OA 6-5-91

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FILED
SID J. WHITE
MAR 13 1991
CLERK, SUPREME COURT
By _____ Deputy Clerk

IN THE SUPREME COURT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA

TRAVELERS INSURANCE COMPANY,

Petitioner,

vs.

JAMES H. QUIRK and MARIE QUIRK,
husband and wife,

Respondents,
Cross-Petitioners,

vs.

SOUTHERN AMERICAN INSURANCE COMPANY,

Cross-Respondent.
_____/

SUPREME COURT
CASE NO. 76,432

RESPONDENT KEY AGENCY, INC.'S BRIEF ON MERITS

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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."

Respondents, Cross-Petitioners James H. Quirk and Marie Quirk, his wife, plaintiffs in the trial court and Appellants in the Second District, are referred to as "the Quirks."

Cross-Respondent Southern American Insurance Company, defendant in the trial court below and Appellee before the Second District, is referred to as "Southern American."

References to the record on appeal are designated by the Prefix "R."

STATEMENT OF THE CASE AND FACTS

Key Agency agrees for the most part with the Statement of the Case and Facts submitted to the Court by Travelers. Key Agency wishes to add the following points.

Key Agency initially sold insurance coverage to West Coast Equipment and Leasing and West Coast Excavating ("West Coast") on the basis that West Coast would be able to save premium dollars by avoiding dual coverage for injuries to employees arising out of motor vehicle accidents occurring while employees used company vehicles on company business. (R. 261-262). Specifically, the President of Key Agency, Thomas Dignam, proposed that West Coast could save substantial premium dollars by rejecting uninsured motorist ("UM") coverage which it would not need as long as it carried worker's compensation coverage and employees drove company vehicles only while on company business. (R. 553-554). Mr. Dignam proposed that instead of purchasing UM coverage, West Coast could use worker's compensation benefits to cover injured employees using company vehicles for company business. (R. 225). Mr. Haines accepted Mr. Dignam's proposal. (R. 427-428); (R. 554).

Mr. Dignam periodically reviewed West Coast's coverage, including its rejection of UM coverage, with either its President, Mr. Haines, or other representatives of West Coast. (R. 432). Throughout the two (2) year period prior to the accident that Key Agency handled West Coast's insurance, Mr. Haines never instructed Mr. Dignam to obtain UM coverage. (R. 130). In fact, the President of West Coast made it clear that West Coast wanted only

to carry coverage the company "had to have." (R. 159). Price of coverage was West Coast's "major concern." (R. 431).

West Coast has not disputed the authority of Mr. Dignam to act on West Coast's behalf. In fact, West Coast deferred to Mr. Dignam's expertise and decisions throughout their relationship. (R. 425-428). In rejecting UM coverage for West Coast, Mr. Dignam merely followed up on West Coast's decision to follow Mr. Dignam's advice that West Coast did not need UM coverage due to its carrying worker's compensation coverage. (R. 262).

At all times that Key Agency acted for West Coast, Mr. Dignam was an independent insurance agent. (R. 560). As such, he was a licensed agent with Travelers Insurance Company, Auto Owners Insurance Company, Service Insurance Company, Ohio Casualty Insurance Company, and New Hampshire Insurance Company. (R. 557). Mr. Dignam was never a licensed agent for Southern American, but obtained insurance from Southern American through Crump London, Southern American's general agent. (R. 558-559).

The Second District decision under review reversed final summary judgments entered by the trial court in favor of Travelers and Key, and affirmed a final summary judgment entered by the trial court in favor of Southern American. In reversing Key's summary judgment, the Second District did not address an argument by Key that the trial court correctly ruled as a matter of law that there was no contract between Key and its insured, West Coast, to procure uninsured motorist coverage. Rather, the Second District reversed Key's summary judgment on the basis that it was dependent upon

Travelers' summary judgment. Key had argued before the Second District that its summary judgment should be affirmed if Travelers' motion for summary judgment were affirmed because affirmance of Travelers' judgment would moot the Quirks' claim against Key for causing a gap in liability coverage.

