OA 6-5-91

047

IN THE SUPREME COURT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA

TRAVELERS INSURANCE COMPANY,

Petitioner,

v.

JAMES H. QUIRK and MARIE QUIRK,

Respondents, Cross-Petitioners,

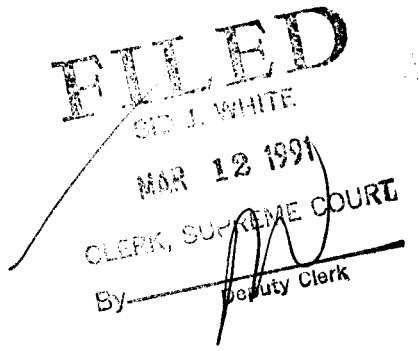
v.

SOUTHERN AMERICAN INSURANCE COMPANY,

Cross-Respondent.

_____/

SUPREME COURT
CASE NO.: 76,432



RESPONDENTS, CROSS-PETITIONERS' BRIEF

ON THE MERITS

JACK McGILL, ESQUIRE
LAW OFFICES OF R. JACKSON McGILL, P.A.
1101 S. Tamiami Trail, Suite 101
Venice, Florida 34285
(813) 485-8339
Florida Bar No.: 143136
Attorney for Respondents, Cross-Petitioners

TABLE OF CONTENTS

CITATIONS OF AUTHORITY

STATUTES PAGE

OTHER PAGE

PRELIMINARY STATEMENT

WHEN THE TERM "TRAVELERS" IS USED IN THIS BRIEF IT SHALL REFER TO THE PETITIONER, TRAVELERS INSURANCE COMPANY, WHO WAS A DEFENDANT IN THE TRIAL COURT BELOW, AND AN APPELLEE BEFORE THE SECOND DISTRICT COURT OF APPEAL.

WHEN THE TERM "SOUTHERN AMERICAN" IS USED IN THIS BRIEF IT SHALL REFER TO THE CROSS-RESPONDENT, SOUTHERN AMERICAN INSURANCE COMPANY, WHO WAS A DEFENDANT IN THE TRIAL COURT BELOW, AND AN APPELLEE BEFORE THE SECOND DISTRICT COURT OF APPEAL.

WHEN THE TERM "KEY AGENCY" IS USED IN THIS BRIEF IT SHALL REFER TO KEY AGENCY, INC., WHO WAS A DEFENDANT IN THE TRIAL COURT BELOW, AND AN APPELLEE IN THE SECOND DISTRICT COURT OF APPEAL.

THOMAS DIGNAM IS THE PRESIDENT OF "KEY AGENCY".

WHEN THE TERM "WEST COAST" IS USED IN THIS BRIEF IT SHALL REFER TO WEST COAST EQUIPMENT AND LEASING AND/OR WEST COAST EXCAVATING.

WHEN THE TERM "R" IS USED IN THIS BRIEF, IT SHALL REFER TO THE RECORD ON APPEAL.

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

By virtue of this Brief serving as the Respondents' Brief on the Merits and Cross-Petitioner's Brief on the Merits, it is necessary that the Cross-Petitioner set forth a more detailed and complete Statement of the Case and Statement of the Facts than that contained in the Petitioner's Brief on the Merits.

The Petition and Cross-Petition for Certiorari in this matter initially stem from an automobile collision which occurred on December 24, 1984 at the intersection of U.S. 41 and Burnt Store Road in Charlotte County, Florida.

At the time of the collision the Cross-Petitioner, JAMES H. QUIRK, was a passenger in a 1984 Ford truck which was owned by his employer, "WEST COAST". The truck was being driven in a northerly direction on U.S. 41 by a fellow employee of "WEST COAST". As the truck approached the intersection of Burnt Store Road, the Defendant in the trial Court below, LINDA M. ANTHONY, pulled her vehicle into the path of the truck causing a collision, which resulted in severe and disabling injuries to Mr. Quirk. (R-1).

The Cross-Petitioners, Mr. and Mrs. Quirk, subsequently filed an action for damages against LINDA ANTHONY. At the time of the collision Ms. Anthony was insured under a policy of liability insurance with State Farm Automobile Insurance Company. (R-17). Shortly after the action was filed, State Farm tendered its policy limits of $10,000.00 to Mr. and Mrs. Quirk for the settlement of their claims against Ms. Anthony. After the offer was received, Cross-Petitioners sought permission from their own uninsured motorist carrier, Queen City Indemnity Company, "TRAVELERS" and "SOUTHERN AMERICAN". (R-17, 19, 21). All of these companies either refused or failed to give consent to the Cross-Petitioner to settle the claim with State Farm within the time period provided for in Florida Statute §627.727, and the complaint was amended to include claims against Queen City Indemnity Company, "TRAVELERS", "SOUTHERN AMERICAN", the three uninsured motorist carriers, and "KEY AGENCY". (R-4).

Prior to Mr. Quirk's collision, his employer, "WEST COAST", had secured liability insurance coverage on its vehicles through

"KEY AGENCY". "KEY AGENCY" first offered automobile liability insurance coverage to "WEST COAST" through a quotation for insurance on December 15, 1982. (R-349, 530). The initial quotation did not offer any uninsured motorist insurance coverage along with the liability coverages proposed. (R-349). Based upon this quotation, "KEY AGENCY" provided a liability policy to "WEST COAST" with Iowa National Insurance Company. (R-227). The Iowa National policy had an effective date of February 11, 1983, and did not provide any uninsured motorist coverage to "WEST COAST" on its vehicles. (R-533).

