

IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

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SUPREME COURT

CASE NO. 72,531

FIFTH DISTRICT COURT
CASE NO. 86-1328

TRANSAMERICA INSURANCE COMPANY,

Defendant/Petitioner,

vs.

BARNETT BANK OF MARION COUNTY, N.A.

Plaintiff/Respondent

RESPONDENTS' ANSWER BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Petitioner, **TRANSAMERICA INSURANCE COMPANY**, Appellant below, was the Defendant in an action in the Circuit Court of the Fifth Judicial Circuit in and for Marion County, Florida. Respondent, **BARNETT BANK OF MARION COUNTY, N.A.**, was the Plaintiff in the Circuit Court, and Appellant in the Fifth District Court of Appeal. In this brief, the parties will be referred to as they appear in this Court. All emphasis in this brief is supplied by Respondent, unless otherwise indicated. The symbol "A" followed by page number(s) will denote Respondent's Appendix attached to this brief.

STATEMENT OF THE CASE AND FACTS

The Respondent would generally accept the statements regarding the procedural aspects of the case contained in the Petitioner's brief. However, the Respondent would rely on the facts as contained in the decision by the Fifth District Court of Appeal as stating the facts that may be considered by this Honorable Court. Reaves v. State, 485 So. 2d 829 (Fla. 1986). Specifically, Respondent would object to Petitioner's references to the wide variety of motions filed with the Fifth District Court of Appeal and the attempts of third parties to participate in the appeals process. Such extrinsic factors are not proper for consideration by this Court, nor are they germane to the narrow issue of whether or not a conflict exists between the Fifth District Court of Appeal's decision and decisions of the Supreme Court of Florida or other district courts of appeal.

SUMMARY OF THE ARGUMENT

This Court has discretionary jurisdiction to review a district court of appeal's decision that expressly and directly conflicts with a decision of another district court of appeal or of this Court on the same question of law. Fla. R. App. P. 9.030(a)(2)(A)(IV). Petitioner suggests that the majority decision of the Fifth District Court of Appeal in the case of **TRANSAMERICA INSURANCE COMPANY v. BARNETT BANK OF MARION COUNTY, N.A.**, directly conflicts with four prior decisions of the Supreme Court of Florida, all of which were decided in 1951 or earlier. The instant case, however, required that the Fifth District Court of Appeal interpret provisions of the Uniform Commercial Code, which did not become law in the State of Florida until 1965. Ch. 65-254 Laws of Fla. (eff. Jan. 1, 1967) Petitioner's suggestion that the four pre-Code cases "directly and expressly conflict" with the instant case is, therefore, without merit.

ARGUMENT

POINT I

WHETHER THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL IN TRANSAMERICA INSURANCE COMPANY V. BARNETT BANK OF MARION COUNTY, N.A., CASE NO. 86-1328, EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THE SUPREME COURT OF FLORIDA ON THE SAME QUESTIONS OF LAW.

This Court has discretionary jurisdiction to review a district court of appeal's decision that expressly and directly conflicts with a decision of another district court of appeal or

of this Court on the same question of law. Fla. R. App. P. 9.030(a)(2)(A)(IV). In order to establish the Supreme Court's jurisdiction based upon the conflict, the decision of the district court must conflict, on its face, with a prior decision of another district court or the Supreme Court of Florida "on the same point of law so as to create an inconsistency or conflict among the precedents." Kincaid v. World Insurance Company, 157 So.2d 517 (Fla. 1963) The Fifth District Court of Appeal's decision in the instant case does not present such a conflict. Indeed, even the dissenting opinion relied on extensively by the Petitioner includes a statement that "...no Florida post-U.C.C. court decisions are on point". TRANSAMERICA INSURANCE COMPANY v. BARNETT BANK OF MARION COUNTY, N.A., No. 86-1328, dissenting opinion at page 5 (Fla. 5th DCA March 15, 1988) Because the Fifth District decision concerns a different point of law, interpretation of the UCC, no conflict can arise. See Kyle v. Kyle, 139 So.2d, 885, 887 (Fla. 1962).

