, Citrus County

BOY SCOUTS OF AMERICA,

Petitioner,

vs.

CHRIS G. HUBNER, ET. AL.,

Respondents.

CASE NO.: SC14-1275

5TH DCA No: 5D13-1350

L.T. No.: 2012-CA-455

5th Circuit, Citrus County

CONSOLIDATED RESPONSE BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND OF THE FACTS

This case arose from a declaratory judgment action concerning a question of insurance coverage, yet neither Old Republic nor the Boy Scouts even cite to the applicable policy language, much less quote it. Hubner accordingly provides the following statement to provide the Court with the true facts which show a lack of any potential conflict jurisdiction.

Old Republic issued an insurance policy to the Boy Scouts, and it states that all Boy Scout Registered Volunteers are individually insured while “participating in an *Official Scout Activity* and in the scope of their duties as such.” Hubner v. Old Republic Ins. Co., __ So. 2d __, 2014 WL 1839102, *2 (Fla. 5th DCA May 9, 2014). The policy then defines the term “*Official Scouting Activity*” as “any activity that is consistent with the values, Charter and Bylaws and Rules and Regulations of Boy Scouts of America.” Id.

By way of an endorsement, the policy further extends coverage to a Registered Volunteer’s use of his or her own personal vehicle, as long as it is “being used only for a Scouting purpose and not for a business, governmental or any other purpose of the Registered Volunteer at the time of the incident.” Id.

Norton was a Registered Volunteer for Boy Scout Troop 370, serving as the Director of Advancement and Leadership Training. Id. His responsibility was to help scouts advance through the ranks, and particularly relevant to this case he was

assisting a scout in completing an Eagle Scout project. Id. The project involved cleaning up an overgrown cemetery, and then documenting the work in a Boy Scout application form that contained spaces for before and after photographs. Id. That workbook would then be submitted for project approval. Id.

The physical cleanup took several weeks to complete, and throughout the project Norton observed the scout photographing the progress. Id. On the final day, however, Norton realized that he did not recall seeing the scout take pictures of the completed project. Id. Norton accordingly drove to his house to obtain his camera, returned to the cemetery, photographed it, and then began to return home. Id. Obtaining those photographs for the scout's application was the sole purpose of his trip — he made no other stops. Id. But it was during that trip that he struck Hubner's car head-on, causing life-threatening injuries to both parties. Id.

The Fifth District examined the policy's coverage terms, expressly noting that it defined Official Scouting Activity "very broadly." Id. It then concluded that, since Norton was participating in the activity of assisting the scout with the requirement of documenting/photographing his project, and was not engaged in any other purpose at the time of the accident, he met the conditions for coverage. Id.

SUMMARY OF ARGUMENT

This is a declaratory judgment case which interpreted the terms of a uniquely-tailored “manuscript” insurance policy, and those terms have never before been examined by any court in the nation, much less Florida. It is therefore impossible for there to be an express and direct conflict with another Florida District Court decision.

Old Republic and the Boy Scouts¹ nevertheless claim that the Fifth District’s decision conflicts with cases assessing an employee’s scope of employment, but it quite simply cannot. The insurance policy at issue does not tie coverage to the scope of employment or any of its related principles. Instead, it ties coverage to a Registered Volunteer’s participation in an “*Official Scouting Activity*.” As the Fifth District expressly noted, the policy then defines that term “very broadly.”

The only thing that the court did in the underlying opinion is look at the policy’s terms, apply them to the unique facts of this case, and reach a coverage decision. That decision does not, and cannot, conflict with any existing Florida precedent, so the Court should decline jurisdiction.

¹ It is remarkable that the Boy Scouts have joined their insurance company in an attempt to deny coverage to a Registered Volunteer that they purchased coverage to protect. While their motivation to do so is unclear — whether it is due to a self-insured retention or the magnitude of the damages involved given the severe nature of the damages with this particular accident — their “agreement” on this issue has no bearing on the effect of Old Republic’s chosen policy language.

ARGUMENT

- I. The Fifth District’s decision cannot possibly “expressly and directly” conflict with anything, because this is an insurance coverage case, and this is the first opinion in the entire nation to examine the policy language at issue.**

While both Old Republic and the Boy Scouts attempt to steer the Court away from the true issue — and remarkably do so by declining to even cite, much less quote, the insurance policy language at issue — this Court may dispense with any jurisdictional consideration for one simple reason. This is an insurance coverage case where the Fifth District interpreted the language of a policy, and that language has never before been addressed by any court anywhere in the country, much less Florida.

