SUPREME COURT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA

JASON K. ALMERICO and THE PHOENIX INSURANCE COMPANY,	)	
Petitioners,	)	Case No.: 89,131
v.	)	
RLI INSURANCE COMPANY,	)	
Respondent.	)	

RESPONDENT'S ANSWER BRIEF ON MERITS

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MISCELLANEOUS

RESTATEMENT OF THE CASE AND FACTS

The Respondent, RLI Insurance Company[1/] respectfully restates the Statement of the Case and Facts to include matters omitted or underemphasized as follows:

For the most part, RLI accepts the Statement of the Case as reflected in the Petitioners' Initial Brief. This appeal arose from an amended final summary judgment entered against RLI on January 17, 1995 requiring it to pay Jason Almerico and The Phoenix Insurance Company $1,667,510.05.[2/] (R. 1303-1306) RLI was also required to pay interest on the judgment at the rate of 12% per year. (R. 1305) The amended final summary judgment required RLI to pay a stipulated judgment entered into between the Collados on the one hand, and Almerico and his uninsured motorist insurer, The Phoenix Insurance Company, on the other hand, in the amount of $1,500,000.00 plus interest, from March 18, 1992. (R. 1304-1305) RLI was given a $250,000.00 set-off because of amounts paid by American Mutual Fire Insurance Company, a primary liability insurer of the Collados. (R. 1305)

After discovery, the Petitioners and the Respondents filed cross-motions for summary judgment. RLI maintained that the

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[1] In conformity with the preliminary statement of the Petitioners, Jason L. Almerico and Phoenix Insurance Company will be referred to collectively as Petitioners or by name. The Respondent, RLI Insurance Company, will be referred to RLI or as Respondent. Technically, the Collados should probably still be listed as parties or Petitioners as proceeding under an assignment of the Collados rights to them.

[2] All references to the record on appeal will be referred to as (R.) followed by citation to the appropriate page in the record.

application for the umbrella policy failed to list all drivers in the household under the age of 25, failed to identify any vehicles which were earned or operated by members of the household when there were drivers under the age of 26, and likewise, failed to list all members of the household holding a valid drivers license age 15 years or older. (R. 959) It was further maintained that both Daron and Derrick Collado, brothers, were licensed drivers under the age of 26, residing with the Collados at the time that the application was submitted, and likewise, two members of the Collado's household owned Mazda RX-7 automobiles which RLI considered to be high performance cars. (R. 959-960) RLI maintained that it was undisputed that its underwriting guidelines did not permit it to issue a personal umbrella policy to any household with a youthful driver and a high performance automobile. RLI maintained that had it been advised of the youthful drivers and the automobiles, that it would not have issued the policy and, as such, was entitled to rescind the coverage pursuant to Florida Statutes Section 627.409. (R. 960)

Phoenix and Almerico also sought partial summary judgment and maintained that any error or omission of a material fact in the application was the result of the insurance agent whom they claimed was acting on behalf of RLI, and as such, RLI was prevented from rescinding the policy. (R. 139-140) They further maintained that the application was completed and countersigned by employees of Pliego Insurance, Inc., d/b/a J. R. Insurance Agency, that for at least two years, J. R. Insurance had been acting as an

agent/producer in completion of applications and administration of the issuance of RLI personal umbrella policies and had been a part of a network of Florida insurance agents who had been administered by Poe and Associates, Inc. of Tampa on behalf of RLI. (R. 140) They further asserted that the application submitted to RLI did not reflect the existence of Daron or Derrick Collado as residents of the Collado's household, nor did it reflect an RX-7 automobile, however, those facts were within the knowledge of J. R. Insurance Agency who also produced a primary policy. (R. 140) It was also claimed that the named insured, Donald Collado, did not complete the application, did not read it, and asserted that the Collados relied upon J. R. Insurance Agency to complete the application and further, that they had provided the agent with all requested or otherwise necessary information. (R. 140-141) They maintained that an insured was not bound by errors or omissions in policy applications committed by the insurer's agent, and further, that the insured had no duty to review an insurance application for accuracy before signing it and submitting it to the agent. Finally, they argued that J. R. Insurance Agency was a statutory agency of RLI pursuant to Florida Statutes §626.324 (sic) (626.342) in addition to a common law agency relationship, and as such, were entitled to a partial summary judgment on the issue of RLI's liability for the coverage afforded under the policy. (R. 141-142)

By order dated January 14, 1994, the trial court entered a "partial summary judgment." (R. 1099-1100) The court granted RLI's motion, in part, upon the court's finding that the

misrepresentations in the application were material and the policy of insurance would not have been issued had the true facts been known to RLI. The court denied RLI's motion in all other respects. (R. 1099) The court also granted partial summary judgment on Count I of the counterclaim and first affirmative defenses of the intervenors. The court found that J. R. Insurance Agency and/or J. R. Pliego was RLI's statutory agent pursuant to Florida Statutes §626.342 (1989), that the statute provided that RLI would be civilly liable as if J. R. Pliego and J. R. Insurance Agency were its duly appointed agent, and that RLI was estopped from rescinding the policy of insurance which was in effect at the time of the accident on February 2, 1990. (R. 1100)

Thereafter, Almerico and Phoenix moved for summary judgment on the basis that RLI had breached its "indemnity obligations" through a wrongful denial of coverage, and as such, RLI was required to pay the full amount of the stipulated judgment. (R. 1127-1131) RLI responded that it had not breached its contract and even if it could be said to have done so, its liability would be limited to the policy limits of $1,000,000.00. (R. 1189-1192)

By order dated August 7, 1994, the trial court granted in part and denied in part the motions for summary judgment of Almerico, Phoenix, Harbin and Prudential.[3] The court found that by reason of its previous orders, RLI was precluded from rescinding the

[3] Harbin and Prudential were also parties to a stipulated judgment against the Collados and they also intervened below. (r. 118-120) Their interests have not been reduced to judgment against RLI.

policy. (R. 1247) The court found that the policy, the declarations of which stated a limit of $1,000,000.00 for coverage, afforded insurance for the automobile accident of February 4, 1990, and the policy insured the Collados for damages exceeding the underlying coverage. (R. 1247-1248) The order stated that there being no evidence presented by RLI to the contrary, the final judgment entered in favor of Almerico for use and benefit of Travelers Insurance Company as against Collado was reasonable in amount and not tainted by bad faith, fraud or collusion. The court reached the same conclusion regarding the judgment entered in favor of Prudential and Harbin against the Collados. (R. 1248) The court concluded that if there was an unresolved issue of fact of whether RLI breached its contractual duty to settle the aggregated claim and further, in the event that RLI was determined to have breached the duty to indemnify its insured by not timely making available the policy limits, that its liability would not be limited to the policy limits, but would be for those damages which occurred as a consequence of the breach. (R. 1249)

Almerico and Phoenix again moved for summary judgment against RLI in November of 1994. (R. 1251-1266) They maintained that it was undisputed that prior to the entry of the various judgments, offers to settle the claim against the Collados for RLI's policy limits of $1,000,000.00 had been made to the attorney for the Collados in August of 1991, but in the absence of those policy limits, the Collados were unable to accept the offer, and as a result, they claimed they were not in a viable position to respond

to the settlement offers. (R. 1253) The motion maintained that RLI knew that Almerico had made such a demand, yet refused to accept it, that the Collados, by necessity, had entered into judgments and assignments of their rights in return for an agreement not to enforce the judgments against them, and as a "direct result of said breach," the judgments were entered against the Collados, and as a matter of law, RLI was now liable for the entirety of the judgments. (R. 1254-1255) On January 17, 1995, the trial court entered an amended final judgment in favor of Almerico and Phoenix Insurance Company. (R. 1303-1306) The court determined that RLI was responsible to pay the full amount of the stipulated judgment as a result of the breach of its contractual duty to settle claims. The court made no findings, and there was any evidence presented concerning any bad-faith refusal to settle by RLI. (R. 1304-1306)

