SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

Appeal No: 89,131

JASON K. ALMERICO, et al.

Petitioners,

Vs.

RLI INSURANCE COMPANY

Respondents.

On Appeal from the Second District Court of Appeal

AMENDED INITIAL BRIEF OF PETITIONERS

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PRELIMINARY STATEMENT

In this brief, the Petitioners, Jason L. Almerico and the Phoenix Insurance Company are referred to as "Almerico and Phoenix" or as "Petitioners" unless specifically referred to the contrary. Respondent, RLI Insurance Company, is referred to by the abbreviated name "RLI" or as the "Respondent". J. R. Pliego and Pliego Insurance, Inc. d/b/a J. R. Insurance are referred to throughout simply as "Pliego" unless otherwise specifically referenced. Citations to the original record on appeal by made by the letter "R." followed by the appropriate page number. Citations to Appendix A are made by the letter "A." followed by the appropriate page number. Citations to Appendix B are made by the letter "B." followed by the appropriate page number. Citations to Appendix C are made by the letter "C." followed by the appropriate page number. Citations to Appendix D are made by the letter "D." followed by the appropriate page number. Citations to Appendix E are made by the letter "E." followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

This dispute arises out of claims against an RLI personal umbrella insurance policy ("PUP") issued to the Collados. RLI asserts that it is entitled to rescind its policy after a covered loss based upon material misrepresentations in the application. Almerico and Phoenix assert that the insurer is estopped from rescission since its producing agent, Pliego, was aware of these material facts when taking the application. Despite supplying Pliego with its blank applications and other program materials and identifying Pliego as an RLI agent and producer on its applications, RLI contends Pliego is not its actual or apparent agent, as a matter of law.

RLI is an insurance company licensed to do business in the State of Florida. (R. 203) RLI marketed the national PUP Program through a network of state administrators and participating local agents (producers). RLI's marketing structure is analogous to a manufacturer/wholesaler/retailer relationship. (R. 222) RLI's PUP Program was outlined by a document entitled:

WHOLESALER
RLI PERSONAL UMBRELLA AGENT ENTRY ADMINISTRATOR
RESPONSIBILITIES/GUIDELINES

(R. 428-430; 1050-1052) According to this document, the administrator is responsible for all communications with "producing agents" regarding customer service, rate revision and guideline changes, application changes, and the mailing of weekly status reports to each individual producing agent. RLI authorized the state administrator to supply the producing agents selected to market the PUP Program with blank RLI applications, underwriting guidelines and other materials used to solicit and effectuate issuance of RLI policies. (R. 225; 243-244) RLI knew that only the producing agent would have contact with the applicant. (R. 255-256)

In 1989, RLI took great steps in drafting a "self-underwriting" application. (R. 213-213) The application format was designed so that eligibility for the PUP Program would be evident on the face of the RLI application. (R. 215) The underwriting unit of RLI reviewed the answers to the questions on the application. (R. 216) If the stated answers were within underwriting guidelines, RLI would issue a policy without further underwriting inquiry. (R. 216) Because PUP underwriting was based upon the self-underwriting application, RLI wanted an insurance

professional familiar with its program to review and countersign the application. (R. 255) In fact, RLI would only accept business from a participating producing agent who countersigned the RLI application. (R. 251; 255; 541) The application contains no express limitation on the authority of Pliego. In fact, RLI admits that it required no such limitation either in the application,or as conveyed by the agent himself. (R. 242)

In 1988, Haynes Brinkley was a Georgia-based brokerage which acted to administer the PUP Program in Florida. (R.436-437) Thereafter, in 1989, Haynes Brinkley became involved in a bankruptcy proceeding and a Florida-based brokerage, Poe and Associates ("Poe"), was substituted as RLI's administrator in Florida. (R. 209-210; 510; 855-856) Poe was expressly authorized to engage producing agents for the PUP Program and to send the blank RLI applications, guidelines, and informational brochures about the PUP Program to the producers. (R. 225; 243-244) RLI assigned a group/range of "agent numbers" to Poe, which Poe then assigned to the producers. (R. 228)

