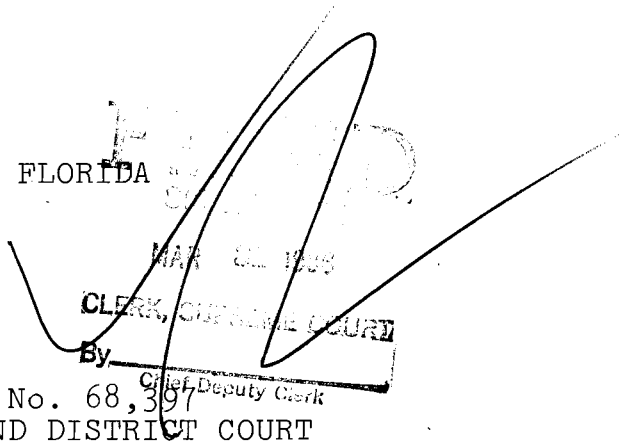
SUPREME COURT OF FLORIDA



ALFRED MARCHESANO, ET AL.,

Petitioners,

vs

NATIONWIDE PROPERTY AND CASUALTY INSURANCE COMPANY,

Respondents.

_____/

Case No. 68,397
SECOND DISTRICT COURT
OF APPEAL NO. 85-69

PETITIONERS BRIEF

A. R. MANDER, III
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103 North Third Street
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STATEMENT OF THE FACTS

On February 26, 1984 the Plaintiffs, Mr. & Mrs. Marchesano, were involved in an automobile accident caused by an uninsured or underinsured motorist. As a result of the accident, Mrs. Marchesano was severely injured and Mr. Marchesano was injured to a lesser extent. (R 362-363) The facts surrounding the accident and the issues of liability and damages were not material to the trial of this action except as triggering events which initiated it.

Plaintiffs made a claim to Defendant for uninsured motorist benefits, and while Defendant admitted Plaintiffs had $100,000.00/$300,000.00 liability coverage, they denied Plaintiff's claim that equal uninsured motorist limits should be available. (R 359) Plaintiff initially filed a one count Complaint for declaratory decree alleging they had not knowingly rejected uninsured motorist limits equal to their $100,000.00/$300,000.00 liability limits. (R 186) Plaintiff later amended and added a second count and basis for the higher uninsured motorist coverage, to-wit: failure to comply with §627.727 (1), Fla.Statutes, requirement of annually notifying Plaintiffs of their options with a notice which is part of the notice of premium in a manner approved by Department of Insurance. (R 362)

The case proceeded to jury trial. The testimony in the trial reflected as follows.

On or about April 20, 1982 Mr. Marchesano went to the Starkey Insurance Agency where he purchased the Nationwide policy which is the subject of this action. (R 6-7) The Nationwide agent who sold Mr. Marchesano the insurance policy was John Starkey. (R 6)

Mr. Marchesano is a retired manual laborer who had done scaffolding, waterproofing and service station work. (R 5; R 16) Mr. Marchesano only completed eighth grade and then went for two years of trade school and radio and television repair. (R 4) While in school, Mr. Marchesano recalls having particular difficulty in English and spelling. (R 24) Mr. Marchesano indicated that he can read and write to the extent of reading basic things like a newspaper but he often has to ask his wife to explain words to him, and he is not able to read legal or insurance documents. (R 15; R 32) Mr. Marchesano was not knowledgeable about different types of insurance (R 7) and he is not very well read, particularly in the area of insurance. (R 5)

The reason Mr. Marchesano had gone to the Starkey Insurance Agency was to obtain insurance coverage for a 1938 Chevrolet that he had just finished renovating. (R 6) Mr.