The relevant evidence before the court for purposes of this appeal is as follows:

Donald Collado was RLI's named insured. He had very little involvement in dealing with J. R. Insurance Agency or Mr. Pliego, his agents and representatives with respect to the procurement of any automobile insurance. (R. 607) He did not recall ever having filled out an application for automobile insurance coverage. (R. 607) Mr. Collado indicated that the application dated July 25, 1988, for the policy which preceded the one at issue, appeared to bear his signature. (R. 607-608) He would not admit or deny that the signature on the August, 1989 application was his. (R. 608)

He had no recollection whatsoever of signing either of the applications. (R. 608) Likewise, he had no memory of reviewing the application and does not believe he would have reviewed it prior to signing it. Remarkably, while Mr. Collado would not admit he signed the application, he nevertheless explained that he thought it was a document relating to insurance on his behalf prepared by his agent, and he assumed they did everything correctly, so he just signed the form. (R. 609) Mr. Collado made this assumption notwithstanding the fact that he never discussed his insurance needs with Mr. Pliego or anyone from his agency. He is sure that he may have spoken to the agent at some point in time, but simply had no recollection. (R. 609) Mr. Collado indicated that his wife handled most of the family's insurance needs. (R. 610-611)

In reviewing the 1988 application, Mr. Collado could not state that the information contained in it was accurate or inaccurate because he simply would not know and would not care to know. (R. 611) He did not recall whether there were four cars in the household on that date. (R. 611) He did know that there were two drivers under the age of 26. (R. 612) Mr. Collado had no recollection of ever having provided Mr. Pliego or J. R. Insurance Agency any information concerning drivers in the household, automobiles that he wanted insured or the address of his children. (R. 614) Essentially, he left the particulars to his wife. (R. 615)

Mrs. Grace Collado testified that the Collados had two children, Daron and Derrick. Daron was born October 12, 1971, and Derrick was born March 28, 1967. (R. 635-636) Derrick lived in the family home at all material times to this action. (R. 636) Daron, on the other hand, went to FSU in August, 1989, through December, 1989, and then returned home and registered at USF. (R. 637) When Daron returned home, he was using a Honda Accord, although he owned a Mazda RX-7 automobile. (R. 638-639) The Collados had bought the RX-7 for him, but it was titled in Daron's name. (R. 639, 643-644) Mrs. Collado believed that the vehicle was purchased sometime in 1988. (R. 639) In August of 1989, however, the Collados purchased the Honda for him to drive. (R. 640) That vehicle was titled in Mr. and Mrs. Collado's name. (R. 640) At that time, the RX-7 remained at the Collados' home, and it was ultimately sold in the fall of 1990. (R. 641) Mrs. Collado testified that it was probably either she or her husband who dealt with J. R. Insurance Agency to obtain coverage on the RX-7 when it was procured. (R. 644) At that time, Mrs. Collado claimed that she either phoned or went to the office to add him to their policy.

Mrs. Collado recalled having acquired an umbrella policy. She did not recall filling out an application. (R. 646) At some point in time, she learned that American Mutual was no longer issuing umbrella coverage and was advised by someone associated with the J. R. Insurance Agency of the need to acquire a policy from a different carrier. (R. 647-648) Mrs. Collado did not believe she was required to come in and fill out an application at that time.

With respect to the July 25, 1988 application for the first RLI policy, she had no recollection of being involved at all in filling out the application. (R. 648) She likewise had no recollection of ever being asked any questions by anyone from the agency for the purposes of obtaining umbrella coverage on that policy. (R. 648-649) She never accompanied her husband to J. R. Insurance Agency or to Pliego's office to obtain the umbrella coverage. In fact, she never went to the office to fill out any application for insurance at any time. (R. 649) She denied that she had ever been provided with any application for insurance by Mr. Pliego or his agency and had no recollection of every having signed one. (R. 649)

Mrs. Collado did not recall ever having been contacted by anyone from Mr. Pliego's agency to advise her of the need to renew the umbrella policy. She denied that she did anything with respect to the renewal of the umbrella policy with RLI in 1989. (R. 650) She had no idea whether her husband had done anything respecting the renewal of the umbrella policy. (R. 650) Mrs. Collado admitted that as between herself and her husband, she was mostly responsible for dealing with insurance. (R. 651)

Mrs. Collado denied that she had been asked any questions that were posed on the application. (R. 651) She denied she had any conversation with anyone from the office concerning the umbrella coverage in August of 1989, other than the fact that the premium had increased. (R. 651) She believed that Robin of Mr. Pliego's agency told her that fact.

When Daron was moving away in August of 1989 to attend FSU, Mrs. Collado stated that she had told Pliego, either over the phone or in person at his office, of Daron's move. (R. 652) Mrs. Collado conceded that she did not know to what extent Mr. Pliego and his staff knew about the Collado family living arrangements, who was home and who was not. (R. 654) Mr. Collado admitted that while she believed she may have told Pliego about Daron's move, she had no specific recollection of the meeting. (R. 654-655) She likewise could not recall whether anyone at the agency acknowledged receiving this information. (R. 655)

Mrs. Collado reviewed the amended declarations page of the American Mutual policy which provided primary coverage. (R. 658) She indicated that it was her intent to have automobile insurance for Daron under the American Mutual policy even though he would not be living in the household. (R. 658) She admitted that Derrick was not listed as a driver on the American Mutual policy because he had his own policy. (R. 659) She stated that on the date of the application, both Derrick and Daron, who were under the age of 26, were residing in the household and driving vehicles which were either owned by them or by Mr. and Mrs. Collado. (R. 660-661) Mrs. Collado recalled that she was advised that in order to obtain the RLI umbrella policy, that the Collados would have to maintain high limits, but she could not specifically recall whether she was advised that there had to be a minimum of $500,000 in coverage. (R. 662)

Mrs. Collado was asked whether Pliego had ever represented he was an RLI agent, and her only response was that he purchased the coverage for her. (R. 663) Mrs. Collado explained that when she was obtaining the umbrella coverage, she really was not sure whether an umbrella policy would provide coverage for all four of the vehicles, including the 1984 Mazda owned and separately insured by Derrick. Instead, she simply asked Robin to obtain an umbrella policy. (R. 667) She did not specify that she wanted an umbrella for all four vehicles, for two vehicles or for even one. (R. 667) She could not recall whether she had already advised the agency that Daron was moving out of the household at the time she asked for the umbrella policy.

Joseph Pliego testified that he formed J. R. Insurance Agency around 1987. (R. 834) Robin Robinson was an employee with his company. (R. 836) He knew Mr. and Mrs. Collado for more than ten years because they were relatives of his ex-wife. (R. 838-839) Referring to the August, 1989 application, he could not recall who actually prepared it. He believed it was probably Robin. (R. 843-844) He explained that his agency worked through brokering agents, Poe & Associates, to obtain the umbrella coverage. (R. 845-846) He had no recollection of being personally involved with the renewal application. (R. 849) He likewise had no personal recollection of ever having talked to the Collados about the information contained within the application. (R. 851) Mr. Pliego had no personal knowledge why Daron Collado's name was not revealed on the 1989 application. (R. 860) Mr. Pliego could not recall

what Daron Collado's situation was in August of 1989. (R. 862) He likewise could not recall any personal knowledge regarding the status of vehicles in the Collado household. (R. 862) Mr. Pliego did not remember whether he had a conversation with the Collados prior to the August, 1989 application having been completed. He likewise did not have any recollection of ever having told them that they did not need to refer to Daron and Derrick on the application. (R. 890-891) He could not recall having discussions with the Collados concerning the changes in the applications between 1988 and 1989. (R. 892)