In late 1983, "KEY AGENCY" was having problems with Iowa National and sought out different insurance coverage for "WEST COAST". (R-259). A policy was subsequently secured through "TRAVELERS" on December 21, 1983. (R-231). When this policy was secured, "KEY AGENCY" was a licensed agent of "TRAVELERS", and had had a written agency agreement with "TRAVELERS" since 1957. (R-548). When "KEY AGENCY" sent the application to "TRAVELERS", Thomas Dignam signed the application as agent for "TRAVELERS". (R-327-328).

The "TRAVELERS" policy secured by "KEY AGENCY" on behalf of "WEST COAST" provided for bodily injury limits of $250,000/$500,000. (R-399). Based upon the application signed by Thomas Dignam as agent, the "TRAVELERS" policy did not contain any uninsured motorist coverage. (R-399, Southern Exhibit 9 to Dignam Deposition of 2/17/87).

John Haines, the president of "WEST COAST", testified in deposition that neither "KEY AGENCY", nor any of "KEY AGENCY's" representatives, had discussed any uninsured motorist coverage with him, nor did he ever reject any uninsured motorist coverage on behalf of "WEST COAST". (R-129).

Mr. Dignam, the president of "KEY AGENCY", testified in his deposition that when the "TRAVELERS" policy was written he went over the coverages with Mr. Haines. He pointed out that the coverages were the same as the Iowa National policy. (R-261). He further testified that he discussed the uninsured motorist coverage with Mr. Haines in December of 1982, when the Iowa National policy was written, and Mr. Haines verbally rejected uninsured motorist coverage on the Iowa National policy. (R-261). There was no evidence, nor any testimony by Mr. Dignam, concerning the actual rejection of uninsured motorist coverage on the "TRAVELERS" policy. Mr. Dignam stated that the discussions with Mr. Haines were merely that the coverages on the "TRAVELERS" policy were the same as those in the Iowa National policy. (R-261).

Mr. Dignam has further testified that "KEY AGENCY" has no documents whatsoever in his files to indicate that "WEST COAST" had ever rejected uninsured motorist coverage on any policy of liability insurance. (R-246).

Mr. Haines has testified in deposition that the only time uninsured motorist coverage was ever discussed with him by "KEY AGENCY" was after Mr. Quirk's collision, when Mr. Dignam brought to him a written rejection of uninsured motorist coverage and asked

him to sign it and back-date it to the time the policy was issued. (R-160). Mr. Haines further testified that he refused to sign the back-dated rejection form for Mr. Dignam. (R-160).

In October of 1984, "WEST COAST" contacted "KEY AGENCY" and informed them that they needed an umbrella liability policy in the amount of $5,000,000. "KEY AGENCY" provided a policy through "SOUTHERN AMERICAN". (Exhibit 4 to Dignam Deposition of 2/17/87, R-399). The "SOUTHERN AMERICAN" policy covered the policy period October 26, 1984 to October 26, 1985 with limits of $5,000,000. (Exhibit 4 to Dignam Deposition of 2/17/87, R-399). The policy was subsequently issued and physically delivered to "KEY AGENCY" in November of 1984. (R-283). The record does not contain any application provided by "SOUTHERN AMERICAN", or indicate whether or not the application itself provided for, or offered, uninsured motorist coverage.

The "SOUTHERN AMERICAN" policy was issued without any uninsured motorist coverage, and there was no rejection of uninsured motorist coverage made prior to its issuance, or at the time the policy was placed into effect, or issued for delivery. (Exhibit 4 to Dignam Deposition of 2/17/87, R-399). When the policy was forwarded to "KEY AGENCY" by "SOUTHERN AMERICAN", or its representative, "SOUTHERN AMERICAN", or its representative, requested that "KEY AGENCY" obtain a signed rejection of uninsured motorist coverage from "WEST COAST" after the policy was issued. (R-503).

Mr. Dignam, Mr. Haines, and Mr. Joseph Cardinale who was an employee of "WEST COAST" involved in some insurance matters for the company, all agree that uninsured motorist coverage was never discussed in reference to the "SOUTHERN AMERICAN" policy. (R-238, 129, 451).

On December 3, 1984, after the "SOUTHERN AMERICAN" policy was issued for delivery, and after "SOUTHERN AMERICAN", or its representative, had requested "KEY AGENCY" to obtain a rejection from the named insured, an employee of "KEY AGENCY" signed "Joe Cardanilli" to the rejection in the place of the signature for the insured, and also signed "Thomas M. Dignam" as the authorized representative of "SOUTHERN AMERICAN". (R-326). Mr. Dignam testified that his name was signed as the authorized representative because theoretically he was the person who represented "SOUTHERN AMERICAN". (R-276). "KEY AGENCY" was also listed on the face of the policy as the producing agent and was furnished an "agency" copy of the insurance policy. (Exhibit 4 to Dignam Deposition of 2/17/87, R-283, 399).

Mr. Dignam, as president of "KEY AGENCY", and his employee, JoAnn Broome, who was the person who forged Mr. Cardinale's signature to the "SOUTHERN AMERICAN" uninsured motorist rejection form, have both stated that neither of them obtained permission to do so, nor did they talk to "WEST COAST", nor Mr. Cardinale, nor Mr. Haines, to obtain permission to sign Mr. Cardinale's name to the rejection form. (R-277, 280, 500). This forged rejection was sent back to "SOUTHERN AMERICAN", or its representative, who had

requested that "KEY AGENCY" obtain the rejection on behalf of "SOUTHERN AMERICAN". (R-495).

