

**IN THE SUPREME COURT OF FLORIDA**

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**APPEAL CASE NO.: SC24-1196**

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PROGRESSIVE AMERICAN INSURANCE COMPANY,

*Petitioner,*

vs.

ROSEMARY ARWAY,

*Respondent.*

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6DCA Court Case No.: 6D23-0399

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**RESPONDENT, ROSEMARY ARWAY'S  
BRIEF ON JURISDICTION**

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## **STATEMENT OF THE ISSUES**

1. Whether the language in the contract of insurance issued by Progressive American Insurance Company (“Progressive”) to Rosemary Arway (“Arway”) tolled the statute of limitations on Arway’s underinsured motorist (“UM”) claim until the third-party tortfeasor’s bodily injury limits were paid to Arway.

Additional issues independent of that on which jurisdiction is invoked that Arway intends to raise if this Court grants review:

2. Whether this Court should adopt the overwhelming majority rule that the date of accrual for breach of contract underinsured/uninsured motorist claims is the date the insurer breaches the policy, thereby receding from *State Farm Mut. Auto. Ins. Co. v. Kilbreath*, 419 So. 2d 632 (Fla. 1982).

## **STATEMENT OF THE CASE AND FACTS**

Progressive issued a contract of insurance to Arway that included UM benefits coverage (“Progressive Policy”). (App. 4). The Progressive Policy contained the following provisions:

Progressive will pay damages...that an insured person is legally entitled to recover from the owner or operator of an uninsured motor vehicle because of bodily injury: 1. Sustained by an insured person; 2. Caused

by an accident; and 3. Arising out of the ownership, maintenance, or use of an uninsured motor vehicle.

Progressive will pay under this Part III only after the limits of liability under all applicable bodily liability bonds and policies have been exhausted by payment of judgments or settlements.

Progressive may not be sued unless there is full compliance with all the terms of this policy.

(App. 4-5).

On August 25, 2015, an underinsured motorist seriously injured Arway in an automobile crash. (App. 4). On November 27, 2018, Arway notified Progressive that the underinsured motorist's insurer tendered its bodily injury limits to Arway. (App. 5). On January 15, 2021, Progressive denied Arway's UM claim based on the expiration of the statute of limitations. (App. 5).

On January 25, 2021, Arway sued Progressive for breach of the Progressive Policy's UM provisions. (App. 5). The trial court held the statute of limitations barred Arway's UM claim. (App. 5).

The Sixth District Court of Appeal reversed. (App. 3-4). The Sixth District framed the issue as whether the language in the Progressive Policy tolled the statute of limitations on Arway's UM claim until the underinsured motorist's bodily injury liability

insurance benefits were fully paid to Arway. (App. 6). In analyzing this issue, the Sixth District focused on the plain language of the Progressive Policy. (App. 7-9). The Sixth District concluded that the language in the Progressive Policy is “functionally identical” to the provisions in the policy from this Court’s decision in *Woodall v. Travelers Indem. Co.*, 699 So. 2d 1361 (Fla. 1997). (App. 8).

The Sixth District noted that in *Woodall*, this Court held that the *Woodall* insurance policy (“*Woodall* Policy”) “had the effect of tolling the statute of limitations until such time as the insureds received payment from the tortfeasor’s liability carrier.” (App. 8) (quoting *Woodall*, 699 So. 2d at 1364) (cleaned up)). Since the *Woodall* Policy and Progressive Policy were functionally identical, the Sixth District followed *Woodall*. (App. 9).