Marchesano testified he specifically recalled telling Mr. Starkey that he wanted "the best coverage" (R 7) and that he never told Starkey that he wanted less than the best. (R 9) Mr. Marchesano testified he specifically recalled that Mr. Starkey assured him that he would get him the best coverage. (R 8) Mr. Marchesano testified that he doesn't recall Starkey ever telling him what uninsured motorist coverage was. (R 9) Mr. Marchesano testified Starkey never told him he was entitled to buy as much uninsured motorist coverage as bodily injury liability coverage. (R 9) He knows that Mr. Starkey never told him he was giving him the lowest uninsured motorist coverage he sold. (R 9) He testified that Starkey never told him to read any portion of the application (R 11) and simply pointed to the spot where he should sign. (R 10) Marchesano testified that he didn't read any of the application (R 10; R 24) and that he doesn't think he would have understood it even if he had read it. (R 11) Marchesano testified that he signed where he signed because he was told to (R 10) and because he was relying on Mr. Starkey as the insurance agent. (R 13) Marchesano testified that he never told Starkey he wanted the lowest uninsured motorist coverage. (R 11) Marchesano testified that he can read the words "uninsured motorist" but that didn't mean he knew the legal significance; and in

fact, he did not know the legal significance. (R 35) Marchesano testified that he was in Starkey's Office for only about 5 minutes. (R 12) Starkey never inquired of him about his financial situation or his assets. (R 12)

Agent Starkey admitted that after he filled out the application he did not read the application to Mr. Marchesano. (R 103) He admits that he probably told Mr. Marchesano where to sign. (R 103) That prior to Mr. Marchesano signing he never directed Mr. Marchesano to read it. (R 103) That he doesn't know whether Mr. Marchesano read it (R 103) and that he didn't even inquire as to whether Mr. Marchesano could read. (R 103) Starkey testified he never inquired as to Mr. Marchesano's level or extent of education. (R 82) Marchesano was not given a copy of the application when he left. (R 11) It turned out that the policy provided for $100,000.00/$300,000.00 liability and only $10,000.00/$20,000.00 uninsured motorist coverage limits.

Marchesano was excited when he got home because he could now use his 1938 Chevy and he told his wife that they were "100% covered on everything". (R 13) When the policy later came in the mail Marchesano testified that he didn't read it and it wouldn't have made any sense to him if he had read it. (R 13) Marchesano testified that he also

didn't read it because he was relying on Mr. Starkey and Marchesano specifically recalled Mr. Starkey telling him that he would give him "the best coverage". (R 8; R 13)

Mr. Marchesano testified that his wife pays the bills and that he never saw any of the envelopes or premium notices that were sent by Nationwide. (R 30) Mr. Marchesano indicated he didn't particularly pay attention to the letters from Nationwide since he felt he already had "the best". (R 30)

Mrs. Marchesano confirmed that the Marchesano's relied on the insurance agents because neither Mr. Marchesano nor her were knowledgeable about insurance coverages. (R 38) She confirmed that Mr. Marchesano is not good at reading matters and gets confused on dates and on bills. (R 37) She indicated that is why she handled paying the bills. (R 37) She recalled that when Mr. Marchesano had come back from his meeting with Starkey that he had stated to her that he had gotten "the best insurance there was" and "not to worry". (R 37) Mrs. Marchesano recalled that sometimes there were a piece of paper in the envelope with the premiums. (R 38) She referred to it as a "separate flyer". (R 38) She indicated that she just glanced at them and then put them in the garbage. (R 44) She indicated she wouldn't pay any particular attention

to them and that she didn't discuss any of them with Mr. Marchesano. (R 44) Mrs. Marchesano testified that she didn't think the flyers were significant to her because it was her understanding that they were already covered. (R 39)

Peter Bushelli testified that he was employed by the Defendant as General Service Supervisor in charge of outgoing mail for Nationwide. (R 110) Bushelli was asked to identify and review three items which had been accepted in evidence as Plaintiff's exhibits 2, 3 and 4. (R 114) Those forms were approved by the Department of Insurance. (R 417-425) Bushelli testified those forms would have been mailed out to the Plaintiffs during the times material to this case. (R 113-115) The forms, which Bushelli referred to as "stuffers", were not part of the premium billing document, and were simply stuffed in the same envelope by a machine. (R 111) These were not the forms Bushelli had attached to the affidavit which Nationwide had filed in the Court file prior to trial. (R 222-225)

