WILLIAM ACQUESTA and
CRYSTAL ACQUESTA, husband
and wife, et al.,

Petitioners, Plaintiffs,

vs.

INDUSTRIAL FIRE AND CASUALTY
INSURANCE COMPANY,

Respondent, Defendant

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

CASE NO.: 65,356

DCA CASE NO.: 82-2568
(4TH DCA)

ON PETITION FOR CERTIORARI

INITIAL BRIEF OF PETITIONERS ON MERITS

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STATEMENT OF THE CASE

This is a Petition for Certiorari to the District Court of Appeal, Fourth District of Florida. The Fourth District reversed and remanded an appeal from a summary judgment entered in favor of the Petitioners against the Respondent (R. 223-224) (see Appendix A(4)). The nature of the proceeding before the trial court which was the issue appealed from was a declaratory action to determine whether there was uninsured motorist coverage in the amount of Ten Thousand/Twenty Thousand Dollars ($10,000.00/$20,000.00). Crystal Acquesta rejected uninsured motorist coverage without the consent of and unknown to her husband, WILLIAM ACQUESTA, the named insured. The trial court found that the named insured, WILLIAM ACQUESTA, did not reject uninsured motorist coverage pursuant to Florida Statute 627.727(1) (R. 223-224).

Petitioners were the original Plaintiffs below and the Appellees before the District Court of Appeal, Fourth District. The Respondent was the original Defendant below and the Appellant before the District Court of Appeal, Fourth District.

The Fourth District Court of Appeal on April 4, 1984, reversed and remanded the trial court, holding that, although the trial court ruled properly and in accordance with Weathers v. Mission Insurance Co., 258 So.2d 277 (Fla. 3d DCA 1972) and Protective National Insurance Co. of Omaha v. McCall, 310 So.2d 324 (Fla. 3d DCA 1975), it disagreed with these rulings and certified its opinion to be in conflict with those rulings (see

Appendix A(1) and A(2). A Motion for Rehearing was denied on May 10, 1984, by the District Court of Appeal, Fourth District.

A Notice to Invoke Discretionary Jurisdiction of the Supreme Court of the State of Florida was filed on May 18, 1984, with the District Court of Appeal, Fourth District.

Petitioners shall be referred to as Petitioners or William Acquesta or Crystal Acquesta. Respondent shall be referred to as Defendant or Industrial Fire.

The deposition of William Acquesta shall be referred to as (W. Dep.), with the page number and then a line number. Crystal's deposition shall be referred to as (C. Dep.), with the page number and line number following. For example, page 1, line 1 of Crystal's deposition shall be referred to as (C. Dep. 1-1).

STATEMENT OF FACTS

Prior to the policy in question, William Acquesta had had insurance on his automobile, part of which was uninsured motorist coverage (W. Dep. 9-24). He had had "full coverage" (W. Dep. 10-3). When his insurance became due, he spoke with an insurance agent by phone and told them he desired to renew his same insurance coverage (W. Dep. 14-3, 14-18, 16-6, 17-7). William told the agent he would send his wife, Crystal, to the agency to pay for the insurance (W. Dep. 16-9), and she was to obtain full coverage on his automobile (R. 180, 223-224). When Crystal appeared at the agency, she signed the application of insurance, which was in William's name, and rejected uninsured motorist coverage, which was without the consent of and unknown to William (R. 223-224). She had been instructed only to pay for the insurance (C. Dep. 13-16). Industrial Fire issued a policy on William's vehicle (R. 223-224). Crystal and the Petitioners' two minor children were involved in an automobile accident with an uninsured motorist (R. 181, 223-224). Industrial Fire, when it obtained the application for insurance, altered the application by crossing William's name out at the top of the application and by writing Crystal's name in its place (R. 33-34). Industrial Fire issued a policy in Crystal's name.

ARGUMENT

WHETHER THE FOURTH DISTRICT COURT OF APPEAL ERRED BY NOT FOLLOWING WEATHERS AND PROTECTIVE CONCERNING UNINSURED MOTORIST COVERAGE?