After subsequent amendments to the pleadings, and after various stages of discovery took place, "TRAVELERS" subsequently filed a Motion for Summary Judgment alleging that Cross-Petitioner had no standing to bring this action against "TRAVELERS". (R-90). "SOUTHERN AMERICAN" subsequently filed a Motion for Summary Judgment adopting the grounds of "TRAVELERS". (R-102). "SOUTHERN AMERICAN" subsequently filed an Amended Motion for Summary Judgment, alleging that "KEY AGENCY" acted as a broker on behalf of "WEST COAST", rather than as an agent or representative of "SOUTHERN AMERICAN", and therefore "SOUTHERN AMERICAN" was entitled to rely upon the forged rejection of uninsured motorist coverage. (R-518).

On March 20, 1989 all pending Motions for Summary Judgment were heard before Elmer O. Friday, Circuit Judge of the Twentieth Judicial Circuit. On March 23, 1989, "TRAVELERS" filed a second Motion for Summary Judgment adopting and incorporating the arguments of "SOUTHERN AMERICAN", as well as its initial argument on standing. (R-568).

On May 19, 1989 an Order was entered granting Summary Judgments on behalf of "TRAVELERS", "SOUTHERN AMERICAN", and "KEY AGENCY", who had also filed a motion. (R-615-618). On May 22, 1989 an Order was entered granting "TRAVELERS'" first Motion for Summary Judgment. (R-619). On May 30, 1989 a Final Judgment was

entered for "TRAVELERS", "SOUTHERN AMERICAN" and "KEY AGENCY". (R-625).

On June 16, 1989 a timely Notice of Appeal was filed appealing the matter to the Second District Court of Appeal. (R-628-629). On June 22, 1989 another Final Judgment was entered on behalf of "KEY AGENCY", (R-632), and on June 22, 1989 an Order granting "TRAVELERS'" second Motion for Summary Judgment was entered. (R-633). On June 29, 1989 an Amended Notice of Appeal was filed to cover the intervening Judgment and Order. (R-637-638). On July 7, 1989 a Final Judgment was entered in favor of "TRAVELERS", (R-643), and on July 21, 1989, a second Amended Notice of Appeal was filed to cover the subsequent intervening Judgment. (R-644-645). On April 25, 1990 the Second District Court of Appeals rendered an opinion, reversing the Summary Judgments against "TRAVELERS", and affirming the Summary Judgment in favor of "SOUTHERN AMERICAN". On July 6, 1990, after a Motion for Rehearing was filed, the trial Court denied the Motion for Rehearing, but clarified its opinion in part.

This Court, on January 22, 1991, accepted jurisdiction on a Petition by "TRAVELERS", and a Cross-Petition by JAMES H. QUIRK and MARIE QUIRK.

SUMMARY OF ARGUMENTS

SUMMARY OF ARGUMENT I ON PETITION

The Second District Court of Appeal's opinion granting the Respondent/Cross-Petitioner standing to raise the issue of "TRAVELERS" failure to secure a written rejection of uninsured motorist coverage should be affirmed.

It is well settled in Florida that a Class II insured does have standing to determine whether or not a named insured initially made a knowing rejection of uninsured motorist coverage. Cullars v. Manatee County, 463 So.2d 484 (Fla. 2d DCA, 1985), St. Paul Fire and Marine Insurance Company v. Smith, 504 So.2d 14 (Fla. 2d DCA, 1987), review denied, 511 So.2d 299 (Fla. 1987).

Since the amendment to Florida Statute 627.727, made effective as to all policies issued or renewed after October 1, 1984, the Statute has provided that if a selection or rejection of uninsured motorist coverage is made by the named insured on a form approved by the Insurance Commissioner, it shall be "conclusively presumed" that the named insured made a knowing rejection.

In order for the Class II insured to make a challenge as to whether or not a named insured made a knowing rejection of uninsured motorist coverage, it is first necessary that the Class II insured have standing to raise the issue as to whether or not there is a written rejection form as required by the Statute. If there is such a form properly signed by the named insured, then the Class II insured's challenge would end at that point by virtue of

the presumption created by the Statute. However, if there is no signed rejection form, then the insurer would have the burden of proof to establish that in fact the named insured had made a selection or rejection in some other manner.

The fact that the District Court has held that a Class II insured does have standing to raise the issue of whether or not there was a written rejection does not automatically create coverage on behalf of the Class II insured when there is not a written rejection. The mere fact that there is not a written rejection would only get one to the second step, and then coverage would be afforded to the Class II insured after that if the insurer fails to meet its burden to prove that there was not a knowing rejection or selection made by the named insured in some other manner.

The Second District Court of Appeal's opinion granting to the Respondent/Cross-Petitioners the right to have standing to contest the absence of the written rejection is correct and should be affirmed.

SUMMARY OF ARGUMENT II ON PETITION

The Second District Court of Appeal's opinion holding that "KEY AGENCY", as a licensed agent of Travelers Insurance Company, was the agent for "TRAVELERS" when placing insurance for "WEST COAST" with "TRAVELERS", is correct and should be affirmed.

The record in this matter is clear that at the time "KEY AGENCY" was involved in placing "WEST COAST's" insurance coverage

with "TRAVELERS", "KEY AGENCY" was a licensed agent of "TRAVELERS", and had been operating under a written agency agreement with "TRAVELERS" since 1957. Further, the evidence establishes that Mr. Dignam, the President of "KEY AGENCY", signed the application for the coverage in the designated block for the agent of "TRAVELERS".

The law is well settled that when a local licensed agent of an insurance company, such as "KEY AGENCY" was, solicits business for his principal, i.e. "TRAVELERS", and prepares the application for the policy, he is an agent for the insurance company, and the mere fact that the insureds used him to procure the policy does not make him the insureds' agent. 16 Appleman, Insurance Law and Practice, §8694.

The Petitioner's contention that "KEY AGENCY" was a broker on behalf of "WEST COAST" is without merit in this cause by virtue of "KEY AGENCY" having both a fixed relationship and employment with "TRAVELERS" by virtue under an agency agreement.