Mr. Pliego testified that he had never actually spoken with anyone at underwriting at RLI. (R. 858) He had no recollection of ever having any direct contact with anyone at RLI. (R. 857) His connection with RLI was through Poe & Associates. (R. 856) He had written only two RLI policies and had no relationship as an agent with them. (R. 852-855) He explained that with a brokering agent like Poe, he would have to send an application to Poe, they would have to approve it and forward it along. He did not have binding authority for the RLI umbrella. (R. 852-853) He recalled having a couple of applications for the RLI program, but not a box of them. (R. 853-854) He continually maintained that if he had any contract pertaining to this insurance, it would have been with Poe & Associates, not RLI. (R. 872) Mr. Pliego possessed a 220 Property and Casualty License as well as 218 Life and Health License. (R. 873)

Robin Robinson, testified that she had worked with Ron Pliego at two different insurance agencies for approximately four years at the time her deposition was taken in October, 1990. (R. 776) She was familiar with the Collados and had dealt with them through both of the insurance agencies. (R. 778) She denied preparing the 1988 application. (R. 778-779) Ms. Robinson admitted to helping fill out the 1989 application. (R. 780) She could not say when or where the application was prepared, nor did she remember where the information contained on the form came from. (R. 780) Sometimes she prepared applications sitting face-to-face with a customer. She did not recall ever preparing applications by taking information from other applications or policy information in the file. (R. 781) She indicated that her writing appeared on the form where the name of the insured was, the entire top right section, but could not identify her writing where the X's and circles were located in the application. (R. 781) She likewise identified her writing where it states American Mutual and where the printing was on the third page. (R. 782) Ms. Robinson did not recall any discussion with anyone in her office, the Collados or Mr. Pliego about the number of drivers in the household at the time the August, 1989 application was prepared. She likewise did not recall any discussion about the number of vehicles that were going to be in the household. (R. 783)

Ms. Robinson could not recall ever having prepared any other application for umbrella coverage with RLI besides the Collados. She stated that after the application had been prepared, however,

it was mailed or should have been mailed to Poe & Associates. (R. 786) Ms. Robinson did not recall ever having spoken to Mr. and Mrs. Collado about the application by telephone. (R. 787-788) In fact, she did not remember the source of the information contained on the application.

Ms. Robinson was asked to review the Collados' file. She identified a form dated August 15, 1989. At that time, there was a request to add Daron Collado as a new driver to the underlying policy. (R. 796) An additional vehicle was also added, a 1989 Honda, and a 1986 Honda was deleted. (R. 797)

Jonathan Michael, an Executive Vice-President at RLI, testified as its corporate representative. (R. 183-317) He testified that RLI is a property and casualty company admitted in all 50 states. (R. 202-203) The personal umbrella program was incepted in 1984 and instituted in Florida. (R. 205) The most prominent sales method used by RLI in the personal umbrella program was the appointment of agents in particular jurisdictions and utilizing those agents to market and produce policies. (R. 207) Under this method, the agents do the marketing as company-appointed agents to serve on its behalf. (R. 208) In 1989, the personal umbrella program was marketed in Florida through Poe & Associates as its agent. (R. 208) Under the program, all applications would first have to have been received from Poe & Associates. (R. 211) Some applications may have been signed by sub-producers or brokers other than Poe. (R. 212) Upon receipt of such an application, RLI would have assumed that Poe had already approved it because that

was how the system had been designed. (R. 212) RLI did reserve the right to make a final decision on whether to issue a policy, but Poe did have binding authority.

The application for the personal umbrella program is an RLI form which was drafted by RLI. RLI had taken great steps to make the application self-underwriting. (R. 213-214) The application format was established so that anyone looking at it would know whether an applicant was qualified. (R. 215) A unit of the company reviewed the answers to the questions on the applications, and if the answers were appropriate, RLI would issue a policy. (R. 216) In 1989, RLI would have accepted the answers to the applications on their face. (R. 218-219)

There was no legal relationship between RLI and J. R. Insurance Agency. RLI relied solely on Poe to take care of receipt of the applications and had no dealings with J. R. Insurance Agency. (R. 219-220) RLI admitted that it knew Poe would find sub-producers such as J. R. Insurance Agency, acceptable to Poe, to take RLI applications. (R. 223-224) Likewise, RLI assigned a group of agent numbers to Poe for implementation of the plan. (R. 225-226) Poe was the one who actually assigned such an agent number. (R. 228) The assignment of these numbers was to accommodate Poe for its own accounting and for RLI's accounting system. (R. 228) With respect to the Collados' application, he indicated that all the information in the application was relied upon by RLI. (R. 265) Had the true facts been know, RLI would not have issued the policy. (R. 269-273)

ISSUES ON APPEAL

I.

WHETHER SECTION 626.342, FLORIDA STATUTES (1989) RENDERS RLI CIVILLY LIABLE FOR THE ACTS OF PLIEGO AS IF PLIEGO WERE RLI'S AUTHORIZED OR LICENSED AGENT.

II.

WHETHER PLIEGO WAS EITHER THE COMMON LAW ACTUAL OR APPARENT AGENT OF RLI.

III.

WHETHER RLI IS ESTOPPED FROM RESCINDING THE POLICY.

IV.

WHETHER RLI MAY BE LIABLE FOR DAMAGES EXCEEDING ITS POLICY LIMITS IN THE ABSENCE OF A FINDING OF BAD FAITH AS A MATTER OF LAW.

SUMMARY OF THE ARGUMENT

This Court should approve the decision of the Second District. It is undisputed that the Collado's insurance application contained material misrepresentations. Mr. Collado now admits that he signed the application and in the absence of fraud or some other special circumstances which do not exist, is presumed to have intended to authenticate and become bound by the contents of the instrument. Under Florida law he may not defend on the basis that he did not read the application prior to signing it.

The Second District appropriately concluded that summary judgment should be entered in favor of RLI because Mr. Pliego was not the agent of RLI. The statute relied upon by Petitioners has no application here. Likewise, the Second District appropriately concluded that as to the procurement of a policy of insurance, independent insurance agents like Mr. Pliego act on behalf of the insured and not the insurer. Moreover, even if Mr. Pliego could be considered the agent of RLI, the limited knowledge that he had concerning the Collado's living arrangements, even if imputed, would be insufficient to estop RLI from rescinding the policy.

If this Court reaches Issue IV raised by the Petitioners, it should conclude that in the absence of a finding of bad faith, an insurer may not be held responsible for extra contractual damages on the basis that it allegedly breached its "duty to indemnify." Here, RLI did not wrongfully deny coverage, but filed a declaratory judgment action to have its rights and the Collado's rights determined. Filing a declaratory judgment action is not a breach

of contract. The Petitioners' entire argument to support their contention is premised upon the implied covenant of good faith and fair dealing and the obligation to accept a settlement offer when a reasonably prudent person would do so. Florida courts have routinely held that a determination of whether an insurance carrier acted in bad faith is a question of fact for a jury. It is not a question of law for a judge. Therefore, even if this Court resolved the issue of estoppel against RLI, summary judgment was nevertheless inappropriate as a jury must first determine whether RLI acted in bad faith before it may be held liable for the full amounts of the consent judgments.

ARGUMENT

Before responding to the specifically numbered arguments raised by the Petitioners, RLI believes that it is important to identify certain facts which both frame the issues and are pertinent to the first three arguments on appeal. First, the trial court determined that the misrepresentations in the application were material and that the policy would not have been issued had the true facts been known to RLI. Florida law is clear that an insurer may void an insurance policy when an insured makes a material misrepresentation in an application, if it can establish that the policy would not have been issued if the true facts had been known to it. Continental Assurance Co. v. Carroll Assurance, 485 So. 2d 406 (Fla. 1986); Florida Statutes §627.409(1) (1989). The Petitioners have never challenged that determination.

