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THE SUPREME COURT OF FLORIDA

TRAVELERS INSURANCE COMPANY

Petitioner,

vs.

JAMES H. QUIRK and MARIE QUIRK, Husband and Wife,

Respondents.
_____/

SUPREME COURT CASE No. 76,432

2ND DISTRICT NO. 89-01682

JURISDICTIONAL BRIEF OF PETITIONER, TRAVELERS

Original

RAYMOND T. ELLIGETT, JR.
Fla. Bar No. 261939
BRETT J. PRESTON
Fla. Bar No. 603716
SHACKLEFORD, FARRIOR, STALLINGS & EVANS, P.A.
POST OFFICE BOX 3324
TAMPA, FLORIDA 33601
(813) ~~273-5000~~ 873-4011
and
LEE D. GUNN IV
Fla. Bar. No. 367192
GUNN, SULLIVAN & OGDEN
P.O. BOX 1006
TAMPA, FLORIDA 33601 813-223-5111
Attorneys for Petitioner
Travelers Insurance Company

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PRELIMINARY STATEMENT

Petitioner, Travelers Insurance Company, Defendant in the trial court below and Appellee before the Second District, is referred to as "Defendant".

Respondents, James H. Quirk and his wife, Plaintiffs in the trial court and Appellants in the Second District, are referred to as "Plaintiff".

References to the Appendix hereto are designated by the Prefix "A".

STATEMENT OF THE CASE AND FACTS

Plaintiff appealed to the Second District from two summary judgments. The first held Plaintiff did not have standing to contest the absence of a written rejection of uninsured motorist coverage. The second held an independent insurance agent, as an agent of the insured corporation (the Plaintiff's employer), effectively rejected uninsured motorist coverage. Therefore, Plaintiff was not entitled to recover uninsured motorist benefits.

The Second District reversed both summary judgments. As to the first, the Second District held Plaintiff had standing to raise the absence of a written rejection even though he was a class two insured. As to the second, it held, as a matter of law, that the independent insurance agent functioned as an agent of Defendant, not the insured corporation, with respect to the rejection of uninsured motorist coverage. Both of these holdings are in conflict with prior decisions of other courts of appeal.

Defendant's post-opinion motions were denied and this petition followed.

JURISDICTIONAL ISSUES

I. Whether the Second District's opinion conflicts with Gast v. Nationwide Mutual Fire Insurance Company, 516 So.2d 112 (Fla. 5th DCA 1987)?

II. Whether the Second District's opinion conflicts with Empire Fire and Marine Insurance Company v. Koven, 402 So.2d 1352 (Fla. 4th DCA 1981) and Pawlik v. Stevens, 499 So.2d 61 (Fla. 5th DCA 1986)?

SUMMARY OF THE ARGUMENT

The Second District's opinion reversing the summary judgment concerning standing to raise the absence of a written rejection conflicts with Gast v. Nationwide Mutual Fire Insurance Company, 516 So.2d 112 (Fla. 5th DCA 1987). In Gast, the Fifth District held the plaintiff there, a permissive user, "does not have standing to raise the absence of a written rejection as a basis for increased policy limits." Gast at 113. The Second District's opinion is precisely to the contrary.

As to the status of an independent insurance agent, this Court should exercise its discretion and accept jurisdiction to resolve a conflict and clarify whether an independent insurance agent who, after considering other alternatives places insurance with a company with whom the agent is licensed, operates as agent of the insurer with respect to rejection of uninsured motorist coverage as a matter of law.

ARGUMENT

I. The Second District's opinion conflicts with Gast v. Nationwide Mutual Fire Insurance Co., 516 So.2d 112 (Fla. 5th DCA 1987).

Florida courts have long held that a Class II insured lacks standing to challenge the absence of a written rejection of uninsured motorist (UM) coverage. (See A-8) The Second District acknowledged its decision "may" conflict with the rule announced in Gast.[1/] In fact, the Second District's decision is precisely opposite the Fifth District's in Gast. The Second District stated:

> We hold that Class II insureds are entitled to challenge an insurance carrier's failure to obtain a written rejection. (A-9)

Later, the court characterized its holding as follows:

> ...we hold that a Class II insured has standing to raise the issue of a written rejection... (A-10)

The Class II insured who is the subject of this holding is the Plaintiff, an employee of the corporate insured and a passenger/permissive user in the vehicle involved in the accident. In Gast, the Fifth District held that:

> The trial court's determination is correct since Gast does not have standing to raise the absence of a written rejection as a basis for increased policy limits.

[1/] The Second District "distinguished" cases where the policy was issued before the 1982 statutory amendment requiring a written rejection, or did not state a policy issue date. See Federal Insurance Co. v. Norris, 543 So.2d 776 (Fla. 1st DCA 1989). Gast addressed the 1985 statute, after the writing requirement.

516 So.2d at 113. Gast was an employee/permissive user (driver) of the company owed vehicle that was involved in the accident. This conflict is clear.

The Second District suggested its holding was "not inconsistent with the outcome in Gast." (A-11) Immediately above this statement it recognized it was granting new standing to Class II insureds that was previously enjoyed only by Class I insureds. (A-10) Thus, this is a departure - and hence conflict - with the prior law.

The Second District decision also conflicts with cases holding Class II insureds lack standing to complain of the insured's failure to comply with other aspects of the UM statute, including the annual notice requirement. E.g. Compass Insurance Company v. Woodward, 489 So.2d 1157 (Fla. 4th DCA 1986).

