

FILED
SID J. WHITE
SEP 5 1990
CLERK, SUPREME COURT
By Deputy Clerk

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

Appellants,)

vs.)

SUPREME COURT CASE NO. 76,432
CASE NO. 89-1682

LYNDA M. ANTHONY, QUEEN CITY)
INDEMNITY COMPANY, TRAVELERS)
INSURANCE COMPANY, SOUTHERN)
AMERICAN INSURANCE COMPANY,)
and KEY AGENCY, INC., a)
Florida Corporation,)

Appellees.)

ON PETITION FOR WRIT OF CERTIORARI FROM THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

RESPONDENT/CROSS PETITIONER'S JURISDICTIONAL
BRIEF AND REPLY BRIEF TO PETITIONER
TRAVELERS BRIEF

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CITATIONS OF AUTHORITY

<u>CASES</u>	<u>PAGE</u>
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<u>Empire Fire and Marine Insurance Company v. Koven</u> 402 So.2d 1352 (Fla. 4th DCA 1981)	3,6,7
<u>Gast v. Nationwide Mutual Fire Insurance Company,</u> 516 So.2d 112 (Fla. 5th DCA 1987)	3,5,6
<u>Pawlik v. Stevens,</u> 499 So.2d 61 (Fla. 5th DCA 1986)	3,4,5,6,8,9,10

JURISDICTION AND QUESTION PRESENTED

Respondent/Cross-Petitioners, James H. Quirk and Marie Quirk, husband and wife, respectfully invoke the discretionary jurisdiction of the Supreme Court pursuant to Florida Rules of Appellate Procedure 9.030(a)(2)(A)(4), to review a decision of the Second District Court of Appeal rendered July 6, 1990 which expressly and directly conflicts with a prior decision of the Fifth District Court of Appeal.

The question of law for which the Second District Court of Appeal has rendered and which differs from the Fifth District Court of Appeal's decision is:

WHETHER THE TRIAL COURT ERRED IN ENTERING SUMMARY JUDGMENT FOR SOUTHERN AMERICAN INSURANCE COMPANY WHERE DISPUTED FACT EXISTS AS TO WHETHER "KEY AGENCY" WAS ACTING AS A BROKER FOR "WEST COAST"?

STATEMENT OF THE CASE AND STATEMENT OF FACTS

WHEN THE TERM "SOUTHERN AMERICAN" IS USED IN THIS BRIEF, IT SHALL REFER TO THE APPELLEE, SOUTHERN AMERICAN INSURANCE COMPANY. WHEN THE TERM "KEY AGENCY" IS USED IN THIS BRIEF, IT SHALL REFER TO APPELLEE, KEY AGENCY, INC. WHEN THE TERM "WEST COAST" IS USED IN THIS BRIEF IT SHALL REFER TO WEST COAST EQUIPMENT AND LEASING AND/OR WEST COAST EXCAVATING.

The Petitioner, "TRAVELERS", has filed a petition seeking to invoke conflict jurisdiction concerning an opinion in this cause for the Second District Court of Appeals which was rendered on April 25, 1990, and an Order rendered July 6, 1990 denying Petitioner's Motion for Rehearing, but clarifying opinion in part. Jurisdiction is sought under Florida Rules of Appellate Procedure 9.030(a)(2)(A)(4), and Respondent/Cross Petitioners, Mr. and Mrs. Quirk, have filed a cross petition seeking conflict jurisdiction under the above mentioned rule in reference to the same opinion and order.

The petitions for discretionary review stem from an automobile collision which occurred on December 24, 1984, in Charlotte County, Florida. At the time of the collision JAMES H. QUIRK was a passenger in a Ford Truck which was owned by his employer, "WEST COAST". "WEST COAST" had obtained insurance coverage on the vehicle through "KEY AGENCY". At the time "KEY AGENCY" was a licensed agent with "TRAVELERS", and secured the underlying coverage with them, and secured coverage of the umbrella with "SOUTHERN AMERICAN", a surplus lines carrier.

The trial court granted summary judgments in favor of "TRAVELERS" and "SOUTHERN AMERICAN". The Second District Court of Appeals reversed the Summary Judgments as to "TRAVELERS", however,

it was determined as a matter of law that "KEY AGENCY" was "WEST COAST'S" insurance broker when it handled the application for the uninsured motorist coverage on the umbrella policy.

"TRAVELERS" has sought jurisdiction concerning the reversal of the summary judgments in its favor, and Respondent/Cross Petitioner seeks conflict jurisdiction concerning the Second District Court of Appeal's ruling as a matter of law that "KEY AGENCY" was "WEST COAST'S" insurance broker, and affirming the trial court's summary judgment on that issue.