Uninsured motorist coverage originates from state legislatures hearing the cry of injured consumers who have been innocent accident victims of financially irresponsible motorist.1/ At first, in an effort to solve the problem, legislators required motorists to have proof of future insurance, and if they failed to prove future insurance, their licenses would be suspended. 2/ Since the first attempt, state legislators have been consistently amending their statutes in an attempt to better protect the consumer. 3/

Florida first responded to the outcry in 1961 by enacting Florida Statute Section 627.0851. This section introduced uninsured motorists coverage in Florida and required it "...for protection of persons insured thereunder who are legally entitled

1/ 3 R. Long, The Law of Liability Insurance, Section 24.01-24.05 (Revised ed. 1983); Pretzel, Uninsured Motorists 1-5 (1972); 2 I. Schermer, Automobile Liability Insurance Section 23.01 (revised ed. 1983); A. Widiss, A guide to Uninsured Motorist Coverage 3-17 (1970); Donaldson, Uninsured Motorist Coverage , 34 Ins. Council J. 57 (1967).

2/ Id.

3/ Id.

to recover damages from owners or operators of uninsured motor vehicles." Fla. Stat. section 627.0851 (1961). The named insured could reject the coverage. Fla. Stat. section 627.0851(1)(1961). As with other states, the Florida Legislature piecemeally amended the statute to address the growing litigation concerning the statute and to further insure the legislative intent of the statute.4/ This legislative intent has been recognized in Weathers v. Mission Insurance Company, 258 So.2d 277 (Fla. 3d DCA 1972), and Protective National Insurance Company of Omaha v. McCall, 310 So.2d 324 (Fla. 3d DCA 1975). In Ferrigno v. Progressive Amercian Ins. Co., 426 So.2d 1218 (Fla. 4 DCA 1983) Judge Glickstein, dealing with the 1980 amendment concerning notice of options as to uninsured motorist coverage, stated: 5/

> "...uninsured motorist coverage may be the only meaningful protection available to Floridians who daily are subjected to misguided missles on the highways of this state; therefore, this remedial statute must be broadly and liberally construed." At 1219.

Unhappy with uninsured motorist coverage, the insurance industry has attempted to frustrate the intent of the state legislators by writing slanted policies to discourage uninsured

4/ 1963 Fla. Laws ch. 63-148; 1971 Fla. Laws ch. 71-88; 1973 Fla. Laws ch. 73-180; 1976 Fla. Laws ch. 76-266; 1980 Fla. Laws ch. 80-396; 1982 Fla. Laws. ch. 82-243.

5/ Judge Glickstein cites Weathers for authority. See also Industrial Fire and Casualty Ins. Co., v. Kwechin, So.2d (Fla. 1983), for a discussion of applying intent of statute.

motorist coverage. 6/ An example of this type of practice was evident in Daly v. Industrial Fire and Casualty Ins. Co., 422 So.2d 1093 (Fla. 4 DCA 1982). In this case, Industrial Fire simply prepared a form which already rejected uninsured motorist coverage for the applicant's signature prior to any discussion with the applicant . Although the Court upheld the rejection of uninsured motorist coverage, it stated that such practice violated the intent of the Statute and asked the department of Insurance and the Legislature for action concerning this. See also, Realin v. State Farm and Casualty Co., 419 So.2d 431 (Fla. 3 DCA 1982). In addition, insurers further frustrate the legislative intent by writing policies which exclude certain individuals and certain vehicles from coverage. Salas v. Liberty Mutual Insurance Co., 272 So.2d 1 (Fla. 1972); Mullis v. State Farm Mutual Aubomobile Ins. Co., 252 So.2d 299 (Fla. 1971).

The Courts should not allow this. The purpose of this statute is to protect innocent injured persons from negligent uninsured individuals who cannot make the injured whole. The law was not written for the uninsured motorist nor the insurance industry, but for the consumer.

6/ 2. I. Schermer, Automobile Liability Insurance Section 23.04(3) at 23-13, (revised ed. 1983).

In Weathers,7/ supra, a case directly on point and certified to be in conflict with the instant case, the Third District stated:

> "The statute evolves from public policy considerations and must be broadly and liberally construed to accomplish this purpose. Conversely, that portion of the statute permitting rejection of uninsured motorist coverage detracts from public policy considerations and must therefore be narrowly and strictly construed." At 279.

The intent of the Florida Legislature was again recognized in Protective National Insurance Co. of Omaha v. McCall, 310 S.2d 324 (Fla. 3d DCA 1975), a case again certified to be in conflict with the instant case. The Protective Court refused to allow the intent of the legislature to be frustrated, and the Court stated that strong public policy required uninsured motorist coverage. The Weathers and Protective Courts saw the intent of the statute, applied it, and refused to allow the insurance industry to frustrate the statutes intent.

