

IN THE SUPREME COURT OF FLORIDA

JACK ECKERD CORPORATION and
TRAVELERS INSURANCE COMPANY,

Petitioners,

v.

SUPREME COURT CASE
NO. : 68,528

WILLIAMSON CADILLAC LEASING,
INC., a Florida corporation,
CAROLYN S. LIPSHAW, ALICE L.
LIPSHAW, FIREMAN'S FUND
INSURANCE COMPANY, a foreign
corporation, PRUDENTIAL
PROPERTY & CASUALTY INSURANCE
COMPANY, a foreign corporation,
and CHICAGO INSURANCE COMPANY,
a foreign corporation, jointly
and severally.

Respondents.

RESPONDENTS' BRIEF ON JURISDICTION

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INTRODUCTION

JACK ECKERD CORPORATION and TRAVELERS INSURANCE COMPANY, the Petitioners and Plaintiffs/Appellants below, will hereinafter be referred to as the "PETITIONERS".

WILLIAMSON CADILLAC LEASING, INC., and FIREMAN'S FUND INSURANCE COMPANY, the Respondents, and Defendants/Appellees below, will hereinafter be referred to as the "RESPONDENTS."

All references to the attached separately paginated Appendix will be made by the designation "A" with appropriate pagination.

STATEMENT OF THE CASE AND FACTS

The RESPONDENTS accept the Statement of Case and Facts as set forth in the PETITIONERS' Brief on Jurisdiction.

JURISDICTIONAL ISSUES

The two jurisdictional issues raised in the PETITIONERS' Brief will be addressed separately herein.

SUMMARY OF THE ARGUMENT

The PETITIONERS' seek to invoke the discretionary jurisdiction of this Court pursuant to Article V, Section 3(b) of the Florida Constitution (1980) and Rule 9.030(a)(2)(A)(iv) of Fla. R. of App. P. The discretionary jurisdiction of this Court may be invoked only when a decision of the District Court of Appeals "expressly and directly conflicts" with the decision of another district court of appeals or the decision of this Honorable

Court. The PETITIONERS cite the cases of Kluger v. White, 281 So.2d 1 (Fla. 1973); Purdy v. Gulf Breeze Enterprises, Inc., 403 So.2d 1325 (Fla. 1981); Underwriters at Lloyds v. City of Lauderdale Lakes, 382 So.2d 703 (Fla. 1980) as providing the "express and direct" conflict basis for this Court to exercise its discretion and accept jurisdiction. The Kluger and Underwriters cases are not even mentioned in the Third District's per curiam affirmance opinion and accordingly, cannot form the basis for a "express and direct" conflict sufficient for this Court to entertain jurisdiction. Express and direct are clear and unequivocal and mean exactly what they say. If Kluger and Underwriters are not even mentioned in the decision of the Third District, it could hardly be said that the Third District expressly and directly rendered a decision contrary to the decisions of Kluger and Underwriters by this Court. Purdy, cannot form the basis for conflict jurisdiction because Purdy is cited with approval as the basis for the affirmance.

The PETITIONERS also seek to have this Court accept jurisdiction on the basis that two of the three citations contained within the per curiam affirmance are now before this Court and have been accepted for review. This cannot form the basis for conflict certiorari when there is a third decision, in this case Purdy, which is cited as authority for the per curiam affirmance and that case is neither pending before this Court nor has it been reversed. Purdy, is in fact the basis for the Court's affirmance and cannot independently form the basis for conflict jurisdiction.

ARGUMENT

THE THIRD DISTRICT'S DECISION DOES NOT CONFLICT WITH KLUGER, UNDERWRITERS, OR PURDY.

Kluger and Underwriters are not mentioned by name or otherwise in the Third District's decision in this case. In 1980, the Constitution and specifically Article V of the Florida Constitution was changed to limit this Court's jurisdiction in conflict cases to those cases where there is "express and direct" conflict with decisions of other District Court of Appeal or the Supreme Court. Express and direct mean just what they say and in order to show conflict sufficient for this Court to exercise its discretionary jurisdiction, the PETITIONERS must show that the decision itself contains a citation to the opinions which the PETITIONER alleges direct conflict with. In the absence of even a citation within the opinion containing the name of the case it can hardly be said that a district court's opinion "expressly and directly" conflicts with a non-cited case.