SUMMARY OF ARGUMENTS

SUMMARY OF ARGUMENT FOR CROSS PETITION

The Second District Court of Appeal's opinion in this cause is in direct conflict with a decision of the Fifth District Court of Appeals which holds that when there are material issues of fact and law as to the capacity in which an insurance agent acts, summary judgment is improper.

SUMMARY OF ARGUMENT IN REPLY TO "TRAVELERS" PETITION

The Second District Court of Appeal's opinion as it relates to "TRAVELERS" is not in conflict with Gast v. Nationwide Mutual Fire Insurance Company, 516 So.2d 112 (Fla. 5th DCA 1987) because the two (2) cases involve completely different issues. In reference to "TRAVELERS" second argument there is also no direct conflict between the Second District Court of Appeal's opinion and 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 Court of Appeal's opinion did not rule as a matter of law that "TRAVELERS" was an agent rather than a broker, therefore there is not direct conflict.

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ARGUMENT

CROSS PETITIONER'S ARGUMENT ON CONFLICT JURISDICTION

The Second District Court of Appeal's opinion in this cause directly conflicts with the Fifth District Court of Appeal's opinion in Pawlik v. Stevens, 499 So.2d 61 (Fla. 5th DCA 1986).

In the instant case, the Second District Court of Appeal in its July 6, 1990 order denying motion for rehearing stated that:

In order to handle surplus lines coverage a general lines agent must obtain an additional license (§626.927 Fla. Stat. 1983). Although Mr. Dignam was a licensed surplus line agent, he was not licensed for "SOUTHERN AMERICAN". In order to obtain this umbrella "KEY AGENCY" obtain an application from Crump London Underwriters, Inc. an authorized surplus lines agent for "SOUTHERN AMERICAN", and submitted the application to that agency. Thus the procedure used for this policy is virtually identical to that in Yates. We agree with the trial court that "KEY AGENCY" was "WEST COAST'S" insurance broker concerning the application for the umbrella policy.

In Auto Owner's Insurance Company v. Yates, 368 So.2nd 634 (Fla. 2nd DCA 1979), the Second District held that a person obtained insurance coverage on an insured's automobile acted as an insurance broker for the insured where he had no authority to act for the automobile insurer and did not hold himself out as having such authority.

The Fifth District held in Pawlik v. Stevens, that the issue of whether an insurance agent or insurance agency was acting as an agent of the insured when the insurance agent signed the insured's name to a form selecting lower uninsured motorist limits creates a genuine issue of material fact precluding summary judgment against the insured.

It is the conflict between the Second District Court's holding in Yates and the Fifth District's holding in Pawlik v. Stevens,

which must be addressed by this court. It appears that the Second District Court has already made a factual determination for the record that the "KEY AGENCY" was acting as a broker rather than an agent for "WEST COAST", but the Fifth District in Pawlik v. Stevens, 499 So.2d 61 (Fla. 5th DCA 1986) has held that this is a question of fact which cannot be determined on summary judgment.

REPLY TO PETITIONER, TRAVELERS, JURISDICTIONAL BRIEF

- I. The Second District's opinion in Quirk v. Lynda Anthony, et. al. does not conflict with the Fifth District's holding in Gast v. Nationwide Mutual Fire Insurance Co., 516 So.2d 112 (Fla. 5th DCA 1987).

Petitioner, Travelers Insurance Company, attempts to show conflict between the Second District's holding here and the Fifth District's holding in Gast. No such conflict of issues exists as it is clear that from the particular circumstances in this case that the Second District limited its decision as follows:

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

The Second District made it clear that it based this decision on the 1982 and 1984 amendments as opposed to the 1985 amendments to the statute which were before the Fifth District in Gast. The Second District reasoned that the nature of the 1982 and 1984 amendments make it apparent that the legislature was attempting to

avoid litigation over a "knowing" rejection by placing a greater emphasis on the written rejection. (A. 9).

In addition, the Second District recognized here that it was faced with a different issue than that in Gast. In Gast, the parties had stipulated that the employer had made a knowing rejection. (A. 10). Here, there was no such stipulation and the issue before the Second District was whether the class II insured has standing to raise the issue of a written rejection, not whether the decision was intentionally made. The Second District was clearly concerned by this issue as evidenced by footnote 4 which discusses the burden upon the carrier to prove that the named insured made a knowing rejection of UM coverage. Accordingly, because the issues before the respective Courts in Quirk and Gast v. Nationwide Mutual Fire Insurance Company, 516 So.2d 112 (Fla. 5th DCA 1987) are clearly different and based upon different statutes and interpretation of precedent, this Court should not grant review as to the alleged conflict.

II. The Second District's opinion in Quirk v. Lynda Anthony et. al. does not conflict 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).

Contrary to Petitioner's, Travelers Insurance Company, argument, nowhere does the Second District hold that as matter of law that the independent insurance agent functioned as an agent of Travelers and not the insured corporation with respect to the rejection of uninsured motorist coverage. The Second District

simply held that "concerning the obligation to obtain a proper rejection of UM coverage, we hold:

"that an independent agent is the insurance company's agent and not the insured's broker, where the relevant insurance company is one of the agent's licensed companies (A. 12).