The intent and the clear meaning of this statute is clearly supported by the well known doctrine of expressio unius est exclusio alterius. When certain persons or things are specified in law, an intention to exclude all others from its operation is

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7/ The majority felt that Mrs. Weathers was not an agent of her husband because in signing the rejection of coverage Mrs. Weathers did not do so in Mr. Weathers name as his agent, or otherwise in a manner to indicate she was acting in an agency capacity. This point will be addressed later in the brief.

intended. For example, the statute (now Florida Statute 627.721(1)) states that only a named insured can reject uninsured motorist coverage. If the legislative intent was to have anyone reject uninsured motorist coverage for the named insured, then the specific language of the statute is unnecessary. The legislative requirement that only the named insured reject uninsured motorist coverage was further enhanced by requiring a rejection in writing. Fla. Stat 627.721(1).

In addition, rules of construction state that the intent of the legislature must be given effect when construing a statute. Fort Lauderdale v. Des Camps,111 So.2d 693 (Fla. 2 DCA 1959); Watt v. Alaska, 101 S.Ct. 1673,68 L.Ed. 2d 80 (1981). Most importantly, the context of the statute must yield to the legislative purpose of this statute. Payne v. Payne, 89 So. 538 (Fla. 1921); State v. Beardsley, 94 So. 660 (Fla. 1922); Conascenta v. Giordano, 143 So.2d 682 (Fla. 3 DCA 1962). In fact, this Court has stated that even when a statute is ambigious, the Courts should look to the legislative intent, and any ambiguity or uncertainty of the legislative intent should receive the interpretation that protects the public interest. State v. Atlantic C.L. R. Co., 47 So. 969 (Fla. 1908); Abood v. S. Jacksonville, 80 So.2d 443 (Fla. 1955); Ruff v. Braynon, 32 So.2d 840 (Fla. 1947). The language and intent of the statute demands uninsured motorist coverage in this case.

Not only does Florida Statute 627.727(1) require only the named insured to reject uninsured motorist coverage, but it must also be an informed rejection, New Hampshire Ins. Co. v. Conner, 435 So.2d 275 (Fla. 2 DCA 1983); Travelers Ins. Co. v. Spencer, 397 So.2d 358 (Fla. 1st DCA 1981), and now in writing. Under the facts of the instant case, William had no knowledge of rejection and therefore it could not have been an informed rejection (W. Dep. 9-24, 11-24). One writer recommends that, in order to protect the public, uninsured motorist coverage should be mandatory. 8/

In the instant case, the parties stipulated that William Acquesta told his wife to obtain full coverage insurance for him on his automobile (R. 223-224; W. Dep. 10-3, 10-13, 14-18). In Riccio v. Allstate Ins. Co.,357 So.2d 420 (Fla. 3 DCA 1978), the Court stated that because the statute required uninsured motorist coverage up to the liability coverage, then "full coverage" meant uninsured motorist coverage equal to the liability limits. It has been suggested that public policy requires that full coverage include uninsured motorist coverage.9/ William Acquesta meant by full coverage to include not only liability insurance coverage but uninsured motorist coverage as he had purchased consistently in the past (W. Dep. 9-24).

8/ A. Widiss, A Guide to Uninsured Motorist Coverage at 285 (1970).

9/ 2. I. Schermer, Automobile Liability Insurance, Section 23.04(1) at 23-21, (revised ed. 1983).

When Crystal went to obtain William's insurance on his automobile, Crystal was presented an application in William's name for his automobile. The agent had Crystal sign a rejection of uninsured motorist coverage. This was without the consent of and unknown to William. When Industrial Fire reviewed the application, instead of notifying the Acquesta's of the apparent conflict in the application so that the true intentions of the parties could be accomplished, Industrial Fire altered the application without the Acquesta's knowledge and issued a policy in Crystal's name. (R. 33). 10/ When Crystal saw the policy, she called Industrial Fire and asked them why the policy was in her name and told them to correct it (C. Dep. 29-12). Before the policy was corrected, Crystal and her minor children were involved in an accident with an uninsured motorist, causing them serious injuries.

10/ In fact, Industrial Fire and casualty Insurance company, by changing the named insured, could very well have been thwarting Florida law. Florida Statute 627.733 requires every owner or registrant of a motor vehicle to maintain security (insurance) on his motor vehicle continuously throughout the registration or licensing. Florida Statute 627.732 defines "owner" as a person who holds the legal title to a motor vehicle. In this case, it is William Acquesta (R. 180,247). The penality for the owner not insuring his motor vehicle as set forth in the Florida Statute 627.733(5) is suspension of the owner's registration and operator's license. One of the facts stipulated to by the parties as reflected in the summary judgment was that Crystal Acquesta went to Dania Insurance Agency, Inc., and signed an application of insurance for her husband, the application being in <u>his</u> name and for <u>his</u> automobile. Industrial Fire and Casualty Insurance company in changing the named insured was subjecting William Acquesta to a violation of law under Florida Statute 627.733. One would think that Industrial Fire and Casualty, an insurance company who is to be aware of the law, was in a better position to appreciate and understand the ramifications of such an action than were the Acquestas.

