

IN THE SUPREME COURT OF FLORIDA

CASE NO. 68,530

JOHN J. VASQUEZ,

Petitioner,

v.

BANKERS INSURANCE COMPANY,

Respondent.

FILED

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BRIEF OF PETITIONER ON CERTIFIED QUESTION

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PREFACE

This case is before the Court on a certified question from the Fourth District Court of Appeal. The parties will be referred to as they stood in the lower court or by proper name. The following symbols will be used:

(R.) Record on Appeal

(A.) Appendix

STATEMENT OF THE CASE

Plaintiff, JOHN J. VASQUEZ, sued BANKERS INSURANCE COMPANY to recover uninsured motorist benefits pursuant to a policy of insurance which was issued to Beverly A. Moore and Timothy Moore (R. 141-143, 257-258) (A. 1). BANKERS denied coverage, raising as one of its affirmative defenses that the Moore's had rejected uninsured motorist coverage (R. 144-146).

At the conclusion of the Plaintiff's case, BANKERS moved for a directed verdict on the issue of uninsured motorist coverage which was denied by the trial court (R. 46, 61). The issue of coverage was submitted to the jury, and the jury returned a verdict finding that the Moore's had not made an informed, knowing rejection of uninsured motorist coverage (R. 90, 330).

BANKERS filed a post-trial motion for judgment non obstante verdicto which was denied by the trial court (R. 331-333, 346). A notice of appeal was then filed with the Fourth District Court of Appeal from the order denying the motion for judgment non

obstantee verdicto and motion for new trial (R. 347).

Subsequently, a final judgment was entered by the trial court (R. 350), and a notice of appeal of that order was filed by BANKERS and also a motion to consolidate (R. 354). Plaintiff's motion to dismiss for lack of jurisdiction filed on October 16, 1984, was denied by the Fourth District Court of Appeal on October 30, 1984 (R. 356).

Subsequently, a final judgment was entered by the trial court on January 15, 1985 based upon stipulations of the parties (R. 368-370). BANKERS filed its notice of appeal of that order on February 4, 1985 (R. 372), and a motion to consolidate all appeals was granted on February 14, 1985 (R. 376).

The Fourth District reversed the jury verdict holding that the trial court should have granted the Defendant's motion for directed verdict at the close of Plaintiff's case. Because the Fourth District recognized conflict and confusion on the issue of uninsured motorist coverage (and rejections of same), it certified the following question:

Does a second signature on an insurance application affixed below a separate paragraph rejecting UM coverage written in bold print and in plain and unambiguous language, conclusively demonstrate a knowing rejection absent extraordinary circumstances not deemed to be present in the case at bar?

This case is before this court on the certified question.

STATEMENT OF FACTS

In January of 1978, Beverly Moore, accompanied by her husband and seventeen (17) year old son, Timothy, went to Boca Honda for the purpose of buying Timothy a motorcycle (R. 20). At the time they purchased the motorcycle, they were asked by a salesman at the motorcycle shop if they wanted insurance and the Moores indicated that they did (R. 21). The salesman then gave them an application to fill out (R. 21-22) (A. 1). Paragraph eight (8) of the application contains a clause concerning a rejection of uninsured motorist coverage, and this was signed by Mrs. Moore and her son. However, at the time she signed it, she believed that the term "uninsured" coverage meant no insurance and she wanted to be fully insured (R. 31, 36). Mrs. Moore also testified that she was not intelligent concerning matters of insurance (R. 31), and that she thought she was receiving "full insurance" when she signed the application (R.45).

SUMMARY OF ARGUMENT

The question of whether Mrs. Moore made a knowing, informed rejection of uninsured motorist coverage was properly submitted to and resolved by the jury. BANKERS was not entitled to a directed verdict on that issue since the question of whether a knowing and informed rejection has been made is a question to be decided by the trier of fact.

The insurance application which Mrs. Moore signed was furnished by the salesman who sold her the motorcycle. Mrs. Moore thought she was receiving full insurance coverage and thought "uninsured" coverage meant no insurance and that is the reason she signed the rejection of uninsured motorist coverage. Additionally, the application did not inform Mrs. Moore of the availability of higher uninsured motorist limits.

The question of whether the language in paragraph eight (8) conclusively demonstrated a knowing rejection was a proper question for the jury to resolve, and therefore, the trial court was correct in submitting that issue to the jury.