Nothing contained in the Second District holding is inconsistent with Empire Fire and Marine Insurance Company v. Koven, 402 So.2d 1352 (Fla. 4th DCA 1981) insofar as there, the Fourth District held that as a matter of law that an insured was bound by the signature of a broker on the insured's application containing rejection of uninsured motorist coverage. There appeared to be no question in Empire Fire and Marine Insurance Company v. Koven, as well as the cited holding in Auto Owners Insurance Company v. Yates, 368 So.2d 634 (Fla. 2d DCA 1979), that the person acting on behalf of the insured was a broker and not an agent. Thus, the Second District's holding here does not conflict with Koven because here, the issue was not whether the person dealing with the insured was a broker but whether the insured was bound by the agent's or broker's acts. Here, the Second District even clarified its opinion, reasoning that:

"Thus, for this limited purpose, an agent is not an insurance broker unless the application is sent to an insurance carrier that the agent is licensed to represent." (A. 13).

This reasoning is entirely consistent with Koven's reasoning that "He (broker) enjoys no fixed or permanent relationship to an insurer but rather holds himself out for employment by the general public." Koven, FN 1 at 1353.

Finally, the Second District's holding in Quirk does not necessarily conflict with Pawlik v. Stevens, 499 So.2d 61 (Fla. 5th DCA 1986) as to the factual question of whether agency is a question of fact. Pawlik did not enunciate or take issue with the Second District's holding here that an independent agent is the insurance company's agent, and not the insured's broker, when the relevant insurance company is one of the agent's licensed companies. Pawlik v. Stevens, simply held that the issue of whether an insurance agent or insurance agency is acting as agent of insured when the insurance agent selected lower uninsured motorist limits is one of fact as revealed by the depositions in that case.

CONCLUSION

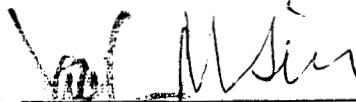
The Opinion rendered April 25, 1990, and the July 6, 1990 Order Denying Petitioner's Motion for Rehearing expressly and directly conflicts with the Fifth District Court of Appeal holding in Pawlik v. Stevens, 499 So.2d 61 (Fla. 5th DCA 1986). The Second District has departed from the essential requirements of law in determining that "KEY AGENCY" was acting as "WEST COAST'S" insurance broker concerning the application for the umbrella policy where there appears to have been questions of material fact as to on whose behalf "KEY AGENCY" was acting when it obtained the umbrella policy from "SOUTHERN AMERICAN".

Based on the foregoing, the Second District's decision does not conflict with the decisions cited by Travelers Insurance Company. The Court's opinion with respect to those issues raised by Travelers was entirely consistent with precedent and prevailing case law and therefore, this Court must decline jurisdiction on Traveler's issues.

WHEREFORE, petitioner having surmounted the threshold for invoking the Supreme Court's discretionary jurisdiction and citing the Second District's decision on their Auto Owner's Insurance Company v. Yates, 368 So.2d 634 (Fla. 2d DCA 1979) which appears to expressly and directly conflict with the decision of the Fifth

District court in Pawlik vs. Stevens, 499 So.2d 61 (Fla. 5th DCA 1986) prays the Florida Supreme Court will accept jurisdiction and review the appeal on the merits.

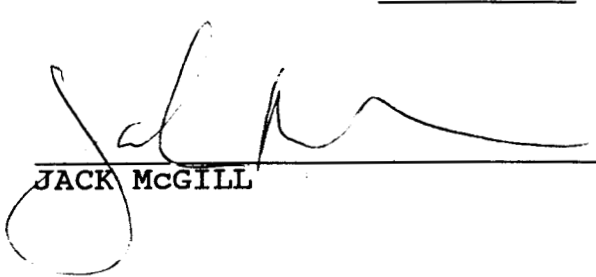
Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by mail to RAYMOND T. ELLIGETT, ESQUIRE, P. O. Box 3324, 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 33902-0280, ROBERT M. DAISLEY, ESQUIRE, P. O. Box 3433, Tampa, Florida 33601, and ANDREW E. GRIGSBY, ESQUIRE, 116 West Flagler Street, Miami, Florida 33130, LEE D. GUNN, IV, P.O. Box 1006, Tampa, Florida 33601 on this 19th day of August, 1990.



JACK MCGILL

APPENDIX "A"

Trial Court Order Granting Summary
Judgment in favor of "SOUTHERN AMERICAN" A-1

Second District Court of Appeal
Opinion in favor of "SOUTHERN AMERICAN" A-2

Second District Court of Appeal decision
rendered July 6, 1990, denying
petitioner's motion for rehearing A-3