## **ARGUMENT**

### **I. THE SIXTH DISTRICT’S DECISION DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH *STATE FARM MUT. AUTO. INS. CO. V. BISHOP* BECAUSE THOSE DECISIONS ARE BASED ON DIFFERENT POLICY LANGUAGE.**

Progressive improperly invokes this Court’s jurisdiction pursuant to article V, section 3(b)(3) of the Florida Constitution. Art. V, §3(b)(3), Fla. Const. That provision provides a limited basis to

review district court decisions 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.” *Id.*

“Express” means the question of law is addressed within the four corners of the majority opinion. *Persaud v. State*, 838 So. 2d 529, 532 (Fla. 2003). “Direct” means that the decision under review and conflicting decision are “based on practically the same set of facts and announce antagonistic conclusions.” *Ansin v. Thurston*, 101 So. 2d 808, 811 (Fla. 1958) (quoting 21 C.J.S. Courts §462). In other words, a conflict of law is express and direct if “one decision would overrule the other if both were rendered by the same court.” *Ansin*, 101 So. 2d at 811. It is this incongruence of binding precedent that creates this Court’s discretionary jurisdiction to review and harmonize the express and direct conflict. *See id.*

There is no incongruence of precedent between the Sixth District’s decision and the First District’s decision in *State Farm Mut. Auto. Ins. Co. v. Bishop*, 750 So. 2d 101 (Fla. 1st DCA 1999). The Sixth District’s decision and *Bishop* are harmonious because each decision premised its holding on different insurance policy language.

In *Bishop*, the First District held that the UM policy (the “*Bishop* Policy”) at issue in that case did not toll the statute of limitations as required by *Woodall*. See *Bishop*, 750 So. 2d 101. *Bishop* concluded that the terms of the *Bishop* Policy differed from the *Woodall* Policy:

[w]hat distinguishes the instant case from *Woodall* is that the [*Bishop*] policy does not preclude the policy holder from filing suit against [the insurer] until after proceedings have been concluded against the tortfeasor.... [T]he phrase “**legally entitled to collect**” in the context of the present policies does not mean that judgment must be entered against the tortfeasor before a claim can be asserted against [the insurer].

*Id.* (emphasis added).

Unlike the *Woodall* Policy, which required the insurer pay all amounts the insured is “legally entitled to **recover**,” *Woodall*, 699 So. 2d at 1364 (emphasis added), the *Bishop* Policy required the insurer to pay all amounts the insured is “legally entitled to **collect**.” *Bishop*, 750 So. 2d at 102 (emphasis added). *Bishop* held this distinction meant that unlike the *Woodall* Policy’s language, a judgment or settlement as to the tortfeasor was not required before a claim could be asserted against State Farm under the *Bishop* Policy, and therefore, the statute of limitations did not toll as in *Woodall*. *Id.*

The material fact that distinguished *Bishop* from *Woodall* was insurance policy language. *Id.* *Bishop*'s distinction of *Woodall* makes the interpretive analysis hinge on whether an insurance policy contains the phrase "legally entitled to recover" or the phrase "legally entitled to collect." *Compare Woodall*, 699 So. 2d at 1364 *with Bishop*, 750 So. 2d at 102. *Woodall* applies if an insurance policy says, "legally entitled to recover." On the other hand, if an insurance policy contains the phrase "legally entitled to collect," then *Bishop*'s policy-language-based distinction of *Woodall* applies. *Compare Woodall*, 699 So. 2d at 1364 *with Bishop*, 750 So. 2d at 102.

When examined side-by-side, the language in Progressive's Policy is identical to the *Woodall* Policy's language while the *Bishop* Policy's language is distinguishable:

<u>WOODALL POLICY</u>	<u>PROGRESSIVE POLICY</u>	<u>BISHOP POLICY</u>
"We will pay damages that the insured is <b>legally entitled to recover</b> from the owner or operator of an uninsured motor vehicle because of bodily injury...." <sup>1</sup>	"[W]e will pay for damages...that an insured is <b>legally entitled to recover</b> from the owner or operator of an uninsured motor vehicle because of bodily injury...." <sup>4</sup>	"We will pay damages for bodily injury an insured is <b>legally entitled to collect</b> from the owner or driver of an uninsured motor vehicle." <sup>7</sup>
"We will <i>make payment</i> under this coverage <b>only after the limits of liability have been used up</b> under all applicable bodily injury liability bonds or policies." <sup>2</sup>	"We will <i>pay</i> under this Part III <b>only after the limits of liability</b> under all applicable bodily injury liability bonds and policies <b>have been exhausted by payments of judgments or settlements</b> ." <sup>5</sup>	"[T]he <b>limits of bodily injury liability</b> of the person legally liable <b>shall be exhausted before any award</b> may be entered against us." <sup>8</sup>
"Legal action may not be brought against us under any coverage provided under this policy, unless the insured has <i>fully complied</i> with all the provisions of the policy." <sup>3</sup>	"We may not be sued unless there is <i>full compliance</i> with all the terms of this policy." <sup>6</sup>	"[T]here is no right of action against us: A. Until all terms of this policy have been <i>met</i> ." <sup>9</sup>

<sup>1</sup> *Woodall*, 699 So. 2d at 1364 (emphasis added).