The District Court's holding that "KEY AGENCY" was acting as an agent for "TRAVELERS", rather than the insured, at the time of the placement of the "WEST COAST's" insurance coverage with "TRAVELERS" is correct and should be affirmed.

SUMMARY OF ARGUMENT ON CROSS-PETITION

The Second District Court of Appeal's opinion affirming the trial Court's Summary Judgment as to "SOUTHERN AMERICAN" was erroneous and should be reversed.

The Second District Court of Appeal affirmed the trial Court's Summary Judgment based upon two reasons, neither of which may properly support a Summary Judgment on the record contained in this case.

The first basis for the affirmance of the trial Court's Summary Judgment was that "KEY AGENCY" was a broker for "WEST COAST" when it filled out the insurance application for the "SOUTHERN AMERICAN". The evidence contained in the record is conflicting as to who "KEY AGENCY" was in fact working for at the time of the completion of the application for the "SOUTHERN AMERICAN" policy. The president of "KEY AGENCY" indicated that he felt theoretically he represented "SOUTHERN AMERICAN", and later also stated that he was an insurance broker for "SOUTHERN AMERICAN's" general agent, Crump London.

Even if one accepts the trial Court's, and the District Court's, designation of "KEY AGENCY" as a broker in the transaction between "WEST COAST" and "SOUTHERN AMERICAN", there still is a conflict, and material issue of fact, as to who "KEY AGENCY" was a broker for. The law allows an insurance broker to represent the insurer, the insured, or in some instances both. 30 Fla.Jur. 2d, Insurance, §316, 16 Appleman, Insurance Law and Practice, §§8727, 8731, 8736.

Based upon Mr. Dignam's testimony, and additionally the fact that "KEY AGENCY" was listed as a producing agent on the policy that was actually issued, there are material issues of fact which

would preclude the granting of a Summary Judgment in favor of "SOUTHERN AMERICAN" on this issue.

The District Court's second basis for affirmance of the Summary Judgment as to "SOUTHERN AMERICAN" related to a change in the Statute regulating uninsured motorist coverage. As the District Court points out, as of October 1, 1984, which was 25 days prior to the issuance of the "SOUTHERN AMERICAN" policy, an excess insurance carrier was only required to offer uninsured motorist coverage equal to the bodily injury liability limits in the application for coverage, and then to provide it when requested by the named insured.

The record in this matter is completely silent as to whether or not "SOUTHERN AMERICAN" complied with the Statute by making uninsured motorist coverage available in the application for the "SOUTHERN AMERICAN" policy. Nowhere in the record is there a copy of the application, nor does anyone testify concerning the actual written application itself. This silence creates a material issue of fact as to whether or not it uninsured motorist coverage was made available in the application, and therefore, a Summary Judgment in favor of "SOUTHERN AMERICAN" is erroneous and improper, and should be reversed.

QUESTIONS PRESENTED ON PETITION

I. WHETHER OR NOT MR. AND MRS. QUIRK HAVE STANDING TO CONTEST THE ABSENCE OF A WRITTEN REJECTION OF UNINSURED MOTORIST COVERAGE?

II. WHETHER OR NOT THE SECOND DISTRICT COURT OF APPEAL WAS CORRECT IN HOLDING THAT "KEY AGENCY", AS A LICENSED AGENT OF "TRAVELERS", ACTED AS AN AGENT FOR "TRAVELERS" RATHER THAN A BROKER FOR "WEST COAST", IN PROVIDING THE "TRAVELERS'" POLICY?

QUESTION PRESENTED ON CROSS-PETITION

I. WHETHER OR NOT AS A MATTER OF LAW, THE TRIAL COURT IN GRANTING, AND THE SECOND DISTRICT COURT OF APPEALS IN AFFIRMING A SUMMARY JUDGMENT FOR "SOUTHERN AMERICAN", WERE CORRECT WHEN THERE ARE MATERIAL ISSUES OF FACT CONTAINED IN THE RECORD?

ARGUMENT I ON PETITION

MR. AND MRS. QUIRK HAVE STANDING TO CONTEST THE ABSENCE OF A WRITTEN REJECTION OF UNINSURED MOTORIST COVERAGE AS A PART OF THEIR CHALLENGE TO WHETHER OR NOT "WEST COAST" HAD MADE A KNOWING REJECTION OF UNINSURED MOTORIST COVERAGE ON THE "TRAVELERS" POLICY.

The Second District Court of Appeal's opinion in this matter, which allowed a Class II insured to raise the issue of a failure to secure a written rejection of uninsured motorist coverage as a part and parcel of a Class II insured's challenge to whether or not there was a knowing rejection of uninsured motorist coverage by a named insured, was correct.

The Respondent/Cross-Petitioner agrees with the Petitioner that the right to reject uninsured motorist coverage is vested in the named insured, "WEST COAST", and its rejection is binding on all insureds under the policy. (§627.727(1), Fla.Stat., (1983), Whitten v. Progressive Casualty Insurance Co., 410 So.2d 501 (Fla. 1982)). However, the law is equally clear that a Class II insured under a policy of insurance does have standing to determine whether or not a named insured initially made a knowing rejection of uninsured motorist coverage. Cullars v. Manatee County, 463 So.2d 484 (Fla. 2d DCA 1985), St. Paul Fire and Marine Insurance Company v. Smith, 504 So.2d 14 (Fla. 2d DCA 1987), review denied, 511 So.2d 299 (Fla. 1987).

Judge Altenbernd's opinion below in this matter sets up a procedure which a Class II insured should follow in a challenge as to whether or not a knowing rejection of uninsured motorist

coverage was made by the named insured. As the opinion points out, Florida Statute 627.727(1) now provides, and since October 1, 1984, which was prior to the renewal of the subject policy, that a written rejection obtained on a form provided by the Insurance Commissioner creates a "conclusive presumption" that there was an informed knowing rejection or selection of uninsured motorist coverage by the named insured.