The Petitioners' first three arguments on appeal after their excuses why they should be relieved from the misrepresentations in the application. To avoid repetition, RLI also believes that it is important to identify certain record facts which are also applicable to the first three arguments. Mr. Collado never discussed his insurance needs with Mr. Pliego or anyone from the J.R. Agency. (R. 609) Likewise, it is undisputed that Mrs. Collado never had any conversation with anyone from the J.R. Agency office concerning the umbrella coverage application of August, 1989. (R. 651) It is also undisputed that Mrs. Collado conceded that she had no idea to what extent Mr. Pliego or his staff knew about the Collado family living arrangements. (R. 654) It is also

uncontested that Derrick Collado, the son who was not involved in the accident, owned his own RX-7 automobile which was not insured by the Collados' primary carrier, American Mutual, but instead was insured through his own policy. (R. 658-659) Finally, it is also undisputed that Mr. Pliego made no representations of whatever kind to the Collados concerning his knowledge of their family living arrangements, the accuracy of the information contained in the application, or that he had some authority from RLI to waive truthful responses to any question contained in the application. With those facts clearly stated, RLI will address the excuses raised by the Petitioners to avoid the legal effect of their misrepresentations contained in Arguments I, II and III as follows:

I.

SECTION 626.342, FLORIDA STATUTES (1989) DOES NOT RENDER RLI CIVILLY LIABLE FOR THE ACTS OF PLIEGO AS IF PLIEGO WERE RLI'S AUTHORIZED OR LICENSED AGENT.

In 1979, the former version of Florida Statute §626.342 provided, in pertinent part:

> 626.746 Furnishing supplies to unlicensed agent prohibited; civil liability and penalty period -
>
> (1) No insurer shall furnish to any agent or prospective agent named or appointed by it any blank forms, applications, stationery or other supplies to be used in soliciting, negotiating or affecting contracts of insurance on its behalf until such agent shall have received from the department a license to act as an agent and shall have duly qualified as such.

In 1980, the legislature repealed that statute and created Florida Statutes §626.342. The new version of the statute, like the old one, prohibited insurance carriers from providing certain supplies to certain insurance agents. Unlike the predecessor statute, however, the broad prohibition had an exception, that is, the prohibition did not apply if the supplies related to a class of business with respect to which the agent was a licensed agent, whether for that insurer or for another insurer. Specifically, the legislature created Florida Statutes §626.342 which stated:

> Furnishing supplies to unlicensed life, disability or general lines agents prohibited; civil liability and penalty -
>
> (1) No insurer, general agent, or agent, directly or through any representative, shall furnish to any agent any blank forms, applications, stationery or other supplies to be used in soliciting, negotiating, or affecting contracts of insurance on its behalf unless such blank forms, applications, stationery or other supplies relate to a class of business with respect to which such agent is a licensed agent, whether for said insurer or another insurer. [emphasis supplied]
>
> (3) Any insurer, general agent, or agent that furnishes any of the supplies specified in subsection (1) to an agent or prospective agent not licensed to represent the insurer and accepts from or writes any insurance business for such agent or agency, shall be subject to civil liability to any insured or such insurer to the same extent and in the same manner as if such agent or prospective agent had been appointed, licensed or authorized by the insurer or such agent to act in its or his behalf by the Department of Insurance. The provisions of this subsection shall not apply to insurance risk apportionment plans under §627.351.

The Petitioners and RLI agree that this Court must view the statute to determine its plain and ordinary meaning. Additionally, this Court must read all of the parts of the statute together in order to achieve a consistent whole. Forsythe v. Longboat Key Beach Erosion Control District, 604 So. 2d 452 (Fla. 1992). Where possible, the court must also give full effect to all statutory provisions and construe the related statutory provisions in harmony with one another. Id. Generally, statutes should be construed to give each word effect. Gretz v. Florida Unemployment Appeals Commission, 572 So. 2d 1384 (Fla. 1991). Where possible, it is the duty of the courts to adopt the construction of a statutory provision which harmonizes and reconciles it with other provisions in the same act. Woodgate Development Corp. v. Hamilton Investment Trust, 351 So. 2d 14 (Fla. 1977). If part of the statute appears to have a clear meaning if considered by itself, but when given that meaning is inconsistent with other parts of the same statute or others in para materia, the court will examine the entire act and those in para materia as to ascertain the overall legislative intent. State ex rel Florida Hi-Lai, Inc. v. State Racing Commission, 112 So. 2d 825 (Fla. 1959). Likewise, statutes which relate to the same subject matter should typically receive compatible interpretations. Schorb v. Schorb, 547 So. 2d 985 (Fla. 2d DCA 1989). Finally, when reviewing an amended statute, different language contained in the amended statute indicates that there is a different meaning which was intended. Escambia Council on Aging v. Goldsmith, 465 So. 2d 655 (Fla. 1st DCA 1985).

Relying upon those well established rules, this Court can easily analyze Petitioner's suggested interpretation of Florida Statute, §626.342 and reject it. Their position is contrary to the rules of statutory construction and would render the repeal of former Florida Statute §626.746 and the addition of the new language contained in Florida Statute §626.342 absolutely meaningless. The statute prohibits insurers from furnishing its business materials to any agent unless such forms relate to a class of business for which the agent is a licensed agent. Subsection (2) of the statute penalizes an insurer who furnishes the supplies specified in subsection (1) (supplies relating to a class of business for which the agent is not a licensed agent) and who accepts business from that unqualified agent. Under the plain terms of the statute, an insurer is liable for the conduct of the agent, if and only if two things occur. First, the insurer must provide the agent with forms, respecting a class of business for which he does not hold a proper license. Second, the insurer who has provided the supplies relating to a class of business for which the agent is not licensed must also accept business from that agent. In this case, it is undisputed that J. R. Pliego was a licensed general lines agent. RLI, a licensed property and casualty insurer, provided him forms respecting the very class of business for which Mr. Pliego held a license. Under the plain and ordinary meaning of the statute, it simply has no application here.

The statutes which preceded Florida Statute §626.342 cited by Petitioners, historically provided an absolute prohibition to an

insurer from providing its forms to anyone other than an agent appointed by that insurer. The current statute has an exception to that broad prohibition. Under the appropriate rules of construction, this Court must assume that when the legislature repealed Florida Statute §626.746 in 1980 and added the new proviso beginning with "unless," that it intended to change the pre-existing law. Adopting the Petitioners' argument would render the whole phrase beginning "unless," meaningless. Under the Petitioners interpretation the insurer would always face liability for providing its forms to an insurance agent not appointed by it regardless of the agent's qualifications. That was true under the old statute and there would be no reason to repeal that statute if the legislature intended for the law to be the same.

The cases relied upon by the Petitioners, Gaskins v. General Ins. Co. of Fla., 397 So. 2d 729 (Fla. 1st DCA 1981) and Brown v. Inter-Ocean Ins. Co., 438 F. Supp. 951 (N.D. Ga. 1977) interpreted the predecessor statute, Florida Statute §626.746, and its absolute prohibition. Those courts imposed liability upon the insurers for the negligent conduct of the agent when the insurers provided the agents forms and accepted business from them. In light of those decisions, the Legislature amended the statute and specifically authorized insurers like RLI to provide its forms to agents so long as those agents held the appropriate license for the insurance to be sold. It did not create a statute to specifically authorize insurers to engage in this conduct and then, as advocated by Petitioners, create civil liability for the very conduct it

authorized. This conclusion is particularly reasonable when it is considered that Petitioners view could have been accomplished if the Legislature did nothing but renew the previous statute.

The Third District's decision in Gonzalez v. Great Oaks Cas. Ins. Co., 574 So. 2d 1182 (Fla. 3d DCA 1991) does not change that conclusion. First and foremost there was no allegation that the policy procured here was obtained through the exchange of business statute. Secondly, unlike the agent in Gonzalez, the facts of record are undisputed that Pliego had absolutely no authority whatsoever to bind RLI. Moreover, this Court's decision in Queens Ins. Co. v. Patterson Drug Co., 74 So. 2d 807, 73 Fla. 665 (1917) is equally inapplicable unlike RLI here, the insurer there never asked the insured about the existence of the condition it attempted to rely upon to deny coverage. Here the Second District correctly concluded Pliego was not RLI's statutory agent and this Court should approve that decision.