“The constitutional standard is whether the decision of the District Court on its face collides with a prior decision of this Court or another District Court on the same point of law so as to create an inconsistency or conflict among the precedents.” Kincaid v. World Ins. Co., 157 So. 2d 517, 517 (Fla. 1963).

That is necessarily so because this Court’s power of review “is concerned with decisions as precedents as opposed to adjudications of the rights of particular litigants.” Seaboard Air Line Railroad Company v. Branham, 104 So. 2d 356, 357–58 (Fla. 1958). The Court explained: “The question of a conflict is of concern to this Court only in those cases where the opinion and judgment of the district court announces a principle or principles of law that are in conflict with a principle or

principles of law of another district court or this Court.” N & L Auto Parts Co. v. Doman, 117 So. 2d 410, 412 (Fla. 1960).

“Our concern is with the decision under review as a legal precedent to the end that conflicts in the body of the law of this State will be reduced to an absolute minimum and that the law announced in the decision of the appellate courts of this State shall be uniform throughout.” Id. “That is the obvious purpose of the constitutional provision and the limitations of our power to review decisions of the district courts in this respect.” Id.

There accordingly cannot possibly be an express and direct conflict of decisions in this case. Old Republic wrote a custom-tailored manuscript policy that applies only to the Boy Scouts, and in doing so it chose some very unique coverage terms. This is not an ISO² policy, with terms that are routinely interpreted and applied by the courts, and as a result no District Court has ever examined these particular terms before.

Since this is the one and only case to ever interpret that policy language, it inherently cannot satisfy the Constitutional standard of a decision which “expressly and directly conflicts with a decision of another district court of appeal or of the

² ISO is the commonly-sued acronym for Insurance Services Office, Inc. It provides standardized or boilerplate insurance policy forms and endorsements that are used throughout the insurance industry.

supreme court on the same question of law.” Art. V, §3(b)(3), Fla. Const. The Court should thus deny jurisdiction for that reason alone.

II. The Fifth District’s decision does not conflict with the cited cases, because none are coverage cases applying the terms of an insurance policy.

When 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.” Kyle v. Kyle, 139 So. 2d 885, 887 (Fla. 1962). See also Gillis v. State, 959 So. 2d 194 (Fla. 2007)(“Upon further consideration we conclude that jurisdiction was improvidently granted, because these cases are factually distinguishable.”).

In this case, the Fifth District applied the terms of an insurance policy to the undisputed facts.³ Old Republic and the Boy Scouts have now cited several decisions that address issues related to the “scope of employment,” but those cases have nothing to do with coverage under the terms of any insurance policy, much less this uniquely-customized one.

The policy does *not* state that Registered Volunteers are only covered if their activities would fall within the scope of employment. Instead, Old Republic tied coverage for Registered Volunteers to their participation in an “Official Scouting Activity.” It then specifically defined that term as any activity that is “consistent

³ All parties have agreed to the pertinent facts, and in the trial court the issue was presented based upon competing motions for summary judgment.

with the values, Charter and Bylaws and Rules and Regulations of Boy Scouts of America.” That is the applicable test, not the scope of employment.

When a court is “interpreting an insurance policy, its definitions control.” Sommerville v. Allstate Ins. Co., 65 So. 3d 558, 560 (Fla. 2d DCA 2011). The Fifth District’s decision thus applied the policy’s definition of an “*Official Scouting Activity*” — and in the process expressly stated that Old Republic defined that term “very broadly” — so cases involving tort law scope of employment principles cannot conflict with the policy’s unique definition. They are distinct concepts.

In bullet-point form, the purportedly-conflicting cases cited by Old Republic and the Boy Scouts are as follows:

- City of Miami v. Simpson, 172 So. 2d 435, 437 (Fla. 1965) decided whether a municipality could be liable for intentional torts committed by its employees in the scope of their employment.
- Duff v. Vazquez, 544 So. 2d 1124, 1124–25 (Fla. 3d DCA 1989) concerned the question of whether an employer could be vicariously liable for an employee who caused an accident while driving to the store, when there was nothing in the record to suggest that the employer even knew that he was going there.
- Sussman v. Florida East Coast Properties, Inc., 557 So. 2d 74, 76 (Fla. 3d DCA 1990) concerned the question of whether an employer could be vicariously liable for an employee who caused an accident when, on her way to work, she detoured to a supermarket to buy a cake for a friend.
- Swartz v. McDonald’s Corp., 788 So. 2d 937, 948 (Fla. 2001) involved an employer’s potential vicarious liability for an employee

who was transporting a company booth from a job fair when she caused an accident.