By virtue of the Statutes creating a "conclusive presumption", the only rational procedure by which a Class II insured can challenge whether or not there was a knowing rejection, is to first raise the issue of whether or not there was a written rejection, and if not, then challenge whether or not there was any knowing rejection secured in another manner. This procedure is not inconsistent with any existing case law concerning a Class II insured's right to determine whether or not there was a rejection of uninsured motorist coverage.

The Petitioner erroneously alleges that the Second District Court of Appeal's opinion is inconsistent with Gast v. Nationwide Mutual Fire Insurance Company, 516 So.2d 112 (Fla. 5th DCA 1987). The Second District's opinion in this matter is not inconsistent with Gast, because in Gast it was very clear that the named insured had selected lower uninsured motorist limits than were available. The Class II insured in Gast was attempting to create higher coverage based upon the mere fact that there was not a written rejection of coverage equal to the bodily injury limits. The Fifth District Court of Appeal's opinion in Gast held that they could not

use the mere failure to have a written rejection to create higher coverage when it was obvious that the named insured had knowingly selected lower limits.

If the Court in Gast had followed Judge Altenbernd's suggested procedure the result would have been exactly the same. If the Class II insured had raised the issue that there was in fact no written rejection or selection, then the insurance carrier would have had the burden to come forth and prove that the named insured had in fact knowingly selected a lower limit of coverage. This is exactly what occurred in Gast, and the evidence clearly established that the named insured had made a knowing selection. The procedure suggested by Judge Altenbernd below, is also consistent with Federal Insurance Company v. Norris, 543 So.2d 776 (Fla. 1st DCA 1989), St. Paul Fire and Marine Insurance Company v. Smith, 504 So.2d 14 (Fla. 2d DCA 1987), review denied, 511 So.2d 299 (Fla 1987), DelPrado v. Liberty Mutual Insurance Company, 400 So.2d 115 (Fla. 4th DCA 1981), pet. review dismissed, 407 So.2d 1105 (Fla. 1981). All of these cases dealt with situations where there was in fact a knowing rejection or selection by the named insured, and the results would have been the same under Judge Altenbernd's outlined procedure.

The lower Court's opinion in this case, and all of the case law cited above, does not allow the mere fact that there was no written rejection of uninsured motorist coverage to automatically create coverage, but only gets you to step two in a Class II insured's challenge as to whether or not there was a knowing

rejection or selection in the absence of a written rejection. If in fact there is a written rejection, then the Class II insured does not get to step two, since the written rejection itself creates the "conclusive presumption" of a knowing rejection or selection, and there would be no need to go further in the challenge.

The Cross-Petitioner has not asserted that the mere failure to have a written rejection automatically creates uninsured motorist coverage equal to the liability limits in this matter. It has always been the Petitioner's position that there was no knowing rejection or selection of uninsured motorist coverage by the named insured, "WEST COAST", and therefore there never could have been a written rejection or selection.

The evidence on the rejection issue has clearly been that since there was no written rejection, and the testimony of the President of "WEST COAST" clearly establishes that there was no discussion concerning uninsured motorist coverage for the policy issued, then there was no knowing rejection or selection, and by virtue of the Statute there would be uninsured motorist coverage available to the Cross-Petitioner in an amount equal to the bodily injury limits.

Had "TRAVELERS" complied with the Statutory requirements of 627.727, and obtained a signed written rejection by the named insured, the Cross-Petitioner's challenge to the knowing rejection issue would have ended when a signed written rejection was produced by "TRAVELERS".

The Petitioner further takes issue with Judge Altenbernd's opinion holding that the Statutory requirement of a written rejection is more than a technicality. Obviously, Judge Altenbernd's opinion is correct on that issue, since the Statute itself creates a "conclusive presumption" of an informed knowing rejection of coverage. For a Statute to provide that level of proof by the doing of an act, then it certainly is more than a mere technicality.

In light of the requirements of Florida Statute 627.727 a Class II insured does have standing to raise the issue of the failure to obtain a written rejection as the first step of its challenge as to whether or not there was in fact an informed knowing rejection of uninsured motorist coverage.

ARGUMENT II ON PETITION

THE SECOND DISTRICT COURT OF APPEAL'S OPINION BELOW WAS CORRECT IN HOLDING THAT "KEY AGENCY", AS A LICENSED AGENT OF "TRAVELERS", ACTED AS AN AGENT FOR "TRAVELERS" IN PROVIDING THE "TRAVELERS" POLICY TO "WEST COAST".

The Second District Court of Appeal's opinion below holds that "KEY AGENCY", as a licensed agent with a written agency agreement, was the agent of "TRAVELERS" and not an insurance broker for "WEST COAST" in the transaction between "TRAVELERS" and "WEST COAST".

It is without question that "KEY AGENCY" was a licensed agent of "TRAVELERS", (R-548), and further had had a written agency agreement with "TRAVELERS" since 1957. (R-548). It is also evident that "KEY AGENCY" was acting as an agent for "TRAVELERS" in obtaining the Travelers policy on behalf of "WEST COAST", by virtue of the fact that Thomas Dignam signed the application for the policy as "agent" for the company, and not as a broker or as an applicant. ("SOUTHERN AMERICAN" Exhibit 7 to Dignam Deposition, R-327-328).

In discussing the status of a local agent of an insurance company's position in a relationship between the company and the insured, 16 Appleman, Insurance Law and Practice, §8694 (1968), states: "When the local agent of an insurance company solicits business for his principal, and prepares the application for a policy, in so doing, he is, prima facie, the agent of the company, and the mere fact that the insureds used him to procure the policy does not make him their agent".

