SUPREME COURT OF FLORIDA

ALFRED MARCHESANO and
DORIS MARCHESANO,

Petitioners,

vs.

NATIONWIDE PROPERTY AND
CASUALTY INSURANCE COMPANY,

Respondent.

CASE NO.: 68,397
APPEAL NO.: 85-694

AMICUS CURIAE, ACADEMY OF FLORIDA TRIAL LAWYERS,
BRIEF IN SUPPORT OF PETITIONERS

ON APPEAL FROM THE DISTRICT COURT OF APPEAL
SECOND DISTRICT
STATE OF FLORIDA

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INTRODUCTION

This is the brief of Amicus Curiae, Academy of Florida Trial Lawyers, in support of the position of the Petitioner-Plaintiff.

The record below will be referred to as follows: (R.). The parties will be referred to as Plaintiff and Defendant or insured and insurer.

STATEMENT OF THE CASE

This was a suit for uninsured motorist benefits filed by the insured, Marchesano, against his insurance company, Nationwide. After a jury trial, the trial court entered final judgment for the insured finding him entitled to uninsured motorist coverage equal to the limits of his bodily injury liability limits (R.406). On appeal, the Second District Court of Appeal reversed finding that the sending of annual notices by the insurer to the insured setting forth his options as to uninsured motorist coverage under F.S. 627.721(1) remedied, as a matter of law, the failure of the insurer to obtain a knowing selection of uninsured motorist coverage at the time the policy was issued. The Second District certified the following question to this Court:

> ". . . what is the effect, if any, of a subsequent notification sent by the insurer to the insured with a premium notice advising the insured of his options as to uninsured motorist coverage as required by §627.727(1), Fla.Stat. 1982?"

STATEMENT OF FACTS

The Amicus Curiae adopts the Statement of Facts contained in the Petitioner's brief.

SUMMARY OF ARGUMENT

The decision of the Second District in this case that the sending of notices pursuant to F.S. 627.727(1) of the options of uninsured motorist limits available to the insured remedies, as a matter of law, the failure of the insurer to obtain an informed selection of limits of uninsured motorist coverage less than the limits of bodily injury liability directly conflicts with the decisions of this Court. This Court in Kimbrell v. Great American Insurance Company, 420 So.2d 1086 (Fla. 1982) and in American Fire and Indemnity Company v. Spaulding, 442 So.2d 206 (Fla. 1983) both held that the issue of whether a knowing selection of uninsured motorist limits had been made by the insured was an issue of fact for the trier of fact.

Additionally, other courts have found that the issue remains an issue of fact even if the insurer has a signed rejection or selection of lower limits. Zisook v. State Farm Mutual Automobile Ins. Co., 440 So.2d 452 (Fla. 3d DCA 1983); Realin v. State Farm Fire and Casualty Co., 418 So.2d 431 (Fla. 3d DCA 1982); American Motorists Ins. Co. v. Weingarten, 355 So.2d 821 (Fla. 1st DCA 1978).

In the instant case, the Second District has elevated the failure of the insured to take action in response to a mailed notice to the level of conclusive proof of an informed selection. Even if the insured had affirmatively signed the option notice and returned it to the insurer, under Kimbrell and Spaulding the issue of whether an informed selection had been made would be for the trier of fact. Therefore, the decision should be reversed.

ARGUMENT

CERTIFIED QUESTION: WHAT IS THE EFFECT, IF ANY, OF A SUBSEQUENT NOTIFICATION SENT BY THE INSURER TO THE INSURED WITH A PREMIUM NOTICE ADVISING THE INSURED OF HIS OPTIONS AS TO UNINSURED MOTORIST COVERAGE AS REQUIRED BY §627.727(1), FLA.STAT. 1982?

In the trial of this case, the jury found that the Plaintiff insured had not made a knowing selection of uninsured motorist limits lower than his liability insurance limits (R.377). The jury also found that the annual notice of options pertaining to uninsured motorist coverage had been given by the Defendant insurer (R.377).

On appeal, the Second District, in reversing the judgment in favor of the insured, found that the sending by the insurer of the annual option notice required to be sent by §627.721(1), Florida Statutes remedied the prior failure to obtain an informed selection of uninsured motorist limits lower than bodily injury limits. In effect, the Second District ruled, as a matter of law, that the mailed notice informing the insured of his options was dispositive of the issue of whether a knowing selection had been made. That decision is in direct conflict with this Court's rulings in Kimbrell v. Great American Insurance Company, 420 So.2d 1086 (Fla. 1982) and American Fire and Indemnity Company v.

Spaulding, 442 So.2d 206 (Fla. 1983). Additionally, that holding by the Second District finds no validation in the statute nor in the cases decided under the statute. Moreover, public policy and common sense dictate that the holding is incorrect.