As the Court can see, none of those scope-of-employment cases involve the interpretation of an insurance policy at all, much less this policy's definition of an "*Official Scouting Activity*."

Likewise, to the extent that Old Republic and the Boy Scouts claim that the Fifth District created conflicting precedent when it looked to the purpose of Norton's trip, they once again ignore the language of the insurance policy and the fact that this is a coverage case.

Specifically, by way of an endorsement, the policy extends coverage to a Registered Volunteer's use of his or her own personal vehicle as long as it is "being used only for a Scouting *purpose* and not for a business, governmental or any other *purpose* of the Registered Volunteer at the time of the incident." (emphasis added). It should accordingly come as no shock that a court interpreting that policy language would look to purpose of the Registered Volunteer's trip, because that is the way Old Republic wrote its policy.

In this case, it is undisputed that the sole purpose of Norton's trip was to assist the scout with the completion of his application for his next rank. He did not make any other stops or do anything else. As the Director of Advancement and Leadership Training, that was him using his car "for a Scouting purpose and not for a business, governmental or any other purpose.

Once again, Old Republic could have tied coverage for Registered Volunteers to a scope of employment analysis if it wished, but it did not. When selecting the terms for this policy, it defined its coverage “very broadly.” The Fifth District just interpreted it as written. There is no conflict, and the Court should deny jurisdiction for that reason, as well.

III. The Fifth District’s decision does not conflict with the cited cases, because none involves the duties of a Boy Scout Director of Advancement and Leadership Training.

Finally, to the extent that the Fifth District’s decision did reference the “scope” of anything, each and every one of the cases Old Republic and the Boy Scouts cite are distinguishable for the same reason. The Fifth District was addressing the scope of duties undertaken by a Boy Scout Director of Advancement and Leadership Training, not any particular scope of employment.

Even in the employment context, there are certainly different outcomes depending on the situation. A judge driving from one place to another likely is not acting in the scope of employment, whereas a cab driver may be. Then again, if the judge is transporting materials to a seminar, that may be within the scope of his or her employment, as well.

In this case, however, the Fifth District was not concerned with the scope of employment. It was assessing the scope of Norton’s duties as the Director of Advancement and Leadership Training for Troop 370. More important, since this

is a coverage case governed by the terms of Old Republic's policy, it was assessing whether he was in the scope of those duties if they are defined as doing anything that is "consistent with the values, Charter and Bylaws and Rules and Regulations of Boy Scouts of America."

In the decisions cited by Old Republic and the Boy Scouts, it is easy to see, for example, how the employee in Sussman was not acting in the course of her employment when she went to buy a birthday cake, because she was a health spa fitness instructor. Sussman, 557 So. 2d at 76. But by the same token, it is easy to see how Norton was acting in the scope of his duties as the Director of Advancement and Leadership Training when he was assisting the scout with his required documentation for his project. Those are not conflicting concepts.

As this Court has explained, "inherent or so called 'implied' conflict may no longer serve as a basis for this Court's jurisdiction." Department of Health and Rehabilitative Services v. National Adoption Counseling Service, Inc., 498 So. 2d 888, 889 (Fla. 1986). Old Republic and the Boy Scouts would have the Court imply that the scope of employment is the same as the scope of one's duties as a Boy Scout Director of Advancement and Leadership Training, but that simply is not the case. That is especially true when the context of the analysis is controlled by a unique policy definition, so the Court should decline jurisdiction for that reason as well.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing was electronically filed through the **e-Filing Portal**, and that one copy each was served by e-mail upon **Shelley H. Leinicke, Esq.**, Counsel for Old Republic, at ftlcrtpleadings@wickersmith.com; **David L. Holbrook, Esq.**, Counsel for Norton, at Dholbrooklaw@aol.com; **George Germann, Esq.**, Counsel for Leanne Germann, at georgegermannesq@att.net and **William Summers, Esq. and Kevin D. Franz, Esq.**, Counsel for Boy Scouts, at wsummers@lanereese.com, kfranz@lanereese.com and mgomez@lanereese.com, on this July 28, 2014.

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CERTIFICATE OF TYPEFACE COMPLIANCE

Pursuant to Florida Rule of Appellate Procedure 9.210, the undersigned counsel certifies that this Brief is printed in Times New Roman 14-point font.

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