In the case of Purdy, supra, Purdy is cited with "approval" as opposed to "express and direct" conflict, and the PETITIONERS' attempt to utilize Purdy as "express and direct" conflict is misapplied. Purdy is the basis for the decision below, not the basis for conflict within the decision below. It is interesting to note as well that in the PETITIONERS' Brief in the Third District, they went to great lengths to distinguish Purdy, but now the PETITIONERS seek to utilize Purdy as the basis for conflict.

(See portion of PETITIONERS' Brief below annexed hereto A. 1-4)
It is a curious anomaly indeed to have the Plaintiff argue below the inapplicability of Purdy to the facts of this case and now see them argue Purdy and the instant case as direct and express conflict.

THIS COURT SHOULD NOT ACCEPT JURISDICTION TO
CONSIDER THE THIRD DISTRICT'S OPINION BECAUSE
OF TWO OTHER DISTRICT COURT CASES PENDING CON-
SIDERATION ON THE MERITS BEFORE THIS TRIBUNAL.

The PETITIONERS urge this Court to accept jurisdiction of this matter on the basis that two other decisions cited in the opinion below in addition to the Purdy decision, supra, are now pending before this Court on the merits. These cases are Blue Cross and Blue Shield of Florida, Inc. v. Matthews, 473 So.2d 831 (Fla. 1st DCA 1985) and Blue Cross and Blue Shield of Florida, Inc. v. Ryder Truck Rental, Inc., 472 So.2d 1373 (Fla. 3rd DCA 1985). The PETITIONERS' attempt to invoke this Court's discretionary jurisdiction in this case is indeed ingenious but must fail.

The PETITIONERS rely on the case of Jollie v. State, 405 So.2d 418 (Fla. 1981). Indeed, if both the Matthews and Ryder cases, supra, were the only citation in the Third District's per curiam affirmance in this case, Jollie would provide a basis for this Court to accept jurisdiction. However, this Court's decision in Purdy, supra, is the first decision cited by the Third District in its per curiam affirmance of this case and the Purdy case is not pending review before this Court and provides a sufficient basis in and of itself for this Court to refrain from ex-

ercising its discretionary jurisdiction to review this case.

A close reading of the Jollie decision reflects that the Third District's decision in Jollie was cited as a "Affirmed, Murray v. State, 378 So.2d 111 (Fla. 5th DCA 1980)". That was the entire opinion in Jollie. The Murray case had been before the Supreme Court for disposition and was in fact reversed. Accordingly, this Court said in those circumstances as presented in Jollie, and only those circumstances as presented in Jollie, when a per curiam affirmance relies upon a cited authority which is pending before the Supreme Court or has been reversed by the Supreme Court, there is sufficient basis to invoke the discretionary jurisdiction of the Supreme Court under the "express and direct" conflict provision. That is not the situation in this case, however, because a third citation in the District Court's per curiam affirmance, namely Purdy, is not pending review before this Court and has not been reversed and provides a sufficient basis in and of itself for affirmance of the Third District's and the Trial Court's ruling in this matter. Accordingly, there can be no "express and direct" conflict when the decision sought to be reviewed contains a per curiam affirmance with a citation to an authority which has not been reversed and is not under review by this Court.

CONCLUSION

Based upon the aforementioned facts and applicable law as recited above, the RESPONDENTS respectfully request this Court to refrain from exercising its discretionary jurisdiction and deny the Petition for Review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief and attached Appendix was mailed this 29th day of April, 1986, to: Frank R. Gramling, Esq., Fertig & Gramling, 750 Southeast Third Avenue, Suite 200, Ft. Lauderdale, Florida 33316; Fred L. Fulmer, Esq., James H. Wakefield & Associates, 1230 Southeast Fourth Avenue, Ft. Lauderdale, Florida 33316; and to Charles P. Schropp, Raymond T. Elligett, Jr., Esq., Shackelford, Farnior, Stallings & Evans, Post Office Box 3324; Tampa, Florida 33601.

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