Pliego Insurance, Inc. d/b/a J.R. Insurance Agency is an insurance agency located in Tampa, Florida. (R. 828; 831; 834-835) The agency is operated by J. R. Pliego who holds a general lines agent license. (R. 832; 834-835; 872-873) This license authorizes J. R. Pliego's agency to act on behalf of insurers writing personal and commercial property and casualty insurance in this state. (R. 873) See § 626.311, Florida Statutes (1989). Pliego is an "independent" insurance agent, meaning he was authorized by several different insurance companies to negotiate their insurance contracts. (R. 859)

In order to provide an umbrella insurance line of coverage, Pliego established a relationship with the RLI PUP Program in 1988 through Haynes Brinkley.[1] (R. 855-856) After Poe took over from Haynes Brinkley, Pliego was added to Poe's list of RLI producing agents. (R. 588) By letter dated March 29, 1989, Poe corresponded with Pliego, enclosing blank RLI

1. Prior to 1988, American Mutual offered personal umbrella policies and the Collados maintained both primary and excess coverage with American Mutual. (R. 855-856) In 1988, American Mutual stopped offering excess policies and Pliego needed to establish a new relationship with a carrier so that he could continue to sell this type of policy. (R. 855-856)

applications, and other supplies, including a procedures manual and marketing brochures. (R. 588) The cover letter advised as follows:

> When submitting your first application, please forward it to my attention, and an agent number will be assigned to your agency. This number will be used for identification purposes.
>
> Also, please forward with your first application submission a copy of your resident agent license and we will automatically arrange for licensing.

(R. 588) In due course, Pliego was assigned "RLI Agent Number 2020."[2] (R. 589-590) In order to maintain his status as a member of the RLI family of producing agents, Pliego was expected to produce a minimum of ten (10) policies per year. (R. 588)

J. R. Pliego knew the Collados even before he got into the insurance business. (R. 839) They are relatives of his ex-wife. (R. 838-839) For many years, the Collados purchased their insurance from companies Pliego represented. (R. 665; 670-671; 838-839) In August of 1988, the Collados continued to desire excess coverage above their primary policy with American Mutual Fire Insurance ("American Mutual"). (R. 855) Since American Mutual was not offering an umbrella line of insurance at that time, Pliego placed the coverage with RLI. (R. 847; 855; 602; 687) Accordingly, on July 25, 1988, Pliego completed and signed an RLI PUP application identifying Pliego as the agent of RLI. (R. 602; 687; 847)

The 1988 RLI application indicated two household drivers under the age of 26, sons Daron and Derrick Collado, and four vehicles. (R. 620-621; 847; 887-888; 895) An RLI PUP policy in the amount of one million dollars ($1,000,000.00) with a policy period from August 6, 1988 to August 6, 1989 was issued to the Collados on the basis of that application. (R. 439-444) Enclosed with the RLI policy, RLI sent a letter to its new insureds thanking them for their business. (R. 444) The letter assured the Collados that they would have umbrella coverage in the event of a lawsuit. Specifically, the letter stated:

> This coverage provides $1,000,000 of personal liability protection over and above the basic policy limits described in your application. That's coverage for you and your dependents, anywhere in the

2. Pliego forwarded his first RLI application to Poe along with a copy of his license in early April, 1989. (R. 587)

> world, 365 days a year. You'll rest more easily with the knowledge that a personal liability lawsuit involving a covered injury to another person or damage to someone else's property will not take away the savings and property you've earned over the years.
>
> * * *
>
> Be confident in the knowledge that you have RLI's Personal Umbrella insurance for a time when you need it most.

(R. 444)

The 1989 underwriting guidelines restricted eligibility for the PUP Program. (R. 432) RLI was experiencing its greatest exposures in circumstances of "youthful" drivers (under the age of 26) and "high performance" vehicles (e.g., an RX-7). (R. 432) Thus, the 1989 guidelines rendered households with both youthful drivers and high performance automobiles ineligible for the PUP Program. (R. 432)

Once again, the Collados wished to maintain an umbrella policy to protect them from excess exposures. In August of 1989, a representative of Pliego filled out the 1989 RLI PUP application and presented it to Donald Collado to sign. (R. 779-780; 844; 857) The 1989 application did not disclose any youthful operators or high performance automobiles in the household. (R. 363-365) Relying on Pliego's superior knowledge and experience in the field of insurance, Donald Collado signed the application without first having read it. (R. 608-609) Pliego then signed the application in the space reserved for the "Producer." (R. 365; 782) Pliego's RLI Agent Number, 2020, was also placed in a box at the top of the application designated for such information. (R. 363) Pliego forwarded the signed application and policy premium payment to Poe, net of Pliego's commission. (R. 786) Based upon the application and in accordance with its established procedures, RLI issued personal umbrella liability policy number PUP 103155, to the Collados for the policy period beginning in August 1989. The policy specifically provided in Part III:

> We will pay on behalf of anyone covered by this policy:
>
> I. Excess insurance over and above the amount provided for in basic policies, or
>
> ***

> V. Finally, if covered under this policy we will pay, up to the limit of coverage shown in the Declarations, the amount you or a relative are, or would be obligated to pay if at fault or held to be at fault at Court. We will then be entitled to any recovery or salvage.

(R. 1170)

In August of 1989, Pliego also renewed the Collado's primary policy with American Mutual. (R. 870) The 1989 American Mutual Declarations Sheet providing primary coverage effective the same date as the RLI policy, lists the Collados and their 18 year old son, Daron Collado, as resident drivers and a Honda, a Cadillac and an RX-7 as scheduled automobiles. (R. 694)

In the deposition of its corporate representative[3] RLI concedes that Pliego knew of the facts necessary to have accurately completed the 1989 RLI application and reveal that the Collados would no longer meet the PUP Program underwriting guidelines:

P96/L5:

> Q. Does RLI agree that J.R. Insurance Agency, through the application for the primary policy or otherwise, was aware of the fact that Daron Collado was a household driver under the age of 26 and was aware of the fact that at least one high performance vehicle, as defined by RLI, and that car being an RX-7?
>
> A. I think that J.R. Insurance Agency was aware of that. I believe they were aware of that.
>
> Q. And RLI believes that J.R. Insurance Agency was aware of those facts prior to August of 1989 when the application was completed?
>
> A. Yes.

(R. 278) Moreover, RLI states in its executed answers to interrogatories dated February 1, 1993:

> Q. When does RLI contend that J.R. Insurance Agency, through any of its employees, or agents (including J.R. Pliego) first knew that the Collados' household consisted of both a "high performance vehicle" (a Mazda RX-7) and a "youthful" driver (person under the age of 26).
>
> A. The depositions of the Collados and J.R. Pliego revealed that they had a close personal relationship and Mr. Pliego was well aware of this information before the date of the application.

(R. 924)

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3. A corporate representative testifies on behalf of a corporate entity. Fla. R. Civ. P. 1.310(b)(6).

On February 4, 1990, Daron Collado, while permissively driving the Honda, lost control of the car, crossing into oncoming traffic and flipping over. Passenger Stephen Buckles was killed and passengers James Harbin and Jason Almerico were seriously injured. (R. 1-5)

Almerico prosecuted claims against Daron Collado, Donald Collado and Grace Collado. American Mutual accepted the defense and promptly tendered its $250,000 limits to Almerico in exchange for a release in favor of its insureds. (R. 1132-1133) Despite numerous demands and offers to settle for its policy limits, RLI refused to involve itself in settlement of Almerico and Phoenix's excess claims against the Collados. (R. 1132-33; 1143; 1136-37; 1265-66; 1267-69) On July 18, 1991, a demand was made on behalf of Almerico and Phoenix for a tender of RLI's policy limits in exchange for a release. (R. 1132-1133) It is undisputed that RLI received this demand and responded by stating that, "RLI continues to deny that there is coverage available under the umbrella policy in question." (R. 1135-1137; 1265) RLI was advised of the further opportunity to settle the entirety[4] of the claims against the Collados for RLI's $1 million policy limits. (R. 1267 - 1271) RLI similarly refused to recognize any contractual obligation to settle the claims. (R. 1268)

In the absence of RLI coverage, the Collados were financially unable to accept the settlement offer. (R. 1268) Upon RLI's refusal to settle the personal injury claims against the Collados, they entered into a stipulation for judgment and assignment of rights with Almerico and Phoenix as the only possible means of limiting their personal exposure.[5] (R. 1267-1271) A stipulated judgment was entered by the court having jurisdiction over Almerico and Phoenix's claims in the amount of one million, five hundred thousand dollars ($1,500,000.00) on March 18, 1992. (R. 118; 1140; 1142-1143) It is undisputed that the stipulated judgment and assignment

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4. The opportunity to settle then included claims for the injuries and damages of Almerico, Phoenix, Stephen Buckles, James Harbin, Prudential Ins. Co. of America (Harbin's subrogated health insurer) and Fernando Fernandez (driver of the oncoming vehicle Daron Collado crossed over and struck).