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

ISSUES ON APPEAL

I. WHETHER THE QUIRKS LACK STANDING TO RAISE THE ABSENCE OF A WRITTEN REJECTION.

II. WHETHER KEY AGENCY ACTED ON BEHALF OF THE NAMED INSURED IN REJECTING UNINSURED MOTORIST COVERAGE.

SUMMARY OF ARGUMENT I

This Court should reverse the Second District's ruling that the Quirks, though Class II insureds, have standing to raise the absence of a written rejection. The Second District decision unnecessarily complicates the clear rule in Gast v. Nationwide Mutual Fire Insurance Co., 516 So.2d 112 (Fla. 5th DCA 1987) that Class II insureds lack standing to raise technical issues regarding the form of the named insured's UM rejection. The decision below in this case creates a potentially confusing rule involving the shifting of the burden of proving a knowing rejection. Gast, on the other hand, sets forth a crystal clear test where the only question is whether the named insured made a knowing rejection.

SUMMARY OF ARGUMENT II

To determine whether an independent agent is acting on behalf of the insured or the insurance company, the court should focus on the act being performed rather than whether or not the independent agent happens to hold a license with the particular carrier through whom coverage is ultimately procured. Generally, questions of agency hinge on whose behalf an agent is acting, not whether the agent might have a relationship with the principal for other purposes. Contrary to the usual principles of agency law, the Second District's opinion below mistakenly ignores the act in question in concluding that Key Agency served as agent for Travelers because Key Agency held a license with Travelers.

The undisputed facts reveal that Key Agency acted on behalf of West Coast in rejecting UM coverage for West Coast. Key Agency rejected UM coverage for West Coast in applying for the Travelers policy at issue in order to implement the recommendations on coverage that West Coast wanted to follow. Key Agency did not necessarily have to involve Travelers, or any of the other carriers with whom it was licensed, in that decision. Key Agency could have procured coverage with any number of carriers to fulfill the overall goal, to save West Coast premium dollars for UM coverage that in West Coast's case arguably would duplicate worker's compensation coverage.

ARGUMENT I

I. THE QUIRKS LACK STANDING TO RAISE THE ABSENCE OF A WRITTEN REJECTION.

In the opinion below, the Second District candidly pointed out the confusing nature of uninsured motorist law that has resulted from the frequent changes to Florida's UM statute throughout the 1980s. Unfortunately, however, the Second District's conclusion that the Quirks have standing to raise the absence of written rejection in this case only adds to the confusion.

Before the Second District's opinion in this case, two cases governing the standing of Class II insureds to challenge UM rejections served to create a relatively straightforward rule. In St. Paul Fire and Marine Insurance Co. v. Smith, 504 So.2d 14 (Fla. 2d DCA 1987), review denied, 511 So.2d 299 (Fla. 1987), the Second District held that an employee of the named insured could not complain of the insurer's failure to comply with the annual notice requirement because the annual notice was a technical requirement rather than a basic requirement of UM insurance law. Consistent with Smith, the Fifth District in Gast v. Nationwide Mutual Fire Insurance Co., 516 So.2d 112 (Fla. 5th DCA 1987) held that an employee of the named insured could not challenge the insurer's failure to obtain a written rejection in the approved form under the 1985 UM statute.

In both Gast and Smith, the courts distinguished the "technical" requirements of the UM statute, i.e., annual notice and written rejection on an approved form, from the "basic" statutory requirement of obtaining a knowing rejection from the named

insured. These cases made it clear that the Class II insured had standing to challenge the substance of whether the named insured made a knowing rejection, but not the form of the insurer's documentation of that rejection.

The Second District's decision in this case adds a confusing twist to the formerly clear rule. The Second District held that the Quirks had standing to challenge the lack of a written rejection in this case because the statutory requirement of a written rejection is in the view of the Second District a "basic" statutory requirement. However, the Second District went on to state that the absence of a written rejection does not resolve a challenge by a Class II insured because the named insured can waive the written rejection requirement. The District Court's opinion suggests that the issue ultimately becomes a question of burden of proof; after a Class II insured establishes the lack of a written rejection, the carrier must then prove that the named insured waived the right to a written rejection by otherwise making a knowing rejection. Quirk v. Anthony, 563 So.2d 710 (Fla. 2d DCA 1990).