The jury found that Defendant failed to offer Plaintiff the higher uninsured motorist limits. (R 377) The jury determined that Defendant sent Plaintiffs the annual notice. (R 377)

Defendant filed a Motion for Judgment N.O.V. which was denied. (R 398) A final judgment was entered decreeing

that $100,000.00/$300,000.00 uninsured motorist limits be available and awarding Plaintiffs costs and reasonable attorney fees. (R 406)

Defendant appealed to 2nd District Court of Appeal. Said Appellate Court affirmed the finding that Defendant had not obtained a knowing rejection. The Appellate Court, however, reversed the judgment on the basis that a later sending of a written notice of options had cleared up the initial ommission. The Court then certified, the issue reversed upon, as being of great public importance.

SUMMARY OF ARGUMENT

A portion of the Plaintiffs allegations have been decided with finality. It must now be accepted by all parties that when Mr. Marchesano purchased automobile insurance Defendant's agent did not properly inform him of his options as to uninsured motorist coverage and did not obtain a knowing rejection of uninsured motorist coverage limits equal to the liability coverage limits that were ordered for Mr. Marchesano. This has been decided by the jury, affirmed by the Second District Court of Appeal and there has been no cross appeal on that issue.

The Second District Court of Appeal has certified the question of "...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?"

Plaintiff vigorously submits:

1. That this certified issue was not one that the Second District Court of Appeal could even properly consider since it was never pled or raised in the trial court and, Defendant's attorney repeatedly acknowledged on the record

that it was not one of the issues.

2. That the subsequent notification, in the context of this case, should have no effect on Plaintiff's right to the higher uninsured motorist limits. The reasons are numerous, but perhaps the clearest one is that it would be directly against legislative intent and stated public policy to render the requirement of a knowing rejection of equal uninsured motorist coverage meaningless. The requirement of a "knowing rejection" would be rendered meaningless because an insurance company and its agents could (and did) ignore the requirement of obtaining a knowing rejection from a poorly educated man in his only face to face meeting with the agent; then send a "stuffer" along with the first premium billing, and the insurance company would have "satisfied their obligation".

ARGUMENT I

WHETHER THE APPELLATE COURT ERRED IN REVIEWING A QUESTION WHICH WAS NOT RAISED BY THE INSURER IN THE TRIAL COURT.

When Defendant appealed to the Second District of Appeal it set forth as its second issue:

> "Whether subsequent periodic notification to the insured of his options as to uninsured motorist coverage pursuant to §627.727, Fla. Stat., over comes any ommission to notify the insured of such options when the application for coverage is initially taken."

This issue was never raised by the insurer in the trial court. This defense was never pled in any of the insurer's pleadings in the trial court. This issue was never argued to the trial court and what is most shocking is that Defendant's attorney stated multiple times, on the record, to the Judge, and even to the jury what the issues were and this argument was never made. (R 51; R 156, R 142) The first time this issue was ever raised was when the insurer filed its brief. Plaintiff promptly filed a Motion to Strike said argument. (A 1) The Appellate Court reserved ruling on it. Subsequently the Appellate Court relied on this new issue and defense to reverse Plaintiffs judgment.

It is basic Florida law that an Appellate Court confine itself to a review of only those questions which were

before the trial court. Matters not presented to the trial court by the pleadings and evidence will not be considered by a court on appeal. Dober v. Worrell, 401So.2d 1322 (Fla. 1981); Cowart v. City of West Palm Beach, 255 So.2d 673 (Fla. 1971); Mariani v. Schleman, 94 So.2d 829 (Fla. 1957); Jones v. Neibergall, 472 So.2d 605 (Fla. 1950) Needless to say it is an even greater extension of error to reverse a trial court judgment where the appealing party conceded in the trial court the issue or defense did not exist.

