DA 6-5-91

IN THE SUPREME COURT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA

FILED
SID J. WHITE
APR 23 1991
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

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

RESPONDENT/CROSS-PETITIONERS' REPLY BRIEF

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TABLE OF CONTENTS

CITATIONS OF AUTHORITY

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

Cross-Petitioners, JAMES H. QUIRK and MARIE QUIRK, adopt the Statement of the Case and Statement of the Facts in their Brief on the Merits.

SUMMARY OF ARGUMENT

This Court has jurisdiction of this matter by virtue of the lower Court's opinion being in direct conflict with the Fifth District Court of Appeal's opinion in Pawlik v. Stevens, 499 So. 2d 61 (Fla. 5th DCA, 1986), which held that when there are material issues of fact as to whether or not an insurance agent or agency is acting for the insured in rejecting uninsured motorist coverage, Summary Judgment should not be granted.

The rationale behind Pawlik v. Stevens warrants this Court's reversal of the Second District Court of Appeal's opinion affirming the trial Court's granting of Summary Judgment to "SOUTHERN AMERICAN". There are material issues of fact as to whether or not "KEY AGENCY" was an agent or a broker in the subject transaction, and further, there are issues of fact as to whether or not, regardless of "KEY AGENCY"'s status, it was acting for "SOUTHERN AMERICAN", or the insured, or both in the transaction involving "KEY AGENCY", "WEST COAST", and "SOUTHERN AMERICAN".

Additionally, there is a material issue of fact as to whether or not "SOUTHERN AMERICAN" through "KEY AGENCY", complied with its statutory obligation to offer uninsured motorist coverage as a part of the application for the coverage sought by "WEST COAST" with "SOUTHERN AMERICAN".

ARGUMENT

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

Before discussing the Cross-Respondent, "SOUTHERN AMERICAN"'s argument on the merits, the Cross-Petitioners feel compelled to respond to "SOUTHERN AMERICAN"'s re-argument that this Court lacks jurisdiction. The entire thrust of the Cross-Petitioners' argument in their Brief on the Merits concerning "SOUTHERN AMERICAN" deals with the fact that a Summary Judgment was improper in this matter, by virtue of there being genuine material issues of fact concerning the relationship of "SOUTHERN AMERICAN", "KEY AGENCY" and "WEST COAST".

The Fifth District Court of Appeal's opinion in Pawlik v. Stevens, 499 So. 2d 61 (Fla. 5th DCA, 1986), is founded upon the premise that when there are genuine issues of material fact concerning who an insurance agent actually represents when he rejects uninsured motorist insurance, Summary Judgment is improper. The lower Court's opinion in this matter directly conflicts with Pawlik and therefore this Court was correct in accepting jurisdiction in the matter. The Cross-Respondent somehow believes that simply because the Cross-Petitioner did not directly cite Pawlik in its Brief on the Merits, this Court can somehow not have jurisdiction after having granted it.

The Cross-Respondent's allegation that there is no conflict, and that this Court was somehow hoodwinked into accepting jurisdiction is an affront to the Court and the Justices who voted to accept jurisdiction, and the argument should be summarily rejected.

In responding to the Cross-Petitioners' argument on the merits, the Cross-Respondent breaks down its argument into six subsections, five of which deal with Cross-Petitioner's argument that "KEY AGENCY" was either a broker or not an agent in the transaction between "WEST COAST" and "SOUTHERN AMERICAN", and the sixth argument deals with whether or not "SOUTHERN AMERICAN" had a duty to offer uninsured motorist coverage.

In the first section of its argument "SOUTHERN AMERICAN" argues that an insurance broker, who is clearly a broker and who clearly is acting for the insured, is authorized to reject uninsured motorist coverage for the insured. This is obviously a clear statement of the law, however it is not a clear statement of the facts contained in the record in this cause. The citations of authority utilized by "SOUTHERN AMERICAN" in its Brief for this proposition all are clear that there was no issue as to whether or not the person executing the rejection was an agent for the insured. However, in this case there are multiple genuine material issues of fact as to who "KEY AGENCY" was acting for when it, through one of its employees, forged the name of a "WEST COAST" employee to an uninsured motorist rejection form.