II.

PLIEGO WAS NEITHER THE COMMON LAW ACTUAL OR APPARENT AGENT OF RLI.

Aside from the statute, Pliego was not RLI's common law agent either. The evidence was undisputed that Mr. Pliego and his agency had never been appointed as an agent by RLI. (R. 219-220) Instead, the only agent appointed by RLI was Poe and Associates, Inc. (R. 219-220, 856) Here, Mr. Pliego was acting as an insurance broker. Traditionally, Florida courts have held that an insurance broker is the agent of the insured in matters connected with the procurement of insurance. AMI Ins. Agency v. Elie, 394

So. 2d 1061, 1062 (Fla. 3d DCA 1981). See also Empire Fire & Marine Ins. Co. v. Koven, 402 So. 2d 1352, 1353 (Fla. 4th DCA 1981).

In Auto-Owners Ins. Co. v. Yates, 368 So. 2d 634 (Fla. 2d DCA 1979), the Second District determined that a broker who procured coverage through Auto-Owners' licensed agent was not an agent of the insurer, but was the insured's agent. Ms. Yates' agent, Harless, was an authorized agent for several insurance companies, including one which wrote automobile coverage. He was not, however, an agent for any company writing insurance on family vehicles. He obtained family automobile coverage for his customers from the Elmer Johnson Insurance Agency. That agency was an authorized agency for several companies writing the coverage, including Auto-Owners. Harless talked to Elmer Johnson about Ms. Yates' vehicle and obtained from him a blank Auto-Owners insurance application. He took the form to his office, filled it out and returned it to Johnson requesting liability coverage in the amount of $100,000/$300,000 and UM coverage in the amount of $15,000/$30,000. Unbeknownst to Johnson, Harless had signed Yates' name to the application in two places indicated for the signature of the insured. The application contained a provision just above the signatures which stated that pursuant to Florida Statutes, UM coverage was required to be offered in the amount equal to the liability limits unless specifically lower limits were requested. The policy issued with the reduced UM limits. Harless received a commission from Auto-Owners. Prior to obtaining coverage for Ms.

Yates, Harless had obtained other policies from Auto-Owners through Johnson for other customers and had signed their names on the applications. Johnson was completely unaware that Harless had signed applications for his customers. The trial court concluded that Harless had provided Ms. Yates with no information concerning the selection of UM coverage and had signed the application without her authority. As the trial court did here with Pliego and RLI, the court found that the acts of Harless were the acts of Auto-Owners, and Ms. Yates had not rejected UM coverage. The court then ruled that UM coverage was available in the amount of the liability limits.

Auto-Owners appealed, arguing that Harless was an insurance broker who acted as an agent for Ms. Yates rather than for Auto-Owners. The Second District agreed with that argument and reversed the judgment.

Judge Grimes wrote that the distinction between an insurance broker and an agent was that the broker acted as a middleman between the insured and the insurer and solicited insurance from the public under no employment from any special company. An insurance agent, on the other hand, represented an insurer under an employment by the insurer. The court explained that the general rule that an insurance broker is the agent of the insured rather than the insurer is not altered simply because the broker may receive compensation out of the premium. Id. at 636. The court also stated that applying the law to the facts at hand, it was evident that in obtaining coverage, Harless had acted as an

insurance broker. He had no authority to act for Auto-Owners and did not hold himself out as having such authority. The mere fact that he had placed coverage with Auto-Owners in the past through the Johnson Agency would not make him an agent of Auto-Owners. The court also rejected the contention that it was imperative for Johnson, the true representative of Auto-Owners, to personally explain the nuances of UM coverage to Ms. Yates. There was no reason for him to have any direct contact with her because she was being represented by Harless, her own insurance broker.[4/] See also, Ivey v. Hull Co., Inc., 458 So.2d 439 (Fla. 2d DCA 1984) (notwithstanding that broker had been provided with blank applications for insurance containing the name of the defendant, the broker did not thereby become an agent of the defendant or have apparent authority to issue policies, and instead, was considered a broker for the insured); Florida East Coast Properties, Inc. v. Tifco, Inc., 556 So.2d 750 (Fla. 3d DCA 1989) (broker did not act as lender's agent in connection with insurance premium finance agreement even though broker possessed forms and conducted transactions with the lender in the past, such that broker's alleged wrongdoing could not be imputed to the lender); T & R Store Fixtures, Inc. v. Travelers Ins. Co., 621 So.2d 1388 (Fla. 3d DCA 1993) (mere acceptance by insurer of prior premium payments transmitted by broker did not have legal effect of conferring

[4] If the agency is a broker and working for the insured, any representations made by the agent to the insurer are binding on the insured. See, Liberty Mut. Ins. Co. v. Scalise, 627 So.2d 27 (Fla. 1st DCA 1993).

actual or apparent authority on the broker to collect premiums as agent of the insurer).

Recently, the Fifth District also rejected the argument that the insurer should be estopped to deny coverage where the insured had materially misrepresented facts on the application where the agent who procured insurance was an independent agent and had no actual authority to issue a policy or to bind the insurer to a contract. In Steele v. Jackson National Life Ins. Co., _____ So. 2d _____, 22 Fla. L. Weekly D817 (Fla. 5th DCA March 27, 1997), Jackson National denied a life insurance claim of Donald Steele for a policy issued on his deceased wife on the grounds that she failed to disclose that she had been treated and hospitalized for paranoid schizophrenia in her application. In February 1986, the Steeles decided to obtain additional life insurance and contacted an agent who represented an insurer not involved in the case. When he was unable to procure the coverage they wanted, he directed them to Daniel Middleton.

The Steeles met with both agents in Middleton's office in May of 1986 and the applications were completed. Middleton testified he selected Jackson National from several insurers he was authorized to represent because he considered them aggressive and more lenient in approving policy applications. Middleton admitted that either he or Stanberry filled out the application form and that every question on the application was read to the Steeles, that all responses were accurately recorded, and that no mention was made of Laura's having received any psychiatric treatment.

Stanberry also stated he was never advised of Laura's mental hospitalizations or treatment.

In the application, Mrs. Steele was asked whether in the previous five years she had observation or treatment at a clinic, hospital or sanitarium to which she answered no. She was also asked whether she had ever been told that she had a mental or nervous condition to which she also answered no.

Mr. Steele testified that he was aware that his wife had been diagnosed with paranoid schizophrenia and had been hospitalized for treatment five previous times, the most recent having been nine months before the date of the application. Mr. Steele testified that he told Middleton and Stanberry of his wife's mental condition and that Middleton had responded that a history of emotional or psychiatric problems was not significant to the insurer and need not be included in the application. Jackson National offered testimony that the company's protocol prohibited coverage on any basis for a person who had more then one recurrence of schizophrenia. Like RLI here, had Jackson National known about the true facts, it would not have issued the policy and would have declined the application.

Mrs. Steele drowned about three months after the application was submitted. Mr. Steele submitted a claim which was denied by Jackson National in November, 1986 based upon its contention that the application contained material misrepresentations. Steele brought suit seeking damages from Jackson National, Middleton and the agency which employed him. Jackson National alleged that

Steele was barred from recovering because of the material misrepresentations in the application. Jackson National filed motions for partial summary judgment on the basis that the representation were material and that Middleton was acting as the Steeles' agent when he processed the applications. The trial court agreed and concluded that Middleton was Mrs. Steele's agent for procurement of the coverage.