Perhaps the clearest way to see the error is to review the history and pleadings of the case. Initially, Plaintiffs filed a Complaint seeking a declaratory decree based on one cause of action contained in a single count. (R 186-187) Plaintiffs were seeking a declaratory judgment to establish they were entitled to uninsured motorist benefits equal to their higher liability coverage limits due to the fact that the Plaintiffs had not made a knowing rejection of equal uninsured motorist limits at the time of the purchase. (R 186-187)

In Defendant's answer to the initial Complaint, Defendant simply denied the allegation and claimed Plaintiff had rejected higher uninsured motorist coverage. (R 188-189) Defendant's answer did not raise the defense that a subsequent

periodic notification to the Marchesanos of their options as to uninsured motorist coverage should overcome any ommission to offer equal uninsured motorist coverage when the application for coverage was initially taken. (R 188-189)

During the discovery process, Defendant's filed an Affidavit with the Court. (R 222-225) The Affidavit was from Peter Bushelli. (R 222-225) Bushelli was employed by Nationwide and he swore in the Affidavit that the attached form would have been the one Nationwide was sending out during the time period in question. (R 222-225)

Plaintiffs learned, as was later proven in Court, that the form filed by Nationwide (Bushelli) in the Affidavit was not approved by the Department of Insurance. (R 121) Plaintiff therefore filed an Amended Complaint adding a second cause of action which entitled Plaintiff to higher uninsured motorist limits because of the Defendant's failure to comply with the annual notice requirements. (R 362-365) See Ferrigno v. Progressive American Insurance Company, 426 So.2d 1218 (Fla. 4th DCA 1983); Ruiz v. Prudential Property and Casualty Company, 441 So.2d 681 (Fla. 3d DCA 1983) Plaintiffs now had two separate justifications for claiming entitlement to the higher uninsured motorist coverage. Even if a jury found against Plaintiff on Count I, then Plaintiffs would still

be entitled to higher uninsured motorist limits since the Defendant's had not sent Plaintiffs an annual approved notice of option which was "part" of a premium. Plaintiff also reworded Count I to better state its first cause of action.

In its answer to the Amended Complaint Defendant again simply denied Plaintiffs allegation and affirmatively stated that Plaintiff had rejected the equal uninsured motorist coverage limits. (R 359-360) Defendant still did not plead any defense that a "subsequent periodic notification to the Marchesano's overcame any initial ommission to notify the Marchesano's of their options when the application for coverage was initially taken. (R 359-360) A thorough and complete review of the entire record and transcript will conclusively show there is not a single place where Defendant's attorney ever suggested to the trial court, to the Plaintiff or to the jury that it believed the insurance agent's ommissions at the time of the initial purchase could be, or were, cleared up by the later mailing of the insurance company's form. (Record)

There were two separate causes of action before the jury and the Court. (R 362-365) If the Plaintiff prevailed on either cause Plaintiff was entitled to a decree making the higher uninsured motorist limits available and this was

conceded on the record by Defendant's attorney. (R 156) Attorney Jacobsen stated on the record, to the jury, in the presence of the trial court and Plaintiffs,

> "If you answer "no" to any of these questions (referring to the Special Interrogatory Verdict) you will be finding in favor of Mr. Marchesano. If you answer "yes" to each of the questions you will be finding in favor of Nationwide" (emphasis supplied)

Attorney Jacobsen never argued that the annual notice cleared up the earlier ommission. He even stated the only two issues in the trial were (1) Whether Mr. Marchesano knowingly rejected uninsured motorist coverage and (2) Whether Defendant sent out yearly notifications. (R 51) See also (R 142)

The jury deliberated and found that Plaintiff was not offered equal uninsured motorist coverage. (R 377) The jury found that Nationwide complied with the requirement for an annual notice of options. (R 377)

Defendant's filed a Motion for Judgment NOV or for New Trial attacking the jury's verdict on Count I. (R 398-399) If the Defendant's had believed that the jury's finding that the sending of an annual notice would have cleared up the failure to offer of Count I, there would have been no need for Defendant to make said motion. Even this motion did not advance any claim that the later mailing of a notice of option

entitled Defendant to prevail on the declaratory decree.

Judge Cobb entered a Final Judgment in Plaintiffs favor ordering the availability of uninsured motorist limits equal to the $100,000.00/$300,000.00 liability limits. (R 406-407) The Final Judgment also awarded Plaintiffs costs and reasonable attorneys fees. (R 407) Defendant filed a Notice of Appeal and appeal was taken to the Second District Court of Appeal.

