

**FILED**

SID J. WHITE

AUG 31 1990

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THE SUPREME COURT OF FLORIDA

TRAVELERS INSURANCE COMPANY,

Petitioner,

vs.

SUPREME COURT CASE NO. 76,432

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

2ND DISTRICT NO. 89-01682

Respondents.

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JURISDICTIONAL BRIEF OF RESPONDENT, KEY AGENCY, INC.

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PRELIMINARY STATEMENT

Respondent Key Agency, Inc. ("Key"), Defendant in the trial court below and Appellee before the Second District, is referred to as "Key."

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

James H. Quirk and his wife, Marie Quirk, Plaintiffs in the trial court below and Appellants in the Second District, are referred to as "Plaintiff." Plaintiff is a respondent to Travelers' Petition for Review. Plaintiff has also petitioned for review of the Second District's decision in favor of Southern American Insurance Company, referred to as "Southern American."

STATEMENT OF THE CASE AND FACTS

Plaintiff appealed to the Second District from final summary judgments granted to Defendants, Southern American, Travelers and Key. The judgments in favor of Key and Southern American were based upon an Order Granting Motions for Summary Judgment entered by the trial court on May 19, 1989. The final judgment in favor of Travelers, which is the subject of Travelers' Petition for Review, was based upon the trial court's granting of two motions for summary judgment by Travelers. The order granting Travelers' first motion for summary judgment held that Plaintiff did not have standing to contest the absence of a written rejection of uninsured motorist coverage. The order granting Travelers'

second motion for summary judgment held that Key, as agent of Plaintiff's employer, the insured corporation, effectively rejected uninsured motorist coverage on behalf of the employer.

In the Second District, Key urged the appellate court to uphold its summary judgment on two grounds. Key argued first that the trial court correctly found as a matter of law that there was no contract to procure uninsured motorist coverage between the insured and the agent upon which plaintiff could validly claim status as a third party beneficiary. Key also argued that its summary judgment should be affirmed if Travelers' motion for summary judgment were affirmed because affirmance of Travelers' judgment would moot the Plaintiff's claim against Key. Plaintiff sued Key for alleged negligence in causing the Travelers' liability coverage limits to be only \$250,000, instead of \$500,000 as required by the umbrella policy issued by Southern American.

The Second District reversed the summary judgments in favor of Travelers and Key, and affirmed the summary judgment in favor of Southern American. In reversing Key's summary judgment, the Second District did not address Key's argument regarding the lack of any contract between Key and its insured to procure uninsured motorist coverage. Rather, the Second District reversed Key's summary judgment on the basis that it was dependent upon Travelers' judgment. In reversing Travelers' judgment, the Second District held: (1) that a Class II insured has standing to challenge the absence of a written uninsured motorist rejection;

and (2) that with respect to the uninsured motorist rejection requirement, an independent agent acts as agent of the insurance company and not broker for the insured when the agent holds a license with that insurance company.

Travelers has petitioned for review of the reversal of its summary judgments. Plaintiff has also petitioned for review of the affirmance of Southern American's summary judgment.

Although filing this Brief as Respondent to Travelers' Petition for Review, Key's position is aligned with Travelers. If the Court accepts jurisdiction and ultimately rules that Travelers' summary judgments should be reinstated, then Plaintiff's claim against Key will again become moot and Key will be entitled to reinstatement of its summary judgment.

## 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

Key agrees with Travelers' arguments regarding acceptance of jurisdiction on this appeal. As suggested by the Second District, its opinion concerning Plaintiff's 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). Regarding the status of an independent insurance agent, 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).



## ARGUMENT

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

The Second District expressly acknowledged that its holding on the standing issue "may conflict" with Gast. In Gast, the Fifth District squarely held that a Class II insured does not have standing to raise the absence of a written rejection. In the instant case, the Second District squarely held to the contrary that a Class II insured does have standing to raise the issue of a written rejection.