The Second District expressed two reasons for treating written rejections differently. First, it characterized a written rejection as a "basic statutory requirement" as contrasted with the "technical" annual notice requirement. Second it observed that, with respect to corporate insureds, because corporations do not sustain bodily injuries, and do not make UM claims, such claims must be brought through corporate agents and employees.

As to the first reason, there is no real distinction between the technical requirement that a rejection be reduced to writing and the technical requirement that an insurer send written annual notice of the availability of UM coverage. Both are required by the same statute. Nothing in that statute suggests one is elevated

to a different, "non-technical", status when compared to the other.[2/]

The attempt to distinguish the written rejection and annual notice requirements conflicts with the First District decision in Federal Insurance, supra. It characterized cases concerning standing to raise both the writing requirement (Gast) and notice requirement (Smith)[3/] as addressing "technical deficiencies"

As to the Second District's second reason for treating written rejections differently, the same rationale could be applied to any requirement of the uninsured motorist statute: only Class II insureds will ever make UM claims where the named insured is a corporation. According to this rationale, Class II insureds must have standing to attack non-compliance with any of the statutory requirements, or no one will have such standing. This would include the annual notice requirement. This again conflicts with Federal Insurance.

Because the Second District's opinion clearly conflicts with those of the Fifth District and the First, the Court should accept jurisdiction of this appeal.

[2/] The annual notice requirement requires that the insurer notify the named insured of his UM options, that the notice be part of the notice of premium, and that insurer provide a means to allow the insured to request such coverage. §627.727(1), Florida Statutes (1989). The annual notice requirement is just as "simple" as the written rejection requirement. (A 9).

[3/] St. Paul Fire & Marine Insurance Co. v. Smith, 504 So.2d 14 (Fla. 2d DCA 1987), rev. denied, 511 So.2d 299 (Fla. 1987).

II. The Second District's opinion conflicts with Empire Fire and Marine Insurance Company v. Koven, 402 So.2d 1352 (Fla. 4th DCA 1981) and Pawlik v. Stevens, 499 So.2d 61 (Fla. 5th DCA 1986).

The Second District effected a radical change in the law of insurance agents and brokers by holding, as a matter of law, an independent insurance agent who places automobile coverage with an insurer with whom the agent is licensed acts as an agent of the insurer with regard to rejection of uninsured motorist coverage. It so held without regard to any other facts and circumstances relevant to the relationships of the insured, agent, and insurer.

This holding drastically alters the traditional and accepted understanding of an independent insurance agent/broker's role in the insurance industry. Further, it ignores the actual limitations and scope of an agent's actual authority, defined by an agency contract, in favor of an arbitrary general rule that does not provide for consideration of the circumstances in individual cases.

Florida cases have held when an insurance "broker" rejects UM coverage, the rejection binds the insured. E.g. Empire Fire and Marine Insurance Company v. Koven, 402 So.2d 1352 (Fla. 4th DCA 1981). The Second District's decision holds an "independent agent" is always acting as an agent of the insurer, and never the insured, in this context. This conflicts with the principles in Koven.

Koven cited Appleman's treatise on insurance, observing a broker enjoys no permanent or fixed relationship with an insurer, but holds himself out for employment by the general public. It further observes that an insurance "agent" is employed by an insurance company to solicit and write insurance for the company.

"Independent agents" are not employed by a specific insurer, are not limited to placing coverage with a specific insurance, and actually tout their independent status by advertising they can shop around between insurers for better coverages and prices.[4/] If such an independent agent is not a broker as a matter of law, at a minimum it presents a fact issue. Plaintiff recognizes the agency issue can be a question of fact in his jurisdictional brief, by citing Pawlik v. Stevens, 499 So.2d 61 (Fla. 5th DCA 1986). This is especially true here, where the "independent agent" was acting for the insured as described above.

CONCLUSION

Based on the foregoing, the Second District's decision conflicts with the decisions cited above. The decision includes two new, significant legal holdings which warrant this Court's

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4/ Such was the situation here, where the agent placed the coverage where the insured could get the best buy, and actually acted as an advisor in selecting certain coverages for the insured.

discretionary review. Accordingly, Travelers respectfully requests this Court to take jurisdiction of this case.

Respectfully submitted,

RAYMOND T. ELLIGETT, JR.
Fla. Bar No. 261939
BRETT J. PRESTON
Fla. Bar No. 603716
SHACKLEFORD, FARRIOR, STALLINGS & EVANS, P.A.
Post Office Box 3324
Tampa, Florida 33601
(813) 273-5000
and
LEE D. GUNN IV
Fla. Bar No. 367192
GUNN, SULLIVAN & OGDEN
P.O. BOX 1006
TAMPA, FLORIDA 33601
Attorneys for Travelers Insurance Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to counsel below by U.S. Mail on this 10th day of August, 1990.

ROBERT JACKSON McGILL, ESQ.
1515 South Tamiami Trail
Suite 1
Venice, FL 34292

CRAIG FERRANTE, ESQ.
P.O. Box 280
Ft. Myers, FL 33902-0280

M. JOSEPH LIEB, JR., ESQ.
P.O. Box 1238
Sarasota, FL 34230

ROBERT M. DAISLEY, ESQ.
P.O. Box 3433
Tampa, FL 33601

ANDREW E. GRIGSBY, ESQ.
116 W. Flagler Street
Miami, FL 33130

Attorney

SF20207