In the second section, "SOUTHERN AMERICAN" argues that "KEY

AGENCY" was a broker, and as a broker could not represent the insurer. This argument fails to take into account that there were material disputed issues of fact as to whether or not "KEY AGENCY" was in fact a broker or an agent in the transaction, and further fails to take into consideration that even if "KEY AGENCY" was considered to be a broker there was an issue of fact as to whether or not it was acting on behalf of the insurer or the insured.

The factual assertions contained in "SOUTHERN AMERICAN"'s Brief on the Merits are merely those factual assertions which they contend are favorable to their position, and fail to recognize that there are additional facts such as the testimony of Mr. Dignam that he believed he was an authorized representative of "SOUTHERN AMERICAN", (R-276), and further felt that he was a broker on behalf of Crump-London, who was the general agent of "SOUTHERN AMERICAN" in the transaction. (R-558-559). In addition to these facts, "KEY AGENCY" received an agency copy of the policy, (Exhibit 4 to Dignam deposition of 2-17-87, R-283,399), and also was listed on the policy as a producing agent for the "SOUTHERN AMERICAN" policy. All of these factors certainly create a scenario whereby a trier of fact would determine that "KEY AGENCY" was an agent of the insurer rather than a broker in the transaction.

Even assuming arguendo that "SOUTHERN AMERICAN" was deemed to be a broker rather than an agent, the law is clear that a broker can represent <u>either</u> the insurance company, i.e. "SOUTHERN AMERICAN", the insured, i.e. "WEST COAST", or he may represent <u>both</u> "SOUTHERN AMERICAN" and "WEST COAST". 30 <u>Fla.Jur. 2d, Insurance</u>

§316, 43 Am.Jur. 2d, Insurance §149, 16 Appleman, Insurance Law §§8727, 8731, 8736.

"SOUTHERN AMERICAN" would have us believe by the mere designation of one as a broker, that he can therefore act only for the insured and not the insurer. This argument is erroneous, contrary to the law, and should be rejected by this Court.

"SOUTHERN AMERICAN" next erroneously argues that "KEY AGENCY" could not by law be an agent of "SOUTHERN AMERICAN". There is no legal reason, or non-legal reason, that would prohibit a surplus lines carrier such as "SOUTHERN AMERICAN" from appointing anyone who was, or is, a licensed surplus lines agent to act for it in meeting the legal requirements of the Florida Surplus Lines Law.

Florida Statute §626.915(3) requires that surplus lines insurance must be placed through a licensed Florida surplus lines agent resident in this State. There is nothing that would prohibit "SOUTHERN AMERICAN" from using "KEY AGENCY" as its agent, or from even having Crump-London, its clearly designated counter-signing agent, from designating "KEY AGENCY" as a sub-agent to act for "SOUTHERN AMERICAN". Peace River Phosphate Mining Co., v. Thomas A. Green Inc., 102 Fla. 370, 135 So. 2d 828 (Fla. 1931), Freeport Ridge Estates, Ltd., v. Reckner, 266 So. 2d 129 (Fla. 3d DCA, 1972). Obviously the answer to the questions of whether or not "KEY AGENCY" was a broker or an agent and who it represented would be for the trier of fact to determine in accordance with the proper instructions on the law.

"SOUTHERN AMERICAN"'s assertion that simply because "SOUTHERN

AMERICAN" is a surplus lines carrier and therefore cannot have an agent in the State of Florida is erroneous, since by statute in order for "SOUTHERN AMERICAN" to sell any insurance in the State of Florida it must have a counter-signing resident agent in the State of Florida. Fla. Stat. §626.914 (1987). The Statute further requires that any coverage that is sold by "SOUTHERN AMERICAN" must be sold through a surplus lines agent who has been so licensed by the State. Fla. Stat. §626.915(3) (1987). If one were to accept the proposition espoused by "SOUTHERN AMERICAN" no-one in the State of Florida could ever be and agent of "SOUTHERN AMERICAN" since by its rationale "SOUTHERN AMERICAN", as a foreign insurer, is not authorized to do business in Florida and therefore cannot have an agent in Florida. The blanket statement argument that "KEY AGENCY" could not by law be the agent of "SOUTHERN AMERICAN" is ludicrous and should be rejected by the Court.