Affirming the summary judgment, the Fifth District determined that Middleton was an independent, as opposed to a captive, insurance agent. The court noted that the general rule was that an independent agent or broker acted on behalf of the insured rather then the insurer. The court also noted that in the absence of special circumstances, the broker would be considered the agent of the insured as to matters connected with the application and the procurement of the insurance, despite the fact that the broker received his or her compensation from the insurer.

The court noted that an independent insurance agent could be the agent of the insurance company for one purpose and the agent of the insured for another. In the case before it, however, Middleton had no actual authority to issue a policy or to bind Jackson National to a contract. The court noted that the Jackson National contract would require it to insure the applicant until Jackson National reviewed the application and rejected it or accepted it. The court noted that that exception did not give Middleton any actual authority other than to temporarily bind Jackson National to a life policy when a deposit accompanied the application. The

court further explained that acts of an insurance agent in the scope of his apparent authority are binding upon his principal and that the general public may rely upon them and do not need to inquire as to special powers of the agent unless circumstances are affirmatively such as to put them on notice to inquire. The court concluded that in the case before it, the questions on the insurance application asking whether Mrs. Steele had been treated at a hospital or had been told she had a nervous or mental condition put her on notice to inquire with respect to Middleton's authority to explain whether her medical history was significant to the insurer when she had in fact been diagnosed with schizophrenia and had been hospitalized for psychiatric treatment five times, the most recent just several months before the making of the application. The court concluded that even if Middleton was Jackson National's agent for some purposes, and even he had apparent authority for some purposes, the Steeles were on notice to inquire as to the scope of Middleton's authority and could not rely on his alleged statement that Laura's diagnosis, treatment and hospitalization were not significant to Jackson National.

The only real exception to the general rule that a broker who procures coverage for the insured is deemed to be the insured's agent is in the UM context. In Quirk v. Anthony, 563 So.2d 710 (Fla. 2d DCA 1990), app'd. sub nom, Travelers Ins. Co. v. Quirk, 583 So.2d 1026 (Fla. 1991), the Second District explained that under Florida's insurance code, a general lines agent obtained a license that disclosed the insurance company that he or she

represents. As such, those insurance companies which licensed the agent knew that he or she would represent them, and they could monitor the agent's conduct through contracts or otherwise. The Second District stated that concerning the obligation to obtain a proper rejection of UM coverage, 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. Id. at 715-716 The Second District's ruling in Quirk cannot be reasonably interpreted as altering the relationship between an independent insurance broker and an insurance company in all other transactions related to the procurement of insurance. In fact, even in the context of rejection of UM coverage, the distinction between an insurance agent and a broker continues to be a valid legal distinction when attempting to impute the conduct of the broker to either the insurer or the insured. See, Gazie v. Illinois Employers Ins. of Wausau, Inc., 583 So.2d 1098 (Fla. 4th DCA 1991) (broker who forged insured's signature on UM rejection, who was not licensed by insurer found to be agent of insured). The Fifth District expressly declined to extend Quirk to the fact scenario before it in Steele.

Neither was Pliego acting as an apparent agent of RLI. This Court need only review Mobil Oil Corp. v. Bransford, 648 So. 2d 119 (Fla. 1995) to determine that the Second District's decision here was appropriate. In Bransford, this Court articulated the test that must be used in any instance where apparent agency is alleged to exist. The court stated three elements must be present: (1)

a representation by the purported principal; (2) reliance on that representation by a third party; and (3) a change in position by the third party in reliance on the representation. Id. at 121.

In this case, even if it can be said that the application relied upon by the Petitioners here constitutes the relevant representation by RLI, (R. 10-12) there is absolutely no evidence of record to satisfy the remaining two elements of the test. In fact, the evidence of record demonstrates that there was no reliance and no change in position by the Collados. As noted in the Restatement of the Facts, Mrs. Collado had specifically been asked whether Mr. Pliego had ever represented he was an RLI agent to her. (R. 662-663) Her only response was that he purchased coverage for her. (R. 663) Mrs. Collado denied that she had anything whatsoever to do with respect to the renewal of the umbrella policy with RLI in 1989. (R. 650) Moreover, she denied having ever been asked any of the questions that were posed on that application. (R. 651) She even went so far as to deny that she had any conversation with anyone from Pliego's office concerning the umbrella coverage in August of 1989 other than the fact that the premium had increased. (R. 651)

At page 5 of Petitioners' initial brief, they admit for the first time that Mr. Collado signed the application. In his deposition, however, he testified that he had no recollection of ever having filled out an application for automobile insurance coverage. (R. 607) He refused to admit or deny that the signature on the August 1989 RLI application was his. (R. 608) In fact, he

had no recollection whatsoever of signing the 1989 or 1988 application for the RLI policies. (R. 608) Based on the uncontested facts of record, the Collados could never establish the existence of apparent agency because there was no evidence of reliance much less a change in position so as to satisfy the second and third prongs of the test identified in Bransford.[5/]

The Petitioners go to great lengths to argue that Pliego was RLI's agent because "RLI has made clear representations that Pliego was authorized to act on its behalf in filling out applications and verifying their accuracy." (Initial Brief, p. 31) It is no small surprise that there is absolutely no record citation to support that assertion. Nor does Florida law support the legal conclusion that the Petitioners attempt to draw from it. The mere fact that an agent may complete an application does not mean that the agent vouches for its accuracy or that the insurance company is bound by the answers as completed by the agent. If the answers are based upon what the insured told the agent, the insured is bound by the representation. See, Shelby Life Ins. Co. v. Taolasini, 489 So. 2d 89 (Fla. 3d DCA), rev. denied, 501 So. 2d 1283 (Fla. 1986).

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[5] Petitioners reliance on American Casualty Co. of Reading, Pa. v. Castellanos, 203 So. 2d 26 (Fla. 3d DCA 1967) and General Ins. Co. v. Romanovski, 443 So. 2d 302 (Fla. 3d DCA 1983) is misplaced. Castellanos recognizes that for some purpose apparent agency may be used to estop an insurer fro denying coverage where its conduct (accepting premium, change requests, etc.) created the appearance that the agent could accept notice of an accident. Romanovski is even more irrelevant because the insurer instructed the agent how to complete the application and the agent independently interpreted a question incorrectly. The Collados claim they never read theirs and never gave the agent the information to accurately complete it.

Likewise, the insured is not estopped if the agent merely performs the scrivener's duty of filling out the application. See, Byron v. Travelers Indemn. Co., 601 So. 2d 1330 (Fla. 2d DCA 1992). Here, the record demonstrates that this case is most analogous to Yates and the Second District appropriately concluded that Mr. Pliego was acting as a broker at the time he procured the RLI policy for the Collados. This Court should approve that decision.

III.

RLI IS NOT ESTOPPED FROM RESCINDING THE POLICY.

The Petitioners last attempt to avoid responsibility for their misrepresentation is their argument that Mr. Pliego knew all the relevant facts and as RLI's agent, the facts that he knew should have been imputed to RLI. The Petitioners contend they should be excused from the obligation of reading the application that was signed and that RLI cannot place responsibility upon the Collados for their failure to do so. Most respectfully, this argument is factually based on a misconstruction of the record and legally based upon case law that has no application to this set of circumstances.

Factually, the Petitioners assert that there is no dispute, that at the time that the August 2, 1989 application was submitted to RLI, Pliego knew of the existence of the household drivers under the age of 26, knew of the presence of the RX-7 in the household, and that at a minimum, RLI should be charged with inquiry notice of the existence of the youthful drivers since it issued the 1988 policy with knowledge of their existence.

With respect to Mr. Pliego's knowledge, one need only review the record to see that the Petitioners' assertions are factually baseless. Neither Mr. nor Mrs. Collado ever discussed their sons living arrangements with Mr. Pliego at the time that the 1989 application was completed. (R. 614, 654) Mr. Pliego himself expressly denied having any recollection whatsoever about Daron Collado's situation in August of 1989 or the status of the vehicles in the Collado household. (R. 862) Thus, to the extent that the facts are undisputed, they are undisputed that the Collados did not inform Mr. Pliego of the living arrangements of the underage drivers, nor did he have any recollection of any independent knowledge of that.