In effect, the Second District's decision elevates nonaction by the insured in response to the annual notice of options required by F.S. §627.721(1) to the status of a binding, knowing rejection and above the status of affirmative actions by insured's that have not been found to be conclusive proof in other cases. For instance, in Spaulding, supra, at 207-208, this Court explained its earlier ruling in Kimbrell, supra, as follows:

> "In Kimbrell we noted that the question of whether the insured made a knowing selection of coverage limits was an issue to be decided by the trier of fact. In making this factual determination the trier of fact should undoubtedly consider whether the insurer expressly informed the insured of his statutory right to higher uninsured motorist coverage. But while the existence or absence of an express offer is relevant to the factual inquiry, it 'is not dispositive of the question whether there was a knowing selection of coverage limits. . . .'"

Further, other courts have held that even when the insurer has a signed election or rejection, the issue of whether done knowingly was still for the trier of fact. Zisook v. State Farm Mutual Automobile Ins. Co., 440 So.2d 452 (Fla. 3d DCA 1983); Realin v. State Farm Fire and Casualty, 418 So.2d 431 (Fla. 3d DCA 1982); American Motorists, Ins. Co. v. Weingarten, 355 So.2d 821 (Fla. 1st DCA 1978). At best, the annual notice of options could be construed as an offer of higher limits. Therefore, it would only be evidence to be considered by the trier of fact in determining whether a knowing selection had been made. Under the clear holding in Spaulding, it would not be sufficient as a matter of law to support a decision in favor of the insurer. Therefore, the decision of the Second District cannot stand in the light of this Court's decisions in Spaulding and Kimbrell.

Additionally, the Second District's ruling found that the Legislature intended ". . . that an insured be bound by his failure to exercise the option provided to him in the written notification required by §627.721(1), Fla.Stat." The statute does not so provide either explicitly or implicitly and no case supports any policy argument to that effect. The Second District's sole rationale for that perception was that the legislative committee staff reports do not show any

intent contrary to the Court's construction. Counsel, in all due respect, has never seen that recognized in any case, text or treatise as a canon of statutory construction.

A much stronger argument can be made that in F.S. 627.721(1), the Legislature intended to give to insureds another chance to exercise a knowing selection of higher limits after an earlier knowing selection of lower limits or knowing rejection of uninsured motorist coverage. The statute imposes no burden upon the insured and is silent as to whether the failure of the insured to act in response to the notice has any consequence for the insured. However, the cases are clear that the statute imposes a burden upon the insurer that will result in granting greater coverage to insureds if the company does not comply. See, e.g., Ruiz v. Prudential Property and Casualty Company, 441 So.2d 681 (Fla. 3d DCA 1983).

Further, the interpretation in favor of insureds is further supported by the fact that the legislative policy and public policy of Florida favor full uninsured motorist coverage and that F.S. §627.727 is not for the protection of insurance companies but instead is for the protection of Florida insureds. See, e.g., Hodges v. National Union Indemnity Co., 249 So.2d 679, 680 (Fla. 1971); Brown v.

Progressive Mutual Ins. Co., 249 So.2d 429 (Fla. 1971); Decker v. Great American Ins. Co., 392 So.2d 965 (Fla. 2d DCA 1980).

Common sense also does not support the Second District's holding. Unless uninsured motorist coverage is understood, the insured could not be expected to make a knowing selection among different amounts of coverage. Most persons purchasing insurance are totally unsophisticated in insurance and cannot be expected to grasp the significance and ramifications of insurance language. Most could not even be expected to attempt to do so by reading what could easily be perceived as an advertising stuffer with the premium bill. The prodigious amount of litigation over the language in insurance policies in general, and uninsured motorist coverage in particular, is indicative that the frequently uneducated and the almost universally "unsophisticated" laymen cannot be expected to grasp and fully understand the selections he is called upon to make concerning uninsured motorist coverage without a knowledgeable insurance agent making an initial explanation. Cf. Realin v. State Farm Fire and Casualty Co., supra.

Additionally, the statute does not impose upon the insured the obligation or duty to read the "stuffer" or

"notice of options" provided for in the statute. Moreover, in a situation such as the instant case in which the insured believes he has the "best coverage", the option notice would in no way advise him that he needs to be concerned about his coverage or that he has less coverage than he is entitled by law to purchase or that he has less uninsured motorist coverage than he has liability coverage.

CONCLUSION

The Second District's decision ignores the fact that the Courts of Florida have always imposed a heavy burden upon insurance companies to obtain informed decisions from their insureds in the area of uninsured motorist coverage. See, e.g., Zisook v. State Farm Mutual Automobile Ins. Co., supra. It also ignores this Court's holdings in Kimbrell, supra, and Spaulding, supra, that the issue of whether a knowing selection of uninsured motorist coverage has been made is a question of fact for the jury. Therefore, the decision should be reversed for reinstatement of the final judgment.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to A. H. Lane, Esquire, Post Office Drawer J, Lakeland, Florida 33802, and A. R. Mander, III, Esquire, 103 North Third Street, Dade City, Florida, 33525, by United States First Class Mail, properly addressed and postage prepaid on this the 28th day of March, 1986.

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