The rule announced by the Second District in this case is potentially confusing. On the one hand, the decision recognizes the standing on the part of a Class II insured to challenge a written rejection. On the other hand, it suggests that the ultimate outcome of the issue rests on whether the carrier can otherwise prove a knowing rejection by the named insured. To

describe the issue as one involving a shifting burden of proof really does not serve to establish a clear rule.

The Second District's attempt to reconcile its holding with the Gast case serves to highlight the preferable clarity of the Gast opinion. In Gast, the Fifth District squarely held that a Class II employee lacks standing to raise the absence of a written rejection. In Quirk, the Second District first held that a Class II insured does have standing to challenge the insurer's failure to obtain a written rejection, but then the Quirk court went on to hold that the carrier could overcome the lack of a written rejection by proving that the named insured otherwise made a knowing rejection. The Gast rule was clear; the Quirk rule is unnecessarily confusing.

Not only does the Gast rule represent the clearer holding, but also it leads to results more consistent with the overall framework of the UM statute. As pointed out by Travelers in its brief, the named insured, not the Class II insured, holds the right of rejection pursuant to the UM statute. The named insured's decision on whether to reject UM coverage binds the Class II insureds. The named insured, after all, has to make the decision on whether to pay the premium for the coverage. Thus, if the named insured knowingly decides not to purchase UM coverage, the Class II insured should have no standing to challenge any technical deficiencies in the form of that knowing rejection. The only issue should be whether the named insured made a knowing rejection of UM coverage.

ARGUMENT II

II. WHETHER KEY AGENCY ACTED ON BEHALF OF THE NAMED INSURED IN REJECTING UNINSURED MOTORIST COVERAGE.

The question of the status of the independent insurance agent who procures an insurance policy repeatedly arises in insurance coverage disputes such as the instant case. Often, the determination of the status of the independent agent determines whether or not the court will find coverage, as exemplified by this case. In the instant case, the trial court granted Travelers' summary judgment on the basis of a finding that Key Agency acted on behalf of the named insured, West Coast, in making a knowing rejection of UM benefits.

In holding that in this case Key Agency acted as Travelers' agent for the purpose of obtaining a proper rejection of UM coverage, the Second District focused on the general relationship between the independent agent and the carrier rather than on the particular function the independent agent was performing at the time of the act in question. In doing so, the Second District attempted to fashion an easy to follow rule. However, because the rule does not take into consideration the function of the independent agent at any given point in time, the court had to expressly limit its holding to the "limited purpose" of obtaining UM rejections.

By focusing on the contractual relationship between Key Agency and Travelers, the Second District unfortunately elevated form over substance. The form of the relationship of the independent agent with the carriers through whom it obtains policies provides only a

starting point for analyzing on whose behalf an independent agent is acting at any given point in time. An independent agent can and usually does have contractual relationships and licenses with numerous carriers. See Fla. Stat. §626.331(2) (1989). In this case, Key Agency's President, Mr. Dignam, held licenses not only with Travelers, but also with Auto Owners Insurance Company, Service Insurance Company, Ohio Casualty Insurance Company and New Hampshire Insurance Company.[1] Thus, finding out with whom an independent agent is licensed does not go very far in determining on whose behalf the agent is acting.

Consistent with the general principles of agency, to determine on whose behalf an independent agent is acting, the court should focus on the act itself. Because the independent agent serves as a middle man between the insured and the carrier, hence the term "broker,"[2] he or she must perform various functions on behalf of each. The most direct way to examine when the independent agent

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[1] Licenses are issued in the names of the individual independent agent rather than the independent agencies for whom they work. (R. 222). See also Fla. Stat. §§626.094, 626.301(2) and 626.331(2) (1989).

