OA 6-5-91



IN THE SUPREME COURT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA

TRAVELERS INSURANCE COMPANY,

Petitioner,

SUPREME COURT
CASE NO: 76,432

vs.

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

Respondents,
Cross-Petitioners,

vs

SOUTHERN AMERICAN INSURANCE COMPANY,

Cross-Respondent.
_____/

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# PETITIONER'S REPLY BRIEF ON MERITS

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## REPLY STATEMENT OF THE CASE AND FACTS

The Petitioner, TRAVELERS INSURANCE COMPANIES, adopts the Statement of the Case and Facts in its Initial Brief.

## REPLY STATEMENT OF ISSUES ON APPEAL

### I.

WHETHER THE QUIRKS LACK STANDING TO RAISE THE ABSENCE OF A WRITTEN REJECTION AS A BASIS FOR INCREASED UNINSURED MOTORIST COVERAGE.

### II.

WHETHER KEY AGENCY ACTED AS A BROKER FOR THE NAMED INSURED AND REJECTED UNINSURED MOTORIST COVERAGE.

## REPLY ARGUMENT

### I.

### THE QUIRKS LACK STANDING TO RAISE THE ABSENCE OF A WRITTEN REJECTION AS A BASIS FOR INCREASED UNINSURED MOTORIST COVERAGE.

At the outset, Travelers is compelled to clarify the statutes that govern this Court's consideration of the employee's standing issue. The Quirks' brief references the 1984 version of the UM/UIM statute as controlling. The 1984 version set forth the requirement that the rejection or selection of lower limits be made on a form approved by the Insurance Commissioner and created the conclusive presumption of a knowing rejection upon its execution. The subject Travelers policy was renewed in December of 1984, and was initially applied for while the 1982 version of the statute was in force. The 1982 statutory rejection requirements therefore control the form required. Auger vs. State Farm Mutual Automobile Insurance Company, 516 So.2d 1024, 1025 (Fla. 2d DCA 1987). But Cf. Adams v. Aetna Casualty & Surety Company, ____ So.2d ____, 16 FLW D373 (Fla. 1st DCA 1991). The 1982 version of the statute required a written rejection in any form.

Under the 1984 version of the statute, a new rejection form was not required at the time of renewal of an existing policy with the same bodily injury liability limits when the named insured or lessee has previously rejected the coverage. All that was required of the carrier at the time of a renewal under these circumstances

was that the notice of premium also have attached with it an annual notice of the insured's options as to uninsured motorist coverage. § 627.727(1) Fla.Stat. (1984). Marchesano v. Nationwide Property & Casualty Insurance Co., 506 So.2d 410 (Fla. 1987). This distinction is critical inasmuch as this case does not present facts which require consideration of the effect of the conclusive presumption language in the post-1984 versions of the UM/UIM statutes. In order to prevent further erosion of the fragile beach of judicial interpretation of UM/UIM statutes, it is necessary that judges and attorneys carefully guard against the possibility of applying the wrong statute. In view of the fact that the applicable uninsured motorist rejection law only required a rejection in writing, the facts of this case do not warrant an elevation of the 1982-1984 written requirement over any other aspect of the statute.

With this clarification it appears Travelers and Quirks agree upon the limited status afforded employees complaining of the lack of UM/UIM rejection. Travelers has met its burden of showing a waiver of rejection rights through the testimony of West Coast's president, John Haines, who affirmed his reliance on Mr. Dignam's [Key Agency's] experience in the insurance industry when selecting West Coast's coverages. (R 117, 118.) Key Agency's conclusion to reject UM/UIM was knowingly made by an insurance expert (R 552, 554.) The District Court should therefore be reversed and the trial court's judgment reinstated.

## REPLY ARGUMENT

## II.

### KEY AGENCY ACTED AS A BROKER FOR THE NAMED INSURED AND REJECTED UNINSURED MOTORIST COVERAGE.

The Quirks' requirement to brief both the petition and the cross-petition place them in an unenviable quandary. The holding below that a licensed agent is deemed the agent of the insurer for all purposes concerning UM rejection is argued by the Quirks as correct against Travelers. Such a holding, however, logically required the District Court's further holding that where the agency is not under such a license and operates through a licensed agency, then such an unlicensed agency is a "broker" acting on behalf of the insured. The Quirks cannot support the foundation of the Second District's rationale and prevail against Southern American. Thus, the Quirks' briefing on the petition and cross-petition is a tale of contradictions. The instant quandary of the Quirks is but a singular example of the impact of Judge Altenburn's decision to ignore traditional agency principles.