With respect to imputing knowledge to Mr. Pliego by virtue of Daron and his RX-7 having been added to the underlying policy, the facts are undisputed that Daron was not added to the underlying primary policy until almost two weeks after the RLI application had been submitted. (R. 796-797) Moreover, Mrs. Collado admitted that Derrick Collado, the other underage driver in the house, did not have a policy with their underlying carrier, and instead, had his own insurance. Certainly, even if Mr. Pliego were to be considered RLI's agent, RLI could not have imputed to it any greater knowledge then that actually possessed by the agent at the time that the application was submitted.

The Petitioners' next argument is that RLI should be charged with inquiry notice of the existence of the youthful drivers since it had issued the 1988 policy with full knowledge of their

existence. (Initial brief, p. 37) Certainly, the irony of this suggestion cannot be lost even on the Petitioners. The undisputed evidence of record is that RLI's underwriting guidelines changed between 1988 and 1989. Those guidelines became more restrictive and prevented RLI from issuing policies to households with youthful drivers or high performance automobiles. In an effort to obtain that information, RLI asked its insureds, like the Collados, to complete applications upon the renewal of their policies. As is demonstrated by this record, drivers under the age of 26 frequently move from their parents' homes, and likewise, often change the vehicles that they drive. In light of the new underwriting guidelines and the reasonable recognition that an insured's circumstances may have changed from the previous year, RLI requested a new application and certainly had every right to expect that it would obtain accurate information in response. The fact that RLI knew of the state of affairs in 1988 in the Collado household has no relevance whatsoever to RLI's knowledge of the state of affairs in that home in 1989 and does not excuse the misrepresentations.

Finally, the intervenors maintain that RLI conceded Mr. Pliego possessed knowledge of the pertinent facts in the deposition of its corporate representative and its answers to interrogatories. One need only review the pertinent testimony and answers to the interrogatories to see that it could hardly be said that RLI admitted anything. RLI's corporate representative merely testified to what RLI <u>believed</u>. His statement of RLI's belief does not

constitute an admission that Mr. Pliego had actual knowledge of the circumstances at the time the application was submitted to RLI. This is particularly true when Mr. Pliego denied any knowledge and there is no evidence put forth by Petitioners to indicate that the information was conveyed to him. Equally unconvincing is the argument that in some fashion, RLI conceded this issue through its interrogatory answers. RLI was merely asked when it contended that people at the J.R. Insurance Agency first knew that the Collado's household consisted of both the high performance vehicles and the youthful driver. Its answer was that the depositions of the Collados and Pliego revealed that they were aware of the information before the date of the application. RLI was certainly never asked to admit when this knowledge was allegedly acquired by Pliego and it has never done so. If Petitioners' wanted these facts to be admitted, they could have sent an appropriate request for admissions and had it been RLI's intention to admit those assertions, it would have done so. It did not.

Rather then accept the Petitioners' arguments that allow the blame to be placed for these circumstances some place other than where it should be, this Court need only rely on long-standing Florida precedent to resolve this issue against the Petitioners and in favor of RLI. For more than sixty years, the courts of this state have held that a person who affixes his signature to an instrument, such as an application for insurance, is prima facie presumed, and in the absence of proof of fraud, to have intended to authenticate and become bound by the contents of the instrument.

See, New York Life Ins. Co. v. Tedder, 153 So. 145, 113 Fla. 649 (1933). Indeed, the rule applies even if the person who signs the document is illiterate. See Swift v. North American Co. for Life & Health Ins., 677 F. Supp. 1145, 1150 (S.D. Fla. 1987), affirmed, 838 F. 2d 1220 (11th Cir. 1988). This Court has held that no party to a written contract may defend against its enforcement on the sole ground that he signed it without reading it. See, Allied Van Lines, Inc. v. Bratton, 351 So. 2d 344, 347-348 (Fla. 1977). That rule equally applies to insurance contracts. See, Bennett v. Berk, 400 So. 2d 484 (Fla. 3d DCA 1981).

The Petitioners' attempt to avoid this logical rule by arguing that Mr. Collado cannot be charged with negligence by his failure to read the application because it was completed by the agent. Moreover, according to the argument, Mr. Collado did not read the application because of his purported reliance on the professional knowledge of the agent. To support this argument, the Petitioners' rely upon this Court's decisions in Columbia Nat'l Life Ins. Co. v. Lanigan, 19 So. 2d 67 (Fla. 1944), Stix v. Continental Assur. Co., 3 So. 2d 703 (Fla. 1941) and their progeny. While those cases may provide a correct statement of the law in the abstract, the rule of law simply has no application to the facts here. There is no testimony from any witness that the Collados sat down and answered each question truthfully in response to the question being asked by the agent. There is no testimony whatsoever that all the truthful information had ever been provided to the agency or its employees. In fact, the undisputed facts of record are that the agent did not

even complete the entire application. Moreover, Mr. Pliego testified that he would never knowingly put false information in an application for insurance and that he had no idea who had completed the application.

Rather then fall within the parameters of the rule in Stix and Lanigan, even if one accepts the position that Mr. Collado actually signed the application and did so operating under the assumption that it had been completed accurately, RLI is still not estopped to deny coverage. Mr. Collado had no reasonable basis whatsoever to assume that the agent to whom he did not communicate would have actual knowledge of the facts as they existed in the Collado household at the time. Based upon that failure of communication, it would have been incumbent upon Mr. Collado to at least read the application to make sure that it was accurate. The Lanigan and Stix cases have never been interpreted in any reported appellate decision in this state, to impose an obligation on an insurance agent to independently ascertain facts known only to the insured, complete the application, and then exonerate the insured for omissions in the form after the insured has verified its accuracy by signing it. The facts of this case and common sense, certainly do not support creating such a rule of law here.[6] This Court should approve the decision of the Second District.

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[6] In light of Mr. and Mrs. Collado's admissions that they did not discuss the family household arrangement with Mr. Pliego, it would appear that they would at least have a duty of inquiry into the scope of the authority of the agent and, a duty of inquiry into the accuracy of the application under the rule of law announced by the Fifth District in Steele.

IV.

RLI MAY NOT BE LIABLE FOR DAMAGES EXCEEDING ITS POLICY LIMITS IN THE ABSENCE OF A FINDING OF BAD FAITH AS A MATTER OF LAW.

Although not addressed by the Second District, the trial court determined, as a matter of law and in the absence of any finding of bad faith, that RLI was responsible to pay the full amounts of the stipulated judgments, including amounts which exceeded its policy limits. The court accepted the Petitioners' argument that RLI breached its "duty to indemnify" which in turn included a duty to settle and that as a result of the breach of the duty to indemnify, RLI was responsible for all "consequential" damages. Remarkably, the Petitioners identified no specific language in RLI's policy which it violated, and instead, appeared to have relied solely upon the implied covenant of good faith and fail dealing between an insurance company and an insurer to impose this extraordinary liability upon RLI. Florida law is quite clear that whether an insurance carrier has breached the implied covenant of good faith and fair dealing is a question of fact which, could not have been resolved based upon the facts of this record.

The precise standard by which to evaluate a claim for "an excess judgment" against an insurer where coverage is denied was specifically addressed by the Fifth District in Robinson v. State Farm Fire & Cas. Co., 583 So. 2d 1063 (Fla. 5th DCA 1991). There, State Farm denied coverage for injuries caused by its insured while driving a vehicle he had purchased from a local dealership days before the accident. State Farm maintained that while it provided

coverage for another vehicle owned by the insured, it would not provide coverage for the newly acquired vehicle because State Farm did not insure all of the insured's vehicles based upon his ownership of an additional uninsured pickup truck. The insured maintained that the pickup truck was inoperable and therefore, State Farm insured all vehicles such that the newly acquired vehicle became insured under the terms of the policy. State Farm was unable to provide any evidence that the uninsured pickup truck was inoperable. Nevertheless, it denied coverage to the insured and refused to defend him resulting in a default. At trial, State Farm was found to insure the newly acquired vehicle and the jury awarded the injured plaintiff verdicts that when reduced to judgment totaled $120,000.00.