The Petitioner suggests that conflict exists between the rule of law announced by the District Court and the rule of law first announced by this Court in Phifer State Bank v. Detroit Fidelity and Surety Co., 97 Fla. 538, 121 So. 571 (1929), and confirmed in Union Indemnity Co. v. City of New Smyrna, 100 Fla. 980, 130 So. 453 (1930), and in Commercial Bank v. Board of Public Instruction, 55 So. 2d 552 (Fla. 1951). The rule of law set forth in these decisions is, as set forth in Phifer State Bank:

A surety on the bond of a contractor for public work, who completes the work after abandonment by the contractor, is subrogated to all the rights of the state in the fund remaining at the time of declaration of forfeiture, and entitled to priority of payment of the balance of said fund as against the assignee of such contract...

Phifer State Bank, 97 Fla. at _____, 121 So. 571 (1929) citing State ex rel. Southern Surety Co. v. Schlesinger, Director of Highways and Public Works, 114 Ohio St. 323, 151 N. E. 177 (Ohio 19____). In the instant case, however, the Fifth District Court of Appeal was called upon to interpret the Uniform Commercial Code, as adopted in Florida, and the rule of law enunciated may be stated as:

The rights of a surety on the bond of a contractor "constitutes a security interest in the construction contract payments, the perfection of which requires filing under U.C.C. §9-303 and §9-302(1) (§679.303 and §679.302(1), Fla. Stat.)" (A3-4) and a "bank's later acquired but perfected security interest has priority over the surety's security interest under U.C.C. §9-312(5) (§679-312(5)(a), Fla. Stat.), which provides that conflicting security interests in the same collateral rank according to priority in time of filing or perfection (A4).

Obviously, the Fifth District has enunciated a rule of law quite different from that set forth in prior Supreme Court decisions. The rules of law do not conflict, however, but are the result of interpreting and applying a previously non-existent statute to a similar fact pattern. The existence of the Uniform Commercial Code was clearly the basis for the Fifth District's arrival at a different end result in the contractor/surety dispute. The District Court noted that adoption of the Code altered the surety's position since, "having the convenient and

practical remedy of filing its security agreement under the U.C.C., the surety company is not entitled to disregard it and rely on the remedy of equitable subrogation to ambush a financing bank which has dutifully filed its security interest as provided by law" (A11-12). Reliance upon a previously non-existent statute to arrive at a different result is not sufficient under the express language of Florida Rule of Appellate Procedure 9.030 to provide the necessary conflict. See Ellsworth v. Nash Miami Motors, Inc., 142 So.2d 733 (Fla. 1962); see also In Re. D. A. W., 193 So.2d 433 (Fla. 1967). The decision of the Fifth District Court is, in fact, one of first impression and is not reviewable by certiorari, absent some constitutional ground other than conflict. See Nash, 142 So. 2d at 734.

The main purpose of Petitioner's Brief on Jurisdiction seems to be a thinly disguised attempt to convince this Court that it should exercise its jurisdiction because the issues presented by the instant case are of great public importance and the Fifth District's opinion is contrary to the decisional law of other State and Federal jurisdictions. Admittedly, the instant case is in conflict with the majority of decisions decided by federal courts and the courts of other states. Such a conflict provides no jurisdictional basis for this Court to review the District Court's opinion. See F. R. App. P. 9.030; Kyle, 139 So. 2d at 887. The district courts of appeal are primarily courts of final appellate jurisdiction and, accordingly, the authority of the Supreme Court to review decisions of the district courts of

appeal is limited and strictly prescribed. Ansin v. Thurston, 101 So. 2d 808 (Fla. 1958). As a court of final appellate jurisdiction, the Fifth District Court of Appeal is perfectly entitled to reach conclusions which may differ from other non-Florida state courts and from Federal courts, and said decisions, merely because of such conflict, are not subject to further appellate review. Similarly, the Florida Rules of Appellate Procedure provide no basis for the Supreme Court to exercise jurisdiction upon a finding, by the Supreme Court itself, that a case presents a question of great public importance. See Fla. R. App. P. 9.030(a)(2).

CONCLUSION

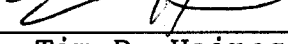
Based on the foregoing Argument, Respondent respectfully requests that this Court refuse to exercise its discretionary jurisdiction to review the decision of the Fifth District Court of Appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail this 27th day of June, 1988 to each of the following:

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