The Florida Courts have also previously held that where the insurer, i.e. "TRAVELERS", makes its local agent, i.e. "KEY AGENCY", the medium through which it receives all benefits from the insured, it is estopped to deny the agents authority when benefits of the insured are involved. Southern States Fire Ins. Co., v. Vann, 69 Fla. 549, 68 So. 647 (Fla. 1915), Russell v. Eckert, 195 So.2d 617 (Fla. 2d DCA, 1967).

The Petitioner's position in this matter seeks to have this Court completely re-write the law of agency between licensed insurance agents and their insurers by simply asserting that since "KEY AGENCY" was an independent agent, and held licenses with several different insurance companies, the request for coverage from the insured would make the licensed agent a broker for the insured, rather than an agent for the company he was licensed to represent. To accept this position this Court would have to completely reverse a long line of cases in which the Courts of this State have held that insurers were bound by the acts of their licensed agents when operating within the scope of their agency agreements.

Petitioner relies upon 16 Appleman, Insurance Law and Practice, §8726 (1968), as standing for the proposition that "KEY AGENCY" acted as a broker for "WEST COAST" in this case, rather than as an agent for "TRAVELERS". The citation from Appleman clearly states that a broker "...enjoys no fixed or permanent relationship to an insurer...". The record in this cause is clear that "KEY AGENCY" and Mr. Dignam had a fixed relationship with

"TRAVELERS" by virtue of a written agency agreement with "TRAVELERS". (R-548).

Petitioner also relies upon 3 Couch on Insurance, and other sections of Appleman, in defining a broker as "one who solicits insurance from the public under no employment from any special company". 3 Couch on Insurance, 2d, §25:92 (1960), 16 Appleman, Insurance Law and Practice, §8726 (1968). However, Petitioner fails to recognize that in fact "KEY AGENCY" did have employment with "TRAVELERS" by virtue of a written agency agreement, and obviously this agreement gave "KEY AGENCY" the right to solicit insurance from the general public on behalf of "TRAVELERS". (R-548). If one were to adopt the Petitioner's reasoning, there would be no reason whatsoever for any insurance company to enter into a written agency agreement with a local agent, and there would be no reason for the statutory scheme of the Florida Insurance Code which requires that agents be licensed by the companies they represent. (§§626.031, 626.331(2), Fla.Stat., (1983). The Petitioner's reliance upon Auto-Owners Insurance Co. v. Yates, 368 So.2d 634 (Fla. 2d DCA 1979), Acquesta v. Industrial Fire and Casualty Company, 467 So.2d 284 (Fla. 1985), Guarantee Insurance Co. v. Sloop, 463 So.2d 784 (Fla. 2d DCA 1985), and Empire Fire and Marine Ins. Co. v. Koven, 402 So.2d 1352 (Fla. 4th DCA, 1981) is also completely misplaced in this matter. None of these cases deal with a situation where a licensed agent of the insurer who issued the policy is the person who signed the uninsured motorist rejection or selection form.

In Yates the insurance agent who signed the policy application for Mrs. Yates was not authorized to act on behalf of any company writing personal automobile insurance coverage. The agent submitted Mrs. Yates' application, with a rejection, through an agent of Auto-Owners, who was licensed to write personal automobile insurance for Auto-Owners. The position of "KEY AGENCY" in this matter would be the same as the Auto-Owners agent whom Mrs. Yates' application was submitted through to acquire the coverage with Auto-Owners. It is quite apparent that had the second agent, who was the Auto-Owners agent, attempted to reject coverage on behalf of Mrs. Yates without informing her, the decision in Yates would have been vastly different.

In Acquesta and Sloop, there was no licensed agent involved in the making of a written rejection or selection for the uninsured motorist coverage, and therefore these cases are not applicable.

In Empire Marine the broker involved was not a licensed agent of Empire Marine, and there was not any contention ever made that he was a licensed agent, or even an agent of Empire Marine, and therefore this case also has no application to the issues involved between the Quirks, "WEST COAST" and "TRAVELERS".

The Petitioner asserts that simply by virtue of there being some evidence that "WEST COAST" requested that "KEY AGENCY" obtain the coverage, without specifically specifying any insurance company for the coverage, that this somehow made "KEY AGENCY" a broker acting on behalf of "WEST COAST", rather than an agent of "TRAVELERS", who had actually licensed "KEY AGENCY".

In Monogram Products, Inc. v. Berkowitz, 392 So.2d 1353 (Fla. 2d DCA 1981), the Second District Court of Appeal in citing Couch, held "giving an insurance agent general authority to insure property with discretion to select the company,. . ., does not make such agent the agent of the insured, . . . in the issuance of the policy." Couch, Cyclopedia of Insurance Law, §25.100 (1960), Monogram Products, Inc., at p.1355.

As Judge Altenbernd's opinion below points out, it was "TRAVELERS" who chose and selected and agreed to license "KEY AGENCY" as its agent to solicit insurance business on its behalf. It was also "TRAVELERS" who accepted the general application signed by Thomas Dignam as agent for "TRAVELERS", and therefore the agency must be deemed to be the agent of the insurer, "TRAVELERS", and not the insured in this transaction. As the opinion below points out, to accept the position espoused by the Petitioner would be ludicrous in light of the fact that independent agents advertise the companies for whom they are licensed, and give the appearance of apparent authority to act on behalf of the insurance companies who select them and license them as their agents.