[2] The terms "broker" and "agent" have caused some confusion because generally independent agents use the terms differently than the courts do. Independent agents sometimes refer to surplus lines agents such as Crump London Underwriters, through whom Key Agency procured the Southern American policy, as "brokers." Because the term "broker" in the case law is merely conclusory shorthand for "agent for the insured," see Auto Owners Insurance Co. v. Yates, 368 So.2d 634, 636 (Fla. 2d DCA 1979), cert. denied, 378 So.2d 351 (Fla. 1979), a lot of confusion could be eliminated by dropping the significance of any distinction between the terms "broker" and "agent." The important point is not whether an independent agent is called "broker" or "agent," but rather whether the independent agent is considered agent for the insured versus agent for the insurer.

performs on behalf of the insured and when the independent agent performs on behalf of the carrier is to focus on where the act in question falls within the chronology of events that takes place in the issuance and servicing of an insurance policy.

Before the application for a particular policy, the independent agent must meet with the insured and review the insured's desires for coverage. At this point, of course, the independent agent has a vast array of companies or "markets" to consider. The independent agent is not even restricted to the companies through whom he or she is licensed because he or she has access to surplus lines agents such as Crump London, the surplus lines agent through whom Key Agency obtained the Southern American policy in this case. During this preliminary stage in the process, the independent agent can only be considered to be acting on behalf of the insured because no particular insurance company has been identified.

In this case, when West Coast first worked with Key Agency on its insurance, West Coast was shopping for an agency on the basis of coverage and price. (R. 116).[3] West Coast did not care about which particular insurance company or companies ended up writing the coverage. (R. 116).

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[3] This Court should not forget the significance of price to insureds. If an independent agent does not present a proposal with the lowest price, he or she usually does not get the account. Key Agency obtained West Coast's business only by saving West Coast substantial premium dollars, which Key Agency accomplished in large part by recommending that West Coast reject UM coverage. (R. 553-554). West Coast's President, Mr. Haines, described the cost of coverage as his "major concern." (R. 432).

As part of this preliminary stage, the independent agent and the insured must determine what type of coverages will be applied for. Without knowing the types of coverage ultimately desired by the insured, the independent agent cannot know what carriers should be considered. Thus, while discussing with the insured the type of coverage to be applied for, the independent agent is still acting on behalf of the insured and not any particular carrier.

The decision on whether to select or reject UM coverage occurs during this phase of the process in which the types of coverage are selected. The UM selection or rejection is incorporated into an application which the independent agent submits to a particular carrier or carriers. The fact remains, however, that the insured's decision on UM coverage is made while the independent agent is acting on behalf of the insured and not any particular carrier.

The undisputed facts in this case demonstrate how this chronology of events takes place in practice. Mr. Dignam of Key Agency initially proposed to Mr. Haines of West Coast that West Coast could save substantial premium dollars by rejecting UM coverage, which Mr. Dignam suggested would not be necessary as long as West Coast carried worker's compensation coverage and employees drove company vehicles only while on company business. (R. 553-554.) Mr. Dignam followed up this proposal with a written quotation for insurance dated December 15, 1982. (R. 349, 530.) The written proposal did not include any uninsured motorist coverage. (R. 349.) This proposal called for coverage to be obtained through Iowa National Insurance Company and upon

acceptance of the proposal, Key Agency ultimately procured an Iowa National policy with an initial effective date of February 11, 1983. (R. 227.) Consistent with Mr. Dignam's suggestion and the written proposal, the Iowa National policy did not contain any uninsured motorist coverage. (R. 553.)

Without question, Mr. Dignam acted on behalf of West Coast in making his recommendations concerning the rejection of UM coverage. It follows, then, that Mr. Dignam also acted on behalf of West Coast in carrying out the acceptance of that recommendation in applying for coverage first with Iowa National and then later with Travelers.

The specific act at issue in this case is the application for a Travelers policy without UM coverage. Key Agency was not performing any function for Travelers in this regard. Presumably, Travelers would have been happy to accept premiums from West Coast for UM coverage.