Crystal out as having sufficient authority to reject uninsured motorist coverage. Fidelity & Casualty Co. v. D.N. Morrison Const. Co., 116 Fla. 66, 156 So. 385 (1934), app dismd 293 U.S. 534, 79 L. Ed. 642, 55 S. Ct. 348; H.S.A. Inc. v. Harris-In-Hollywood, Inc., 285 So.2d 690 (Fla. 4th DCA 1973), cert dismd 290 So.2d 493 (Fla); Miller v. Sinclair Refining Co.,268 F.2d 114 (5th Cir. 1959). In the instant case, William told the agent that he wanted to renew his policy and his wife would pay for the insurance the next day (W. Dep. 16-16). William did not want any changes from his previous insurance (W. Dep. 17-18). His wife knew he wanted uninsured motorist coverage (W. Dep. 20-2). He had had uninsured motorist before the policy under question in this case (W.Dep. 9-24). It is clear from these facts that Crystal had no authority to do anything but renew the previous policy with full coverage and everyone knew this. An inspection of the policy indicates, before its alteration, by Industrial Fire, that the named insured was to be William and that the vehicle was in his name. At the top of the application -- filled out by the agent -- is all of William's identifying information (R. 24, 28-30). Under "Full name of all operators in household," again, corresponding with the applicant's personal information, William's personal information appears. Granted, Crystal signed the application under "Applicant's Personal Signature" and "Applicant's signature." But by this occuring, Industrial Fire knew there was a conflict in the application, and because of the conflict Industrial Fire altered the application by crossing out William's name and writing Crystal's above his (R. 33). Industrial Fire should have been put on inquiry that the

application was incorrect, and it should have acted in good faith and contacted the Acquestas to find out from William what kind of coverage he wanted. Stiles v. Gordon Land Co., 44 So.2d 417 (Fla. 1950); Tomkin Corp. v. Miller, 156 Fa. 388, 24 So.2d 48 (Fla. 1945). Industrial Fire, an insurance company, knows what the law is and how such a conflict could forseeably have drastic effects. Industrial Fire should have sought written rejection by William. 11/

Finally, in order for there to be apparent authority, Industrial Fire must establish a course of dealing. An isolated or ever occasional transactions are insufficient. Bogue Electric Mfg. Co. v. Coconut Grove Bank,269 F.2d 1 (5th Cir. 1959). In the instant case, there was no course of dealing, none ever established, and no hint of one in the record. Crystal's appearance was an isolate event. In Weathers, supra, under similar circumstances, the Third District also found no agency, and stated: "... in signing the rejection of such coverage Mrs. Weathers did not do so in Mr. Weather's name as his agent, or otherwise in a manner to indicate she was acting in an agency capacity." at 279.

There is no apparent authority in the instant case.

In summary, the purpose of the statute is to protect the insured consumer from the negligence of irresponsible motorist. Misunderstandings due to lack of proper explanation or alterations

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11/ All Industrial Fire had to do was phone, inquire and resolve the paper work or send Mr. Acquesta the form for rejection in the mail. This would have provided Mr. Acquesta, the named insured, the right to indicate his intentions by rejecting uninsured motorist coverage, or by requesting it as he had in the past.

of policies without consent of the named insured can be eliminated by requiring only the named insured to reject uninsured motorist coverage. This was the intent of the statute. The Courts must interpret laws in conformity and resolve cases with the law's express purpose. In this instant case, this Court should reverse the Fourth District Court of Appeals' decision and hold that the Acquestas had uninsured motorist coverage.

CONCLUSION

For the aforementioned reasons, the summary judgment should be upheld.

Respectfully submitted,

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Attorney for Petitioners,
Plaintiffs.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief of Petitioners on the merits was mailed this 19th day of June, 1984, to Marcia Levine, Attorney at Law, Fazio Dawson & DiSalvo, 633 S. Andrews Avenue, Fort Lauderdale, Florida 33301 and Robert Peltz, Esquire, Rossman & Baumberger, P.A., Suite 1207, 19 W. Flagler Street, Miami, Florida 33130.

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