The Respondent/Cross-Petitioner would also point out to this Court that both the Third District Court of Appeals, and the First District Court of Appeals have recently issued opinions which follow the Second District Court of Appeal's decision in this matter. In Rodriguez v. American United Insurance Company, 570 So.2d 365 (Fla. 3d DCA, 1980), the Third District Court held that for purposed of obtaining proper rejection of uninsured motorist

coverage an independent insurance agent was the agent of the insurer who he was licensed to represent, and was not a broker for the insured. Likewise, the First District, in Adams v. Aetna Casualty Insurance Company, 16 FLW D373 (Fla. 1st DCA, 1991), also held that an agency authorized to sell an insurance company's policy is the agent for the insurer, not the insured, in obtaining a rejection of uninsured motorist coverage.

These recent cases, together with the preceding argument clearly shows the wisdom of affirming the Second District Court of Appeal's opinion, making "KEY AGENCY" an agent of "TRAVELERS" who was the company who licensed the agency to act on its behalf.

ARGUMENT ON CROSS-PETITION

THE SECOND DISTRICT COURT OF APPEAL'S AFFIRMANCE OF THE TRIAL COURT'S GRANTING OF A SUMMARY JUDGEMENT IN FAVOR OF "SOUTHERN AMERICAN" IS ERRONEOUS IN LIGHT OF THERE BEING MATERIAL ISSUES OF FACT IN THE RECORD.

The Second District Court of Appeal's opinion below affirming the trial Court's Summary Judgment as to "SOUTHERN AMERICAN" is erroneous. The basis of the trial Court's ruling was that as a matter of law "KEY AGENCY" was acting as a broker for "WEST COAST" when employees of "KEY AGENCY" forged the name of a "WEST COAST" employee on an uninsured motorist rejection form after the policy had been issued for delivery.

The District Court affirmed the trial Court's Summary Judgment on this basis that "KEY AGENCY" was a broker for "WEST COAST" when it filled out the insurance application form to "SOUTHERN AMERICAN", and did not request uninsured motorist coverage for "WEST COAST". The Court also pointed out that as of October 1, 1984, which was 25 days prior to the effective date of the "SOUTHERN AMERICAN" policy, "SOUTHERN AMERICAN" only had a duty to offer uninsured motorist coverage as a part of the application for insurance, and furnish it when there was a written request by the named insured. §627.727(2) Fla.Stat. (supp.1984).

The granting of a Summary Judgment by the trial Court, and the affirmance of the District Court on either basis in this case is improper and requires reversal.

The evidence is very clear that "KEY AGENCY" was involved in the issuance of the "SOUTHERN AMERICAN" policy. What is not clear,

however, is exactly who "KEY AGENCY" was acting for in having a "SOUTHERN AMERICAN" policy issued, and obtaining the subsequent rejection of uninsured motorist coverage when requested to do so by "SOUTHERN AMERICAN" or its general agent.

Both the trial Court and the Second District Court of Appeals have designated "KEY AGENCY" as a broker in the transaction involving the "SOUTHERN AMERICAN" policy issued for "WEST COAST". Although these Courts have designated "KEY AGENCY" as a "broker", this designation is not dispositive of the issue as to who "KEY AGENCY" was acting for, if in fact it was a "broker". An "insurance broker" may represent either the insurance company, i.e. "SOUTHERN AMERICAN", the insured, i.e. "WEST COAST", or he may represent both "SOUTHERN AMERICAN" and "WEST COAST". 30 Fla.Jur. 2d, Insurance, §316, 43 Am.Jur. 2d, Insurance, §149, 16 Appleman, Insurance Law, §§8727, 8731, 8736. It is apparent from the testimony of Thomas Dignam, that he was not certain as to who he was representing in the transaction. Mr. Dignam testified that he was the authorized representative of "SOUTHERN AMERICAN" when he had one of his employees forge a signature of a "WEST COAST" employee on the rejection form sent along with the policy by "SOUTHERN AMERICAN" or its general agent. (R-276). Mr. Dignam also testified he felt that he was a broker for Crump London, who was the general agent of "SOUTHERN AMERICAN" for the issuance of the "SOUTHERN AMERICAN" policy. (R-258, 558 -559).

The question of the agency relationship between the parties in this matter is further clouded by the fact that "SOUTHERN

AMERICAN" was not an authorized insurer in Florida, but was what is referred to as a "surplus lines insurer" under the Florida Surplus Lines Law. §§626.913-.937 Fla. Stat. (1983).

As a surplus lines insurer "SOUTHERN AMERICAN" was not an authorized Florida insurance company with which insurance coverage could normally be placed. As an unauthorized insurer "SOUTHERN AMERICAN" did not maintain any type of agency network similar to that utilized by authorized insurance carriers such as "TRAVELERS" with their licensed local agents.

The "Florida Surplus Lines Law", §§626.913-.937 Fla. Stat. (1983), which regulates surplus lines insurers, provides for the licensing of insurance agents as surplus lines agents. These surplus lines agents are licensed by the State to handle the placement of insurance coverages with surplus lines insurers if the coverage is placed through a counter-signing Florida licensed resident agent of the insurer. §626.914 Fla.Stat. (1983).

In the instant case "KEY AGENCY" was a surplus lines agent. (R-222, 559), and Crump London was the counter-signing Florida licensed resident agent for "SOUTHERN AMERICAN". (R-558-559). Mr. Dignam did in fact secure the placement of the insurance coverage with "SOUTHERN AMERICAN" through its licensed resident agent Crump London. (R-558).

The "Florida Surplus Lines Law", also makes it clear that a local surplus lines agent is in fact involved in the issuance of a surplus lines policy, and acting in concert with the insurer, when it requires that each surplus lines agent through whom surplus

lines coverage is procured, write or print on the outside of the policy his name, address, and identification number, and the name and address of the local agent through whom the business is originated. This information is required to be given with a notice to the insured that the policy it a surplus lines policy and the insured does not have the protection of the Florida Insurance Guaranty act. §626.924 Fla.Stat. (1983).