The first time Defendant advanced the argument and defense that a later mailing should overcome an initial ommission is when Defendant filed its brief with the Second DCA. The trial court had never been asked by Defendant to rule on this defense. (R) Plaintiff was never put on notice as to this defense in the trial court and was therefore not given an opportunity to address it with law or testimony at the trial level. (R)

When this issue (defense) was first raised on appeal Plaintiff promptly and timely moved to strike it. (Appendix Exhibit A) In the trial court it had been assumed by all parties and the court that if Appellee prevailed on either count they were entitled to the higher coverage. Appellant's never pled that, by their sending the annual notice, such constituted a correction of the initial failure to offer as

alleged in Count I. Appellant's never pled that the Appellees sending in a premium payment thereafter constituted a knowing selection or rejection. Nowhere in the record did Appellant ever object or advance to the court that they should be entitled to the judgment on the basis of the findings in the Interrogatory verdict.

What is perhaps most unjust about the pending opinion is that since the Defendant never advanced this defense in its pleadings, the jury was never asked to determine the necessary factual question of whether Plaintiffs knowingly selected lesser uninsured motorist limits when the annual notice was mailed to them. If Defendant had pled in their answer that they had sent the annual notice and that such act constituted an offer which cleared up any earlier deficiencies and that on the basis of same, they secured a knowing selection, Appellee would have responded that Plaintiffs did not knowingly react thereto because:

a. Plaintiffs relied on the representations of Agent Starkey that they had the best coverage.

b. Plaintiffs were not sufficiently educated and sophisticated in reading insurance to understand the notices (see Realin v. State Farm Fire and Casualty Company, 418 So.2d 431 (Fla. 3d DCA 1982).

c. The notice sent to Plaintiffs did not specifically tell Plaintiffs they had less uninsured motorist coverage than liability coverage.

d. The notice was not attached to the premium and was not a "part" of the premium as required by the statute.

When you couple the fact that the notice does not specifically state they have less than full uninsured motorist coverage with their reliance on the early representations of the agent, it certainly is unjust to assume that there is knowing selection by the Marchesanos when the only affirmative act they took was paying their premium.

Plaintiffs here, unlike the insured in the case of Allstate Insurance Company v. Eckert, 472 So.2d 807 (Fla. 2d DCA 1985), did not return the form in question to the insurance company and they did not make any marks or selections on the form. Plaintiffs did not affirmatively select or act upon the document (junk mail) that was sent them.

The evidence was uncontroverted that Al Marchesano never personally received, saw, or was informed of the annual notice or its contents. Mrs. Marchesano simply glanced at the forms and threw them away since she did not think they applied to them since her husband and her were already operating under the belief that they had 100% coverage.

All these points therefore left a factual issue as to whether any type of knowing selection occurred by Plaintiffs after the annual notice was sent to them. This question was not determined by the jury because the defense now advanced by the Appellant was never pled and was never at issue in the trial.

ARGUMENT II

WHERE THE INSURED FAILS TO COMPLY WITH ITS RESPONSIBILITY UNDER THE LAW TO OFFER THE INSURED UNINSURED MOTORIST COVERAGE LIMITS EQUAL TO HIS BODILY INJURY LIABILITY LIMITS IN THE ONLY FACE TO FACE PURCHASE WITH AN AGENT, CAN SAID VIOLATION OF THE LAW BE IGNORED BECAUSE THE INSURER COMPLIED WITH A SUBSEQUENT AND SEPARATE OBLIGATION UNDER THE LAW OF ANNUALLY SENDING THE INSURED NOTICE OF HIS OPTIONS PERTAINING TO UNINSURED MOTORIST COVERAGE.

