IN THE SUPREME COURT OF FLORIDA

CASE NO. 68,530

JOHN J. VASQUEZ,

Petitioner,

v.

BANKERS INSURANCE COMPANY,

Respondent.

_____/

REPLY BRIEF OF PETITIONER ON CERTIFIED QUESTION

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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.

Respondent argues that since there was a plainly worded rejection which was signed by the insured in this case, that there was therefore no question of fact to be decided by the jury. However, that argument flies in the face of this court's holding in Kimbrell v. Great American Insurance Co., 420 So. 2nd 1086 (Fla. 1982), wherein the court held that the question of whether a knowing rejection has been made "is an issue to be decided by the trier of fact." (at 1088) The court further emphasized that the "making of an express offer, however, is not dispositive" of that issue. (at 1088)

Respondent's argument is also inconsistent with those cases holding that a signature purporting to reject uninsured motorist coverage 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 Mutual Automobile Insurance Co., 440 So. 2d 452 (Fla. 3rd DCA 1983).

Respondent argues that the "generalized language" which is quoted above from the Kimbrell decision is factually and legally misplaced because Kimbrell did not deal with a written rejection. However, a close reading of the facts in Kimbrell show that it did not matter whether the rejection was in writing or not. In Kimbrell, the employer testified that the insurance agent

specifically offered him uninsured motorist coverage in the same amount as his liability coverage and that he selected the minimum coverage required under the law. When a new corporation was formed, the employer secured the same coverage which was $250,000 liability and only $10,000 uninsured motorist coverage. Even with that plain, unrebutted testimony, the trial court denied motions for summary judgment filed by both parties and let the case go to the jury. The jury found that the insurance company had offered the employer UM coverage in an amount equal to the liability coverage and that the insured had made an informed decision to reject that coverage. The Fourth District Court affirmed that verdict, and this court approved the decision of the Fourth District. This court did not hold that the trial court should have granted a summary judgment, but instead, emphasized that the issue of whether a knowing rejection had been made was to be decided by the trier of fact. Petitioner submits that it does not matter whether the rejection was in writing or not because in Kimbrell, the testimony was very clear both from the employer and the insurance agent that the employer was offered higher limits and that he specifically selected the lower limits. Even with that, the issue was presented to the jury.

Similarily, in the instant case, there was evidence that Mrs. Moore was offered UM coverage equal to liability coverage but she rejected that coverage. However, there was also evidence that Mrs. Moore did not make an informed, knowing rejection and therefore that issue was properly presented to the jury for

resolution. In Kimbrell, unlike the instant case, the clear testimony of the insurance agent and the employer concerning the selection of lower limits was uncontradicted. Therefore, in regard to any conflicting testimony or evidence, Kimbrell is even weaker than the instant case, and again, that case was allowed to go to the jury.

Nationwide Property and Casualty Insurance Co. v. Marchesano, 482 So. 2d 422 (Fla. 2d DCA 1985) correctly follows the dictates in Kimbrell. In Marchesano, the following language appeared on the application:

> "Uninsured Motorist Coverage has been explained to me and I understand I can purchase up to $100,000/$300,000 limits" (and this was immediately preceded by) "I wish Uninsured Motorist Coverage with limits of $10,000/ $20,000 bodily injury". (at 424)

Even though the court construed that signed acknowledgment to be a rejection of the $100,000/$300,000 limits, the court concluded that the signed rejection was not absolutely binding on the insured, relying on this court's decision in Kimbrell. The Second District Court held that the issue of a knowing rejection was to be decided by the trier of fact. The court emphasized that:

> any other result in this case would mean that a signed rejection of the type involved here would be fully dispositive as to their having been a knowing rejecting, which would be contrary to the dictates of Kimbrell. (at 425)

As stated in the initial brief, Petitioner submits that the Marchesano decision is directly in conflict with Bankers Insurance Co. v. Vasquez, 483 So. 2d 440 (Fla. 4th DCA 1985), and further, submits that public policy considerations would dictate that Marchesano is the correct decision.

Respondent also argues that the portion of Florida Statute Section 627.727(2) (1977) is inappropriate because there was no claim that Mrs. Moore was entitled to or requested $100,000/ $300,000 UM coverage. The relevant portion of that statute states that:

> "... the insurer shall make available, at the written request of the insured, limits up to $100,000 each person, $300,000 each occurance, irrespective of the limits of bodily injury liability purchased..."

The Fourth District Court has construed that portion of the statute to mean that the insurer must make known that upon written request of the insured, those higher limits would be available. Lustig v. Colonial Penn Insurance Co., 406 So. 2d 543 (Fla. 4th DCA 1981), footnote 2.

Therefore, in order to have a valid, informed rejection, you must first of all have an informing offer. It is clear from the application in this case that Respondent failed to make known that upon written request of the insured, limits of $100,000/ $300,000 UM coverage would be available regardless of the bodily injury liability limits. Because Respondent failed to advise Mrs. Moore of all of the available options, there was never an informed rejection. See, e.g., Lumberman's Mutual Casualty Co. v. Beaver,

355 So. 2d 543 (Fla. 4th DCA 1981); Realin v. State Farm Fire and Casualty Co., 418 So. 2d 431 (Fla. 3rd DCA 1982). Respondent's argument that since the application offered UM limits of $10,000/$20,000 (which would be equal to the liability limits) then there was an informed offer totally ignores Florida Statute Section 627.727(2) (1977) and the Lumberman's Mutual and Lustig decisions.

Respondent's attempts to distinguish the various other cases cited by the Petitioner in his initial brief also fail. The summary of the Respondent's position is that this case should be decided strictly on a contract basis and that because Mrs. Moore signed what purported to be a rejection of uninsured motorist coverage then that signature should be binding. However, the subject of uninsured motorist coverage is a complex area of the law with strong public policy arguments to consider. As the Marchisano decision stated, these types of average cases cannot be decided strictly under general contract principles. One must also consider the public policy which favors uninsured motorists protection for the general public, and also the fact that the general public, when dealing with uninsured motorists coverage, is simply not at arms length with the insurance company or the insurance agent.

Petitioner would therefore submit that in a situation such as the instant case where numerous facts are involved which concern the issue of whether a knowing rejection has been made, then those various facts should be submitted to the trier of fact so that a decision can be reached.

CONCLUSION

For the reasons stated herein, the final judgment entered in favor of the Petitioner should be affirmed.

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By: _____
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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail this 6th day of June, 1986, to Milton A. Gasoi, Esq., 100 E. Atlantic Avenue, Suite 211 W., Delray Beach, Florida 33444 and to David F. Crow, Esq., 1615 Forum Place, Barristers Bldg., Suite 500, West Palm Beach, Florida 33401.

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