<sup>2</sup> *Id.* (emphasis added).

<sup>3</sup> *Id.*

<sup>4</sup> (App. 4) (emphasis modified).

<sup>5</sup> (App. 4) (emphasis modified).

<sup>6</sup> (App. 5) (emphasis removed).

<sup>7</sup> *Bishop*, 750 So. 2d at 102 (emphasis added).

<sup>8</sup> *Id.* (emphasis added).

<sup>9</sup> *Id.*

The Progressive Policy does not say “legally entitled to collect.” (App. 4-5 That makes *Bishop* distinguishable. ). Compare *Bishop*, 750 So. 2d at 102 with (App. 4-5). It also makes *Woodall* controlling since the Progressive Policy is identical to the *Woodall* Policy. (App. 4-5, 8).

Different contractual terms lead to different legal outcomes. *U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So.2d 871, 883 (Fla. 2007); *Bonich v. State Farm Mut. Auto. Ins. Co.*, 996 So. 2d 942, 945 (Fla. 2d DCA 2008). *Bishop* Policy’s language is materially distinguishable from that in the Progressive and *Woodall* Policies. The different policy language harmonizes *Woodall*, the Sixth District’s decision, and *Bishop*. Thus, there is no express and direct conflict. *See, e.g., Ansin*, 101 So. 2d at 811.

## **II. PROGRESSIVE’S PARADE OF HORRIBLES IS UNWARRANTED.**

Progressive claims that the purported conflict between Sixth District’s decision and *Bishop* will have “significant consequences for Florida insurance companies and their respective insureds in future UM actions.” (Jur. Br. at 9). Progressive is mistaken.

As discussed, there is no express and direct conflict between *Bishop* and the Sixth District’s decision. The different language in the respective insurance policies harmonizes the two decisions.

Next, Progressive complains that the Sixth District’s decision “make[s] it difficult if not impossible to evaluate whether the 5-year statute of limitations has run in a given UM action.” (Jur. Br. at 9). Not so. Insurers and insureds alike need only look at the insurance

policy. *Woodall*'s policy-language-based holding has been undisturbed for over twenty-five years. Progressive cannot claim to be shocked by the Sixth District's decision when it used language identical to that in the *Woodall* Policy.

Finally, Progressive argues that the non-existent conflict undercuts the purpose of the statute of limitations. Again, *Woodall* has been the law in the State of Florida since 1997. The legislature has amended section 95.11, Florida Statutes, over 18 times since this Court decided *Woodall*. "When a court has interpreted a statute, particularly one amended as frequently as this one, and the Legislature does nothing to suggest that the interpretation does not effectuate legislative intent, there is ordinarily no good reason to alter the interpretation." *Clark v. State*, 823 So. 2d 809, 811 (Fla. 1st DCA 2002) (citing *State v. Hall*, 641 So. 2d 403, 405 (Fla. 1994)) (additional citations omitted). Indeed. This Court should, therefore, reject Progressive's invitation to act as a super-legislature.

### **CONCLUSION**

Based on the above argument and authorities, this Court lacks jurisdiction.

Respectfully submitted,

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### **CERTIFICATE OF COMPLIANCE**

This brief complies with font requirements of Rule 9.045, Florida Rules of Appellate Procedure. It is typed in Bookman Old Style 14-point font and is proportionately spaced type. Additionally, this brief complies with Rule 9.210, Florida Rules of Appellate Procedure, as it is 1,556 words and does not exceed 9 pages.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail to the below for service and all parties listed on the Florida E-Filing Portal on September 10, 2024.

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