This Court correctly focused on the actions of the agent in resolving the agency issue in Acquesta v. Industrial Fire and Casualty Co., 467 So.2d 284 (Fla. 1985). In Acquesta, the court held that a wife's rejection of UM coverage was binding on her husband because in applying for the automobile insurance policy, she was acting on behalf of her husband. The court agreed with the reasoning of the Fourth District which had found no basis to distinguish between a wife acting as agent for her husband and a "broker" acting on behalf of its insured. See also, Empire Marine Insurance Co. v. Koven, 402 So.2d 1352 (Fla. 4th DCA 1981).

By properly focusing on the significant act of rejecting the UM coverage, the Acquesta court also addressed whether the agent in that case (Mrs. Acquesta) had her husband's authority to apply for the insurance on his vehicle and to reject uninsured motorist coverage. The court concluded that the record there revealed that the wife had at least apparent authority to do both.

In the instant case, the testimony is undisputed that Mr. Dignam had actual authority from West Coast to act on West Coast's behalf in selecting the insurance coverages to be applied for. Mr. Haines testified that he relied upon the expertise of Mr. Dignam and always agreed to follow his recommendations. (R. 117-119). Mr. Haines stated that West Coast "more or less left it in his hands to handle things for us and make sure we were covered properly." (R. 117).

Mr. Dignam's recommendation regarding UM coverage was clear. He suggested that West Coast reject UM coverage and instead cover its employees through worker's compensation coverage. The premium savings enabled Key Agency to obtain West Coast's business.

The fundamental problem with the Second District opinion in this case is that it confuses the issue of documenting the insured's decision on UM coverage with the actual decision itself. The substance of the UM statute governs the decision itself of making a knowing and informed rejection of UM coverage. The statute also addresses the form of the decision through the technical requirements such as the requirement of written evidence of rejection on an approved form. The statute imposes the

technical requirements upon the insurer, who must comply or face the consequence of being held to provide UM coverage for which it received no premium. The substantive decision on whether to purchase or reject UM coverage, however, rests squarely with the insured, who may decide to follow the recommendations of his independent insurance agent and effectively delegate the decision to that agent.

The UM statute should not be interpreted so as to fictionalize the relationship between the independent agent and his insured on whose behalf he acts, depending upon whether or not the independent agent happens to have a license with the carrier through whom coverage is ultimately obtained. In this case, West Coast had expressed a desire to save premium dollars and Key Agency developed a proposal to meet that desire in part through rejection of UM coverage. West Coast made the decision to rely on Key Agency's expertise in this regard. West Coast's decision to rely on Key Agency had nothing to do with Travelers or whether Key Agency was licensed with Travelers. Rather, the decision had to do with the relationship between West Coast and Key Agency, and Key Agency's sensitivity to West Coast's concern about the cost of its insurance.

Because Key Agency was acting on behalf of West Coast rather than Travelers in making the decision on whether to reject UM coverage, Key Agency should be considered the agent of West Coast for the purposes of UM rejection. To hold otherwise conflicts with the well-established principles of agency law by ignoring the

reality of what function the agent was performing when it acted on behalf of its principal.

CONCLUSION

For the reasons stated above, Key Agency respectfully requests that this Court reverse the Second District's opinion in Quirk v. Anthony, 563 So.2d 710 (Fla. 2d DCA 1990) and reinstate the final summary judgment entered in favor of Travelers. Because the summary judgment in favor of Travelers moots the claim of the Quirks against Key Agency, Key Agency also requests that if this Court rules as requested, that it also reinstate the final summary judgment entered in favor of Key Agency.

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; Craig Ferrante, Esquire, Post Office Box 280, Fort Myers, Florida 33902; Andrew E. Grigsby, Esquire, 116 West Flagler Street, Miami, Florida 33130; and, Lee D. Gunn, IV, Esquire, Post Office Box 1006, Tampa, Florida 33601, on this 11th day of March, 1991.

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