The Court granted Amicus to the Academy of Florida Trial Lawyers ("AFTL"). Its brief avoids even attempting to argue that this Court adopt the Second District's inflexible rule that an independent agent can never act on behalf of an insured in making a knowing rejection of uninsured motorist coverage. Rather, AFTL correctly begins its argument with the proposition that general principles of agency govern the relationship between the parties

involved in the formation of an insurance policy since it is essentially a contract. (AFTL Brief on the Merits at page 5.)

Unlike AFTL's misconceived statements, Travelers is not asking this Court to adopt a hard and fast rule that the independent agent is always acting on behalf of the insured as concerning decisions affecting UM limits. Rather, Travelers urges this Court to follow the long and well established principles of agency that have been carried into insurance agency law. It is, in fact, AFTL and the Quirks who seek to promote an invariable rule that an independent agent that ultimately places coverage with one of its licensed carriers can never be deemed authorized by its customer to make decisions concerning uninsured motorist coverage.

Neither the Quirks, nor AFTL, argue that Florida's statutory licensing laws are intended to require such a result. Neither brief attempts to distinguish this Court's reasoning in Parnell[1] that the legislative scheme of licensure is not intended to control agency relationships between third parties. The correctness of this observation by the Parnell Court is easily demonstrated by examining the language of the relevant licensure statutes. The licensing requirement that may have existed between Key Agency and Travelers as set forth by § 626.331 Fla.Stat. (1983), emanates from the definition of Key Agency as a "general lines agent". See § 626.031 Fla.Stat. (1983). Travelers does not contest Key Agency's status as a general lines agent, as that term is defined

[1] Centennial Insurance Company v. Parnell, 83 So.2d 688 (Fla. 1955).

by § 626.041. Rather, Travelers urges that the very language of the statutory scheme indicates that the license was not intended to create a fixed or permanent relationship between the agent and the carrier as would be affecting third parties. In fact, the statutes require insurance consultants who clearly have no relationship with any insurer to be licensed as "agents". § 626.041(2)(d) Fla.Stat. (1981).[2] If the legislative purpose of Chapter 626 was to impose fixed and permanent relationships between insurers and agents, then insurance consultants clearly would not have been within the framework of licensed agents.

Rather, the purpose of this licensing Chapter, like so many others,[3] is simply to have some accountability and public supervision of an industry of public importance. In fact, the

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[2] § 626.041(2) With respect to any insurances, no person shall, unless licensed as an agent:

...

(d) In this state engage or hold himself out as engaging in the business of analyzing or abstracting insurance policies or of counseling or advising or giving opinions (other than as a licensed attorney at law) relative to insurance or insurance contracts, for fee, commission, or other compensation, other than as a salaried bona fide full-time employee so counseling and advising his employer relative to the insurance interests of the employer and of the subsidiaries or business affiliates of the employer.

[3] See e.g. Accountants, § 473.301 Fla. Stat. (1989); Appraisers, § 475.001 Fla. Stat. (1989); Banking Code: Banks and Trust Companies, § 658.14(4) Fla. Stat. (1989); Barbering, § 476.024 Fla. Stat. (1989); Dentistry, § 466.001 Fla. Stat. (1989); Medical Practice, § 458.301 Fla. Stat. (1989); Nursing, § 458.301 Fla. Stat. (1989); Pharmacy, § 465.002 Fla. Stat. (1989); Real Estate Brokers and Salesman, § 475.001 Fla. Stat. (1989); Securities Transactions, § 517.1205 Fla. Stat. (1989); and Veterinary Medicine, § 474.201 Fla. Stat. (1989).

stated legislative purpose of requiring a general lines agent's ("agent's") license is to "authorize and enable the licensee actively and in good faith to engage in the insurance business as such an agent or solicitor with respect to the general public and to facilitate the public supervision of such activities in the public interest, ..." § 627.730(1) Fla. Stat. (1989).[4]

The Quirks also incorrectly criticized Travelers for relying upon general agency principles in support of its position that Key Agency was acting on behalf of its customer, West Coast, at the time it determined that no uninsured motorist benefits would be requested. Travelers simply relies on the very treatises argued by the Quirks. Specifically, 16 Appleman, Insurance Law and Practice, § 8726 states:

> [H]owever, the acts of a person and not what he is called, determine whether he is a broker or an agent, and the fact that one is an insurance agent for some companies would not prevent him from being an insurance broker.