ARGUMENT

THE TRIAL COURT PROPERLY ALLOWED THE ISSUE OF WHETHER A KNOWING, INFORMED REJECTION OF UNINSURED MOTORIST COVERAGE HAD BEEN MADE BY MRS. MOORE TO GO TO THE JURY.

Florida Statute Section 627.727 (1977) provides in part that uninsured motorist coverage must be included in any automobile insurance policy delivered or issued for delivery in this state, unless the insurer rejects this coverage. The portion of the uninsured motorist statute permitting rejection of coverage must be narrowly and strictly construed, whereas the part of the statute concerning uninsured motorist coverage itself should be broadly and liberally construed. Weathers v. Mission Insurance Co., 258 So. 2d 277 (Fla. 3rd DCA 1972).

The law in the State of Florida is also clear that a rejection of uninsured motorist coverage equal to the insured's liability limits and a selection of lower amounts of uninsured motorist coverage must be informed and knowing. Kimbrell v. Great American Insurance Co., 420 So. 2d 1086 (Fla. 1982). The question of whether an informed, knowing rejection of coverage has been made is a question of fact and the insurer has the burden of proof on that issue. Lane v. Waste Management, Inc., 432 So. 2d 70 (Fla. 4th DCA 1983), rev. denied, 441 So. 2d 633 (Fla. 1983); Commercial Union Insurance Co. v. Velazquez, 464 So. 2d 210 (Fla. 3rd DCA 1985). Even though Mrs. Moore signed paragraph eight (8) which contained the rejection of uninsured motorist coverage, her

signature is not conclusive of a knowing rejection. American Motorist Insurance Co. v. Weingarten, 355 So. 2d 821 (Fla. 1st DCA 1978); Zisook v. State Farm Automobile Insurance Co., 440 So. 2d 452 (Fla. 3rd DCA 1983).

The Fourth District did not believe that "extraordinary" circumstances existed in this case to overcome the language of paragraph eight (8) that a knowing rejection had been made. However, Plaintiff submits that there are extraordinary circumstances in this case which properly allowed the issue of a knowing rejection to go to the jury. Mrs. Moore was not a party to the lawsuit and had no interest in the outcome of the case. The salesman who sold her and her son the motorcycle was the same one who sold them the insurance (R. 21). The motorcycle shop had printed insurance forms from Bankers Insurance Company which indicated it "specialized" in motorcycle insurance (A. 1). Mrs. Moore was not intelligent on insurance matters (R. 31), and she thought that she had full insurance when she filled out the application (R. 45). She did not ask any questions about the application because she felt she was getting full coverage (R. 43, 45). Defendants failed to put on any witnesses from the motorcycle shop to rebut her testimony.

There is ample case law in the State of Florida holding that the question of whether an insured has made a knowing and informed rejection of uninsured motorist coverage is one to be decided by the trier of fact. This is true even in those cases involving a

written rejection of uninsured motorist coverage (or a selection of lower limits).

In Kimbrell v. Great American Insurance Co., supra, the Florida Supreme Court held that the issue of whether the insured has knowingly rejected uninsured motorist coverage is to be decided by the trier of fact. 420 So. 2d at 1088.

In deciding this issue, the Court stated that the trier of fact may also consider "whether the insurer offered the insured the full amount of uninsured motorist coverage," and that the "making of an express offer, however, is not dispositive of the question of whether there was a knowing selection of coverage limits." (420 So. 2d at 1088). Finally, the Court held that the fact that 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. 420 So. 2d at 1089.

Florida Statute Section 627.727(2)(1977), provides in part that the insurer should make available at the written request of the insured, limits of \$100,000/\$300,000 uninsured motorist coverage, regardless of the limits of bodily injury liability purchased. It has been held that the insurer must advise its insured of all available options concerning the purchase of uninsured motorist coverage at the time it issues the policy. Lumberman's Mutual Casualty Co. v. Beaver, 355 So.2d 441 (Fla. 4th DCA 1978). In this case, the insurance application clearly does not inform Mrs. Moore of all of her available options. Specifically, BANKERS did not make known that upon written request, there would be \$100,000/\$300,000 uninsured motorist

coverage available. See Lustig v. Colonial Penn Insurance Co., 406 So. 2d 543 (Fla. 4th DCA 1981), footnote 2.