There is no support in the statute or prior case law for the position the Second District has taken. Quite to the contrary, legislative policy favors "full statutory uninsured motorist family protection for Florida motorists..." Hodges v. National Union Indemnity Company, 249 So.2d 679, 680 (Fla. 1971)

> The purpose of the statute (627.727) is not to protect the insurance carrier or the uninsured motorist, but is to extend protection to persons who are insured under a policy covering a motor vehicle registered or principally gargaged in Florida and who are impaired to damaged in Florida by motorists who are uninsured or underinsured and can not thereby make whole the impaired party. Decker v. Great American Insurance Company, 392 So.2d 965 (Fla. 2d DCA 1980); Brown v. Progressive Mutual Insurance Company, 249 So.2d 429 (Fla. 1971); State Farm Mutual Automobile Insurance Company v. Diem, 358 So.2d 39 (Fla. 3d DCA 1978)

It is clear that in Florida, the judicial perception of legislative intent as to uninsured motorist coverage has been consistent:

1. Favor full uninsured motorist coverage for Florida residents.

2. Place a heavy duty upon insurers to obtain a knowing rejection of statutorily provided for uninsured motorist limits. See Kimbrell v. Great American Insurance Company, 420 So.2d 1086 (Fla. 1982); Zisook v. State Farm Automobile Insurance Company, 440 So.2d 452 (Fla. 3d DCA 1983); Aetna Casualty and Surety Company v. Fulton, 362 So.2d 364; Hodges v. National Union Indemnity Company, 249 So.2d 679 (Fla. 1971). The Second District Court of Appeal seems to acknowledge this as the perception in the law, and then seems to ignore it.

The portion of the statute we have under analysis is 627.727 (1), Fla.Stat. 1982, which reads in material part as follows:

> "... each insurer shall at least annually notify the named insured of his options as to coverage required by this secion. Such notice shall be part of the notice of premium, shall provide for a means to allow the insured to request such coverage, and shall be given in a manner approved by the Department of Insurance..."

The burden of this statute is clearly directed to "each insurer". Therefore each insurer must send the notice required to the insureds. This section does not state any requirement that the insureds must react to the notice. There is nothing in the statute that indicates the legislature intended for the annual notice to cure an initial failure to get a valid rejection.

The Second District Court of Appeal's opinion that such a notice was meant to and should be able to clear up an initial ommission is in contravention of case precedent. How can it be said as a matter of law that because an insurer maintains in its files evidence of having sent a notice of options "stuffer" with a premium notice that there has therefore been a knowing selection made? This doesn't square with the decision in Kimbrell, supra that

> "the fact the insurer maintains in its files evidence of an offer and a selection is relevant but not crucial to a finding that a knowing selection was made".

It also doesn't square with the decision in Zisook, supra which stated

> "an informed rejection of uninsured motorist coverage cannot, without extrinsic evidence, be implied from the insurers signature on the application for an uninsured motor vehicle coverage".

How therefore can an informed rejection of uninsured motorist

coverage be implied from the sending of a stuffer without any extrinsic evidence and without any proof that the Marchesano's affirmatively acted upon such a stuffer.

The Second District Court of Appeal has made a finding 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 §627.727 (1), Fla.Stat." Plaintiff submits this finding is quite perplexing since the statute obviously does not say that, there is no case precedent that supports a perception that the Legislture had such an intent, and the Second District opinion doesn't set forth a rational basis for believing such an intent existed. All the Second District said was that they had examined the House and Senate Committee Staff Reports and "those reports do not manifest any legislative intent contrary to that which is perceived in this opinion". Plaintiff is unable to find any case precedent that suggests legislative intent is determined by that type of analysis.

The Second District further went on to say that the Legislature intended to "counter balance the above referenced heavy burden upon an insurer to obtain a knowing rejection of uninsured motorist coverage limits at the time the insurance was initially purchased". Plaintiff submits that this assumes

incorrectly that it is a heavy burden for a professional insurance agent to explain to a customer that they have a right to buy as much insurance for their own protection as for the protection of a person in the other car. Plaintiff submits that that is a pretty simple concept for a professional insurance agent to grasp and explain. It's also a very crucial concept in light of the staggering number of uninsured or inadequately insured drivers in this state.

Plaintiff would also assert that when talking about "counter balancing"; the parties being counter balanced should have a relatively equal ability. The typical insurance purchaser does not approach the sophistication that a professional insurance agent has or should have.