This conflict warrants review by this Court. Gast is consistent with those cases holding that Class II insureds lack standing to challenge technical deficiencies in the insurer's compliance with the uninsured motorist statute. Eq., Compass Insurance Co. v. Woodward, 489 So.2d 1157 (Fla. 4th DCA 1986), review denied, 500 So.2d 546 (Fla. 1986) (permissive user has no standing to object to "improper procedures" concerning uninsured motorist rejection). The Second District's decision has cast doubt upon what is meant by a "technical" requirement and what the Second District might consider in the future to be a "basic statutory requirement." The Fifth District has not elevated the written rejection requirement to some special status. Thus, one of the main justifications for the Second District's decision serves to highlight the conflict with the Fifth District.

The Second District statement that its holding was "not

inconsistent with the outcome in Gast" is difficult to understand. The outcome in Gast was that the Class II insured lacked standing to challenge the absence of a written rejection. The outcome in the instant case is that the claimant has been granted standing to challenge the absence of a written rejection. The only qualification to the Second District's opinion is that the Second District has ruled that its holding allowing a Class II insured standing does not necessarily mean that the Class II insured is automatically entitled to uninsured motorist coverage in the absence of a written rejection by the named insured. Regarding standing, however, the Second District's decision is clear - and clearly contrary to the decision in Gast.

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's decision in this case holds that an independent agent who is licensed with a particular insurance carrier acts on behalf of the carrier, and not the insured, when obtaining a rejection of uninsured motorist coverage. This decision conflicts with prior decisions by both the Fourth and Fifth District Courts of Appeal. The Fourth District held to the contrary in Koven when it concluded that an insurance "broker's" rejection of uninsured motorist coverage is binding upon the

insured. In Koven, the court defined a broker as someone who has no permanent or fixed relationship with one insurer, or in other words, an independent insurance agent. In Pawlik v. Stevens, 499 So.2d 61 (Fla. 5th DCA 1986), the Fifth District held that the issue as to whether an independent insurance agent is acting on behalf of the insured when selecting lower limits presents a question of fact.

Thus, the current status of the law is uncertain as to what status an independent agent holds in the procurement of uninsured motorist rejections. In the Fifth District, the issue presents a question of fact. In the Fourth District, an insurance "broker," presumably the same as an independent agent, acts on behalf of the insured. According to the Second District, the issue depends upon whether or not the independent agent is licensed with the carrier. If licensed, the independent agent acts on behalf of the carrier. If not, the independent agent acts on behalf of the insured. The Second District's decision on this issue no doubt will have a wide ranging impact on insurance litigation throughout the State. Although the holding specifically addresses the independent agent's role in obtaining uninsured motorist rejections, the opinion does not expressly limit itself to the uninsured motorist rejection context. Without question, trial courts throughout the State will soon be faced with arguments in numerous insurance contexts based upon the Second District's decision and the conflicting cases on the issue of on whose behalf an independent agent acts. This issue

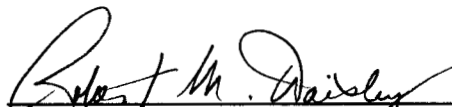
is undeniably one of great public importance because, arguably, it affects every insurance policy procured in the State by an independent insurance agent. Resolution of the issue by this Court is urgently needed.

CONCLUSION

Key respectfully requests this Court to take jurisdiction of this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail to Robert Jackson McGill, Esquire, 1515 South Tamiami Trail, Suite 1, Venice, Florida 34292; M. Joseph Lieb, Jr., Esquire, Post Office Box 1238, Sarasota, Florida 34230; Andrew E. Grigsby, Esquire, 116 West Flagler Street, Miami, Florida 33130; Craig Ferrante, Esquire, Post Office Box 280, Fort Myers, Florida 33902-0280; and, Brett J. Preston, Esquire, Post Office Box 3324, Tampa, Florida 33601, on this 30<sup>th</sup> day of August, 1990.



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