The plaintiff thereafter brought suit to recover the excess judgment above the policy limits based on State Farm's alleged bad faith and failure to investigate the coverage liability and damages issues, its failure to provide the insured a defense and its refusal to settle within the policy limits. State Farm was granted a summary judgment in part on the basis that it had acted in good faith as demonstrated by the trial court's refusal to grant summary judgment on the coverage issue against it in the underlying case. The Fifth District cited to this Court's decision in Boston Old Colony Ins. Co. v. Gutierrez, 386 So. 2d 783 (Fla. 1980) and stated in pertinent part:

> Because the duty of good faith involves diligence and care in the investigation and evaluation of the claim against the insured, negligence is relevant to the question of good

> faith. The question of failure to act in good faith with due regard to the interests of the insured is for the jury.

Id. at 1067.

The Robinson court explained that courts had struggled with the concept of "bad faith" where the insurer wrongfully denied coverage and refused to defend. "Bad faith" was essentially a breach of an implied fiduciary duty that arose from the insurers right to control the defense and settle claims against the insurer. As such, the Robinson court explained that some courts viewed bad faith as an irrelevant concept when the insurer refused to defend and treated such cases as a pure breach of contract. Under such a theory, an excess verdict against the insured is simply an element of damage resulting from the insurer's breach of a duty to defend. Other courts have viewed the insurer's abandonment of the defense of the insured and refusal to settle as the most extreme degree of the breach of the insurer's fiduciary duty. The Robinson court also noted that some courts had found that there was no liability for breach of the duty to settle where the insurer had an arguable, good faith, or fairly debateable coverage defense.

The Robinson court resolved the issue and explained that the correct approach to evaluating a claim for "an excess judgment" against the insurer where coverage is denied is to look at all the circumstances involved in the denial of coverage. Id. at 1068. Factors such as whether the insurer was able to obtain a reservation of the right to deny coverage, efforts or measures taken by the insurer to resolve the dispute promptly or in a way

such as to limit any potential prejudice to the insureds, the substance of the coverage dispute or the weight of legal authority on the coverage issue, the insurers diligence and thoroughness in investing the facts specifically pertinent to coverage and efforts made by the insurer to settle the liability claim in light of the coverage dispute. The Fifth District reversed the summary judgment in favor of State Farm and found that there were sufficient inferences upon which a jury could find, that even considering the coverage dispute, a reasonably prudent person, faced with the prospect of paying the entire judgment, would have not have taken the risk.

In John J. Jerue Truck Broker, Inc. v. Ins. Co. of North America, 646 So. 2d 780 (Fla. 2d DCA 1994), the Second District adopted the Robinson analysis and applied it to a claim brought pursuant to Florida Statute §624.155. The Second District emphasized that in evaluating the claim, the trial court must consider all circumstances involved in the denial of coverage and should include, but not be limited to the factors set forth in Robinson. Where there are disputed issues of fact relating to those circumstances, then the claim must be submitted to a jury for resolution. This Court adopted the analysis of the Jerue and Robinson courts in State Farm Mutual Auto. Ins. Co. v. LaForet, 658 So. 2d 55 (Fla. 1995) wherein it found that for consistency, both first and third party actions should be evaluated by the same standards.

As they argued below, the Petitioners argue that there is no need for a showing of bad faith and instead, pure contract damages are available to them for RLI's refusal to settle the case while the declaratory judgment action was pending. According to the Petitioners, the excess judgments are merely consequential damages of RLI's alleged breach of its duty to "indemnify" and therefore, absent a showing that the settlement was procured by fraud, collusion or bad faith, RLI was required to pay the full amount of the consent judgments. As support for this argument, they rely upon decisions which had addressed the consequences imposed upon an insurer for its wrongful denial of a defense. See, Thomas v. Western World Ins. Co., 343 So. 2d 1298 (Fla. 2d DCA), cert. dismissed, 348 So. 2d 955 (Fla. 1977). See also Caldwell v. Allstate Ins. Co., 453 So. 2d 1187 (Fla. 1st DCA 1984); Florida Farm Bureau Mutual Ins. Co. v. Rice, 353 So. 2d 552 (Fla. 1st DCA 1980), rev. denied, 399 So. 2d 1142 (Fla. 1981); Steil v. Florida Physicians Ins. Reciprocal, 448 So. 2d 589 (Fla. 2d DCA 1984).

With all due respect, reliance on those cases is misplaced. First, it was never alleged that RLI breached any duty of defense to the Collados. The underlying insurer was continuing to defend the case and there is absolutely no evidence in this record that RLI had ever even been called upon to assume that defense, much less that it ever breached that obligation. As such, cases which involve a consequential damage analysis for the breach of the express contractual duty to defend simply do not apply. Moreover,

that approach, as explained above, has been rejected by the Florida court's who have addressed it.

Likewise, RLI did not unilaterally void coverage. It filed the declaratory judgment action pursuant to Florida Statutes §86.011, alleged it was in doubt about its rights and asked the court to determine what those rights were. Filing such an action does not constitute a breach of contract. The purpose of the act is to allow for a determination of rights before an actual violation of the asserted right occurs. See Dept. of Education v. Glasser, 622 So. 2d 1003 (Fla. 2d DCA 1992), quashed on other grounds, 622 So. 2d 944 (Fla. 1993). Issues involving insurance coverage have been held to be properly resolved through the use of a declaratory judgment action. See, e.g., Britamco Underwriters Inc. v. Central Jersey Investments, Inc., 632 So. 2d 138 (Fla. 4th DCA 1994). Simply stated, the filing of the action was not itself a breach of contract.

Moreover, the Petitioners' argument is based upon the fallacious predicate that a breach of the duty of "indemnity" would result in extra contractual damages being available against the insurer. This fallacy is particularly obvious when one analyzes the argument and sees quite clearly that it is based upon the alleged failure to settle, as opposed to the failure to indemnify, which forms the basis for the contention. Even if their was no question of coverage, RLI would only be required to pay damages that the insured was obligated to pay up to its policy limits. Breach of that contractual obligation would not result in a greater

judgment being entered against the Collados. Notwithstanding the title given to it by the Petitioners, what they are really alleging is a breach of the implied covenant of good faith and fair dealing and the associated obligation to settle when under all the circumstances an insurer reasonably should have done so. A determination of that issue is, and has, for the most part, always been a jury issue under Florida law. If this Court determines that the Collados should be excused for their material misrepresentations, that Pliego was RLI's agent and had been provided sufficient information such that it could be imputed to RLI, this Court should still remand for a jury trial on the issue of the extent of the damages required to be paid by RLI.

CONCLUSION

Based on the above and foregoing authorities, this Court should approve the decision of the Second District.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by U.S. Mail to **Lee D. Gunn, IV, Esquire**, Post Office Box 1006, Tampa, Florida 33601-1006; **A. Woodson Isom, Esquire**, 101 S. Franklin Street, Suite 101 Tampa, Florida 33602; **Harold D. Oehler, Esquire**, Post Office Box 1531, Tampa, Florida 33601; **David Hyman, Esquire**, Post Office Box 1801, Riverview, Florida 33569-1801; **Peter J. Brudny, Esquire**, 813 W. Kennedy Blvd., Suite 100, Tampa, Florida 33606; and **John McLaughlin, Esquire**, 708 Jackson Street, Tampa, Florida 33602-5008, on May 2, 2001.

_____
George A. Vaka, Esquire