(Footnotes omitted).

Moreover, the Quirks recognize that general agency principles allow for "dual agency" in the context of insurance. (Quirks' Brief on the Merits at page 27). In fact, a statute making an agent the agent of the insurer in performing certain acts does not preclude the insurer's agent acting as the insured's agent in certain particulars in a proper case. 16 Appleman, Insurance Law and Practice, § 8736.

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[4] See also Florida's "Unauthorized Lines Process Law" § 627.904-912 Fla. Stat. (1989) which purpose is to facilitate the public interest in allowing Florida residents to use Florida courts for insured Florida risks.

As Travelers consistently asserts, and as the Quirks assert where convenient, the rule of law to be set forth in this case is that a court must first examine under whose authority and for the protection of whose interest the insurance agent is acting at the time of the act at issue. So long as the independent agent who is licensed by several companies is not undertaking an agency for the insured which is incompatible with whatever agency agreement he may have with several carriers, the agent may act for both the insurer and the insured. 16 Appleman, Insurance Law and Practice, § 8736.[5]

The decision of Key Agency to represent the interests of West Coast in determining the appropriate program of insurance that would balance coverage with corporate premium dollars is consistent with the holding of several statutory licenses with various insurance companies. As these facts poignantly demonstrate, where the best insurance for its customer was not available through a licensed company, Key Agency undertook the duty it owed to its customer, West Coast, to place that coverage with a carrier (Southern Insurance Company) for which it held no license. The public interest in assuring accountability of the insurance industry is maintained by the statutory requirement that somewhere in the chain of policy issuance a representative registered in

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[5] Stating, "[T]he same person may act as agent for both the insurer and the insured unless the dual agency created requires the assumption of incompatible duties. And the fact that an agent writes insurance applied for in one or several companies, and renews or rewrites canceled policies in other companies, does not show incompatibility of duties." (Footnotes omitted).

Florida is involved. § 624.425 Fla. Stat. (1989); § 626.913 Surplus Lines Law; short title; purposes, Fla. Stat. (1989).

Therefore, the trial court was eminently correct in its review of the record and determination that, as a matter of law, Key Agency acted as the agent for West Coast when it made the knowing decision to reject uninsured motorist benefits as a part of the corporate insurance program and it thereafter issued a written application and request for quotations that set forth this written rejection under the agency's signature. (R-354).

## CONCLUSION

The parties briefing the Court to date concur that the Quirks lack standing to raise the absence of a written rejection as a basis for increased uninsured motorist coverage. The parties are also in agreement that the determination of whether an insurance "agent" is seen as acting for the insurer or the insured requires an examination of the facts of the particular case. In the instant case, it is undisputed that West Coast authorized Key Agency to act as its "broker" for purposes of making a knowing rejection of UM/UIM benefits at the time that the application to Travelers was made indicating uninsured motorists benefits were rejected. The Trial Court's granting of summary judgment continues as a beacon for the correct analysis of the undisputed facts it reviewed. Not even the Quirks can support the abrasive impact of the Second District's holdings when arguing for coverage against Southern American Insurance Company. Properly scrutinized, Travelers is seen as a carrier receiving a written request from the agent of a potential insured for issuance of a commercial policy that did not include uninsured motorist benefits. Travelers now asks this Court that it be allowed to honor its insured's request.

For these reasons, the Travelers respectfully requests that this Court reverse the Second District's opinion of Quirk v.

Anthony, 563 So.2d 710 (Fla. 2d DCA 1990), and reinstate the final judgment dated July 7, 1989, entered in favor of Travelers.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by regular U.S. Mail this 13th day of April, 1991, to: ROBERT JACKSON McGILL, ESQ., 1101 South Tamiami Trail, Suite 101, Venice, Florida 34285; 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; and ANDREW E. GRIGSBY, ESQUIRE, 116 West Flagler Street, Miami, Florida 33130.

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