The Second District Court of Appeal further stated that the Legislature was intending to place "countervailing burden upon an insured to pay attention to the subsequent statutorily required notification..." Plaintiff again contests that this was the legislative intent. Such a burden was not stated and there is no case precedent that such an intent exists. Plaintiff asserts it's unfair to specifically tell the insurance company of their burdens and not bother to specifically tell the citizens of Florida if such a "countervailing burden" is being placed upon them. If such an intent existed on the

part of the Legislature it could have been and should have been put it writing.

It would also be helpful if the citizens of the State were equipped to carry this statutorily implied burden. Mr. Marchesano certainly wasn't equipped to understand the significance of the uninsured motorist coverage. It might be one thing if Plaintiffs felt they were sufficiently sophisticated in insurance to order insurance by mail. Perhaps a distinction would exist if Marchesano had acted on a written advertisement or brochure in a magazine or newspaper and made their initial purchase from that by mail with no reliance on Defendant's agent.

But the Plaintiffs here knew they were ignorant. The Plaintiffs here, went to one of Defendant's professional agents to have <u>him</u> help them secure "the best coverage". The agent provided Plaintiff with no education or explanation of insurance terms and coverages. Mr. Marchesano left that purchase conference as ignorant and ill equiped to understand terms and coverages as when he went there. Since Defendant never raised the issue or defense that the later notices might clear up the earlier ommissions, the only issue was whether Nationwide had <u>sent</u> the approved form. If Nationwide sent it, then automatic higher uninsured motorist would not have

occurred on that ground. If they did not send it, then higher uninsured motorist was mandated. Ruiz, supra

If Nationwide had raised the later sending of notices as a cure for no offer and no knowing rejection, then Plaintiff would have been entitled to litigate whether a knowing rejection ocurred when the form was sent to Plaintiffs. There would have been additional questions required on the Special Interrogatory Verdict, to-wit: (1) Did Marchesano receive the approved form? (2) Did Marchesano act upon the forms and knowingly reject higher to equal uninsured motorist coverage?

It is be patently unfair and illogical to say that as a matter of law a piece of paper, not affirmatively acted upon by Plaintiffs, dissolves specifically stated legislative requirements. If this were the case, the statutory requirement of obtaining a knowing rejection would be meaningless. An insurer could simply ignore the requirement of obtaining a knowing rejection, send a "stuffer" along with the first premium notice, and they would have satisfied their obligation.

The statute does not say an uninformed offer and rejection can be cleared by a premium notice. The insurance companies, who are educated and involved in selling insurance protection, are held to provide higher and equal uninsured motorist coverage unless they send the annual notices. The

Legislature neither says nor implies that it wants this mailing to diminish the insureds rights. It simply places another requirement on an insurance company doing auto business in Florida. To say that such a mailing clears up a prior unknowing rejection without the jury deciding whether the form was received and whether a knowing rejection occurred thereupon, flys in the face of the earlier decision by this Court that:

> "the question of whether an insured has knowingly rejected uninsured motorist coverage... is an issue to be decided by the trier of fact." Kimbrell v. Great American Insurance Company, 420 So.2d 1086, 1088 (Fla. 1982)

There was no testimony to show the Plaintiffs received the approved form, that they read it, that they understood its words, abbreviations, and significance; that they realized they had less than best uninsured motorist coverage, that they acted upon the notice, or that they signed any notice. All Plaintiffs did was pay there premium which was listed on a separate piece of paper.

It is significant to note, as Plaintiff raised in the trial court, (R 49) that the notice of options sent was not "part" of the premium as required by 627.727. The statute does not say the notice of options is to be with the premium; it says it is to be part of it.

CONCLUSION

Based on the foregoing authorities and argument Appellants/Plaintiffs/Petitioners asks that the decision of the Second District Court of Appeal be reversed and that the Final Judgment entered in the trial court be reinstated and affirmed.

Respectfully submitted,

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By: _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Donald G. Jacobsen and A. H. Lane, P. O. Drawer, J, Lakeland, FL 33802, by U. S. Mail, this 27 day of March, 1986.

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