In support of its motion for directed verdict at the close of Plaintiff's case, Defendant placed great reliance upon the fact that Mrs. Moore signed the application without asking any questions. That same defense was presented in Lumberman's Mutual Casualty Co. v. Beaver, supra, which the Court addressed by asking the following:

How could a company comply with the law ... if it issued a policy, for example, with no uninsured motorist coverage, unless it had apprised the insured of the options available and the insured had rejected such coverage? (at 443-444)

Similarly, in Travelers Insurance Co. v. Spencer, 397 So. 2d 358 (Fla. 1st DCA 1981), the court specifically held that Florida Statute Section 627.727

imposes a duty on the insurer to inform the insured of his statutory options so as to enable him to make an informed decision regarding the amount of UM protection, if any, he desires. (at 361)

The Court further held that the principles of estoppel and waiver

cannot apply to bar an inactive, silent insured from his statutory right to UM coverage because those principles have since been superseded by the standard established by the statute, which requires nothing less than an informed affirmative rejection. (at 361-362)

In Realin v. State Farm Fire and Casualty Co., 418 So. 2d 431

(Fla. 3rd DCA 1982), the insured had been sent a rejection form in the mail concerning uninsured motorist coverage which he signed and returned to State Farm. The rejection form contained two (2) options -- first, the insured could reject uninsured motorist coverage completely, or second, the insured could elect the lower limits of liability stated in the policy. However, that application did not inform the insured of the availability of higher uninsured motorist limits. The Third District, in reversing the trial court's granting of a summary judgment in favor of State Farm, held that even though an insurer has no duty to explain uninsured motorist coverage unless asked, the insurer does have a duty to inform the insured of the availability of higher limits and to offer those limits to him. In this case, there is nothing on the insurance application which informs Mrs. Moore that she could elect higher limits and there was no evidence presented which would reflect that such an offer was made.

Paragraph eight (8) only offers a complete rejection of uninsured motorist coverage. As the Fourth District noted in Lustig v. Colonial Penn Insurance Co., supra, "there can be no informed rejection in the absence of an informing offer" 406 So. 2d at 544

A case involving similar facts is Protective National Insurance Co. of Omaha v. McCall, 310 So. 2d 324 (Fla. 3rd DCA 1975). In that case, the wife of a named insured signed a rejection of uninsured motorist coverage. The waiver which she signed was virtually the same waiver that Mrs. Moore signed (see footnote 1, page 325, of McCall). Mrs. McCall testified that she

did not understand the rejection of uninsured motorist coverage. The Third District affirmed the trial court's granting of a summary judgment in favor of the insured and held that a knowing waiver had not been made. Even though the court's ruling was based in part on the fact that the wife of the insured had signed the waiver, the court also emphasized the fact that Mrs. McCall had testified that she did not understand the rejection.

In Lane v. Waste Management, Inc., supra, Waste Management's insurance manager met with an insurance agent and advised him that the company did not want uninsured motorist coverage except in those states that required it, and even then, wanted only the minimum amount of uninsured motorist coverage required by statute. Even with that testimony, the Fourth District held that whether a knowing informed rejection had been made should be left to the trier of fact. The court acknowledged, however, that Waste Management's rejection was "not the uninformed decision of some 'mom and pop' couple unfamiliar with insurance generally, but rather that it was the considered judgment of a large national corporation" 423 So. 2d at 73. Plaintiff submits in this case that Mrs. Moore falls within that category of the "mom and pop couple unfamiliar with insurance" which is a factor which would support the trial court's submitting the issue to the jury.

Another factor which also supports the case going to the jury was the fact that Mrs. Moore was furnished the insurance application directly from the salesman who sold her the motorcycle. This was not a case where the insured went to an insurance office and spoke with an insurance agent in detail

concerning coverage prior to obtaining the policy.

Just prior to the Fourth District's opinion in the instant case (Bankers Insurance Co. v. Vasquez, 483 So. 2d 440 (Fla. 4th DCA 1985)), that same Court rendered an opinion which ran contrary to its opinion in the instant case in Sentry Insurance Co. v. Ellison, 474 So. 2d 2 (Fla. 4th DCA 1985). Sentry involved a per curiam affirmed decision which contained a dissenting opinion from Judge Hersey. In Sentry, the insured had signed a rejection of uninsured motorist coverage on a form which provided that "I do not want Uninsured Motorist Limits equal to my Bodily Injury Liability Limits." 474 So. 2d at 3. Even with that language, the issue of a knowing rejection was allowed to go to the jury, who found in favor of the insured that a knowing rejection had not been made. The Fourth District later receded from the Sentry opinion in the instant case, holding that its earlier decision was in error. 483 So. 2d at 441.