If in fact the local agent through whom the surplus lines policy was originated was not deemed to be a part of the agency relationship with the insurer, there certainly would be no reason for the State to require that the local agent's name and address be placed on the front of the policy along with the counter-signing general resident agent of the insurer. This was obviously done as a requirement to indicate to the insured the relationship between the insurer, its counter-signing general resident agent, and local producing agent. The policy issued by "SOUTHERN AMERICAN" in this matter clearly establishes on the face of the policy that "KEY AGENCY" was the producing agent when the information required by §626.924 of the Florida Statutes was placed on the face of the policy. (Exhibit 4 to Dignam deposition of 2-17-87).

The record is also replete with additional evidence that "KEY AGENCY" was functioning on behalf of "SOUTHERN AMERICAN" in the transaction involving "WEST COAST", by virtue of the fact that "SOUTHERN AMERICAN", through Crump London, had "KEY AGENCY" deliver the policy, (R-502), collect the premium, (R-281), and had "KEY AGENCY" attempt to obtain a written rejection of uninsured motorist

coverage after the issuance of the policy for delivery. (R-503). All of these activities delegated to "KEY AGENCY" by "SOUTHERN AMERICAN", or its general agent, at the very least create an inference as to "KEY AGENCY's" functioning on behalf of "SOUTHERN AMERICAN".

In the trial Court below, and in the Second District Court of Appeals below, "SOUTHERN AMERICAN" has relied upon Acquesta v. Industrial Fire and Casualty Company, Inc., 467 So.2d 284 (Fla. 1985), Auto-Owners Ins. Co. v. Yates 368 So.2d 634 (Fla 2d DCA, 1979), Empire Fire and Marine Insurance Co. v. Koven, 402 So.2d 1352 (Fla. 4th DCA, 1981), Guarantee Insurance Co. v. Sloop, 473 So.2d 784 (Fla. 2d DCA, 1985), and Noaker v. Canadian Universal Ins. Co., 468 So.2d 330 (Fla. 2d DCA, 1985), to support its position.

All of the above decisions involve situations where an agent for the insured, or a broker acting for the insured, made a selection or rejection of uninsured motorist coverage at the time of the application for the policy. The fact of the selection or rejection being contained at the time of the application is simply not present in the instant matter. The rejection signed here was made at a later date, and was not contained in the original application, and was made by one who ostensibly had an agency relationship with the insurer rather than the insured. The agency relationship concerning the forged rejection is certainly fortified by Mr. Dignam's statements that he was ...theoretically representing "SOUTHERN AMERICAN" when he had one of his employees

forge the name of a "WEST COAST" employee to the rejection. (R-277, 280, 500).

As was pointed out earlier in this argument, the Second District Court also affirmed the lower Court's Summary Judgment on the additional basis that §627.727(2) Fla.Stat., (supp.1984), only required that an excess insurance carrier offer uninsured motorist coverage as a part of the application for an excess insurance policy, and the coverage shall be supplied when requested by the named insured.

The affirmance of the Summary Judgment on this basis however, fails to take into account that nowhere in the record is there any evidence whatsoever that "SOUTHERN AMERICAN" complied with the requirements of §627.727(2) Fla.Stat. (supp.1984), by making uninsured motorist coverage available as a part of the application, with limits up to the bodily injury liability limits of the policy.

"SOUTHERN AMERICAN's" failure to offer uninsured motorist coverage up to the limits of the bodily injury liability limits in the policy application, should subject it to providing coverage equal to the bodily injury liability limits. First State Insurance Co. v. Stubbs, 418 So.2d 1114 (Fla. 4th DCA, 1982), review denied, 426 So.2d 26, Spira v. Guarantee National Insur. Co., 468 So.2d 540 (Fla. 4th DCA, 1985).

By virtue of there being material disputed issues of fact concerning the agency relationship between "KEY AGENCY", "SOUTHERN AMERICAN", and "WEST COAST", and further there being no record evidence from which the Court could conclude that as a matter of

law "SOUTHERN AMERICAN" had offered uninsured motorist coverage equal to the bodily injury liability limits in its application, "SOUTHERN AMERICAN" has failed to meet the burden required to have a Summary Judgment granted in its favor, and the trial Court's granting of Summary Judgment, and the Second District Court's affirmance of the Summary Judgment should be reversed.

CONCLUSION

Based upon the foregoing arguments, the Respondent/Cross-Petitioner prays this Court to affirm the District Court of Appeal's opinion in reference to "TRAVELERS", and reverse the District Court of Appeal's opinion, and the trial Court's ruling, as to "SOUTHERN AMERICAN", and the matter be remanded back to the Circuit Court of the Twentieth Judicial Circuit, in and for Charlotte County, Florida.

Respectfully submitted,

JACK McGILL, ESQUIRE
1101 S. Tamiami Trail, Ste 101
Venice, Florida 34285
(813) 485-8339
Florida Bar #143136
Attorney for Respondent/Cross-Petitioner.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by mail to ROBERT M. DAISLEY, ESQUIRE, P.O. Box 3433, Tampa, Florida 33601, M. JOSEPH LIEB, JR., ESQUIRE, P.O. Box 1238, Sarasota, Florida 34230, CRAIG FERRANTE, ESQUIRE, P.O. Box 280, Fort Myers, Florida 33902, LOVE PHIPPS, ESQUIRE, 116 West Flagler Street, Miami, Florida 33130, and LEE D. GUNN, ESQUIRE, P.O. Box 1006, Tampa, Florida 33601, on this 11th day of March, 1991.

Jack McGill

JACK McGILL