The next section of "SOUTHERN AMERICAN"'s argument is that "KEY AGENCY" was not an agent of "SOUTHERN AMERICAN". This argument is the converse of "SOUTHERN AMERICAN"'s second argument that "KEY AGENCY" was a broker in the transaction.

In this section of the argument "SOUTHERN AMERICAN" argues that simply because Mr. Dignam was not a "licensed agent" of "SOUTHERN AMERICAN" he could not act as an agent in this particular transaction fails to take into account the relationship established between "SOUTHERN AMERICAN", Crump-London, and "KEY AGENCY". Mr. Dignam indicated that in fact he did have a business relationship with Crump-London prior to this transaction, and in fact felt that

he was a broker for Crump-London, who was "SOUTHERN AMERICAN"'s counter-signing resident agent. Mr. Dignam further stated in one of his earlier depositions that he was the person who was the authorized representative of "SOUTHERN AMERICAN" for the rejecting of uninsured motorist coverage. "SOUTHERN AMERICAN" does point out that in a later deposition, obviously after having consulted with counsel for both "SOUTHERN AMERICAN" and "KEY AGENCY", Mr. Dignam backtracked and indicated that it should have been Frances Bacon, who was the authorized representative of "SOUTHERN AMERICAN", to sign the rejection form, rather than him. This obvious conflict supports the Cross-Petitioner's position in that if Mr. Dignam had no idea as to whether or not he was "SOUTHERN AMERICAN"'s authorized representative, how would the insured know whether or not Mr. Dignam was a representative of "SOUTHERN AMERICAN", and further, how would the Court know summarily that he was not an authorized representative?

In addition to the conflicting beliefs of Mr. Dignam, there is evidence that "KEY AGENCY" received the agency copy of the policy, and further is clearly listed on the face of the policy as the "producing agent". It is clear from all of these facts that even though "KEY AGENCY" may not have been a "licensed agent" of "SOUTHERN AMERICAN" there certainly was evidence of "KEY AGENCY" being an authorized representative, or an agent, of "SOUTHERN AMERICAN" and Crump-London in the transaction between "WEST COAST" and "SOUTHERN AMERICAN".

In its next argument "SOUTHERN AMERICAN" contends that there

was no contact whatsoever between "SOUTHERN AMERICAN" and "KEY AGENCY", yet in the second paragraph of the argument on this issue they assert that "SOUTHERN AMERICAN" had asked that a rejection form be signed. "SOUTHERN AMERICAN"'s argument further bolsters the Cross-Petitioners' position that Summary Judgment was improper because there are genuine material issues of fact when "SOUTHERN AMERICAN" points out that the record in this case does not reflect exactly what "SOUTHERN AMERICAN" asked "KEY AGENCY" to do, or what communications transpired between them at the time "SOUTHERN AMERICAN" asked that the rejection form be signed. As this Court is well aware, the burden is on one moving for Summary Judgment to show that there are no genuine issues of material fact, and the very argument asserted by "SOUTHERN AMERICAN" in the fifth section of its second argument in its brief clearly establishes that they have failed to meet their burden, and the trial Court should not have entered Summary Judgment, and the Second District Court of Appeal should not have affirmed it.

Lastly, "SOUTHERN AMERICAN" asserts that it met its statutory obligation by making uninsured motorist coverage available in the application for insurance. There is no document whatsoever in the record that purports to be the application for insurance that shows any uninsured motorist coverage was offered as a part of the application. The only document relative to "SOUTHERN AMERICAN" and uninsured motorist coverage contained in the record, other that the policy itself which was issued prior to the signing of any rejection of uninsured motorist coverage, is a blanket rejection

form which "SOUTHERN AMERICAN" obviously required the insured to execute. One might very well infer from this that "SOUTHERN AMERICAN" was making the rejection of uninsured motorist coverage a condition of issuing the policy, rather than actually offering uninsured motorist coverage to the insured. Again, this clearly supports the Cross-Petitioners' position that there are genuine material issues of fact and the lower Court erred in affirming the trial Court's erroneous granting of Summary Judgment in this matter.

CONCLUSION

The opinion of the Second District Court of Appeal affirming the trial Court's erroneous granting of Summary Judgment should be reversed and this matter remanded back to the trial Court for trial on the merits.

Respectfully submitted,

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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 22nd day of April, 1991.

JACK McGILL