Plaintiff submits that the Sentry decision was correct, and that the issue of whether Mrs. Moore had made a knowing rejection of uninsured motorist coverage was properly presented to the jury. There was sufficient evidence and testimony for the jury to conclude that a knowing informed rejection had not been made, even though Mrs. Moore had signed an application rejecting uninsured motorist coverage.

The Second District has recently issued an opinion which apparently conflicts with the Fourth District's holding in the instant case. In Nationwide Property and Casualty Insurance Co. v. Marchesano, 482 So. 2d 422 (Fla. 2d DCA 1985), the insured had

signed a rejection of limits of uninsured motorist coverage equal to the liability limits. The application contained the following acknowledgement: "Uninsured Motorist Coverage has been explained to me and I understand I can purchase up to \$100,000/\$300,000 limits", and this was preceded by "I wish Uninsured Motorist Coverage with limits of \$10,000/\$20,000 bodily injury". 482 So. 2d at 424. The Second District concluded that the signed rejection was not absolutely binding on the insured even though the language was plain and unambiguous. The Court recognized the "general principle that in a contract case a person who has signed a document is presumed to have known, and cannot deny, its contents," (at 424), but the Court went on to say that the recent cases of Kimbrell, supra, and Zisook, supra, reflect a "perception of legislative intent to place a heavy duty upon insurers to obtain a knowing rejection of statutorily provided for uninsured motorist limits and to reflect a public policy in Florida to favor full uninsured motorist coverage ..." (at 424-425). The Court concluded that these types of cases cannot be construed strictly on general contract principles. The Court placed great emphasis on the Florida Supreme Court's ruling in Kimbrell that the question of whether a knowing rejection of uninsured motorist coverage has been made "is an issue to be decided by the trier of fact." 420 So. 2d at 1088.

In the instant case, the Fourth District concluded that the signed rejection was fully dispositive as to the issue of there having been a knowing informed rejection made by Mrs. Moore. Nationwide held that the signed rejection is not fully dispositive

of that issue since that would be contrary to the dictates of Kimbrell. 482 So. 2d at 425. Therefore, there exists a conflict between the Second District and the Fourth District concerning that issue.

Even though the Second District held that there had been a valid rejection of uninsured motorist coverage by virtue of a subsequent notification which had been sent to the insured, the Court certified the following question:

When There Has Been A Failure Of An Insurer To Fulfill Its Statutory Duty To Obtain From An Insured At The Time Of The Purchase Of A Motor Vehicle Insurance Policy A Knowing Rejection Of Uninsured Motorist Coverage Limits Higher Than Those Specified In The Purchased Policy And Equal To The Policy's Bodily Injury Liability Limits, 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 Section 627.727 (1), Florida Statutes (1982)?

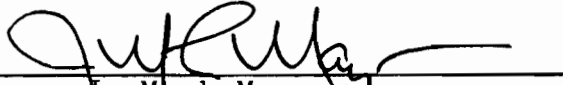
Even though our legislature has seemingly cleared up some of the confusion by the recent amendment to Section 627.727 (1) by providing that the rejection of uninsured motorist coverage is to be made on a form approved by the Insurance Commissioner (Ch. 85-62, Section 16, Laws of Florida), Plaintiff submits that prior to the effective date of that statute, each rejection form must be decided on a case by case basis and is one to be resolved by the trier of fact pursuant to the dictates of Kimbrell. To hold otherwise would run contrary to the public policy of this state which is to favor full uninsured motorist coverage unless there has been a knowing informed rejection.

CONCLUSION

The final judgment entered in favor of the Plaintiff should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to Milton A. Gasoi, Esquire, Suite 211 W., 110 East Atlantic Avenue, Delray Beach, Florida 33444, and to David F. Crow, Esquire, 1615 Forum Place, Barristers Building, Suite 500, West Palm Beach, Florida 33401, this 28th day of April, 1986.



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