5. On March 9, 1992, the Collados assigned their rights against RLI to James B. Harbin, Prudential Insurance Company of America, Fernando Fernandez, Jason Almerico and Travelers Insurance Company (Phoenix). (R. 119-120) As part of the agreement, Almerico, Travelers Insurance Company and the Collados stipulated to a judgment in the amount of $1,500,000.00, to bear interest at the rate of 12% per year.

of rights are the product of good faith negotiations and represent a reasonable value for the catastrophic injuries sustained by Jason Almerico. (R. 1148-1149)[6]

Procedurally, the instant case was commenced as a declaratory judgment action brought by RLI against the Collados and American Mutual seeking a declaration of rescission.[7] (R. 1-72) RLI asserts that it did not have knowledge of facts material to its acceptance of the Collados risks. RLI has affirmed that the only basis for the denial of coverage and attempted rescission is the existence of a driver under the age of 26, together with an RX-7 in the household. (R. 465) In the absence of recision on this ground, RLI concedes the February 4, 1990, accident would be covered under the Collado's policy. (R. 465)

As judgment creditors of the Collados, and as the express assignees of the named insureds, Almerico and Phoenix intervened in this action to protect their pecuniary interests. (R. 79-82; 84-87; 126)[8] Almerico and Phoenix answered the RLI complaint and raised as an affirmative defense that RLI was estopped from rescinding the policy because its application was completed by RLI's agent with full knowledge of the facts asserted by RLI to have been omitted. (R. 100-101) Almerico and Phoenix also counterclaimed against RLI for declaratory judgment, breach of contract, bad faith and vicarious liability for the negligence of Pliego.

Count I of the counterclaim seeks a declaratory judgment affirming the policy and its coverage for the Collados' legal liability for Almerico and Phoenix's damages. It alleges that the application was completed by RLI's actual and/or apparent agent, and that the Collados relied upon Pliego's superior knowledge and skill in completing the application and did not read it prior to signing it. (R. 103-104) It further alleged that the omitted facts were known to the agent at

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6. Upon entry of the Final Judgment American Mutual paid $250,000.00 in exchange for partial satisfaction.

7. American Mutual was dismissed as a party by RLI and is not a party to this appeal.

8. The settlement and trust agreement between Almerico and Phoenix provides that Almerico agreed that Travelers (Phoenix) as his uninsured motorist carrier was entitled to subrogate for recovery of its limits ($600,000.00). (R. 111) An addendum to the agreement was executed on May 7, 1992, again, granting Almerico sole rights to any moneys paid under the American Mutual policy, and Travelers (Phoenix) the exclusive right to the next $600,000.00, plus 12% interest and the cost of prosecution as well as attorney's fees. (R. 114-117) Thereafter, any additional recovery was to go to Almerico.

the time he prepared the RLI application, such that RLI had actual or constructive knowledge of the facts necessary to complete the application and was, therefore, estopped from rescinding the policy. (R. 104)

Count II asserts breach of contract. It alleges that the policy imposes a duty upon RLI to make its liability limits available to protect the Collados from damages in excess of the underlying coverage. (R. 105) Count II states that RLI breached its contractual duties by rejecting the Collados' demand that it tender its policy limit to effectuate the releases prior to the entry of any judgment against the Collados. (R. 105) As a direct and proximate result of the breach, a judgment was entered against the Collados which has not been satisfied except to the extent of the partial satisfaction reflecting the primary carrier's limit of $250,000.00. (R. 105)

Count III asserts bad faith refusal to afford coverage and settle the claim. (R. 106-107) Count IV alleges vicarious liability for Pliego's negligence in failing to procure the requested umbrella coverage. (R. 108-109) Only the declaratory judgment and breach of contract counts are at issue before this Court.

RLI generally denied the material allegations and raised, among others, the defense that Pliego was not its agent and, therefore, had no authority to act on behalf of RLI. (R. 130-133)

Phoenix and Almerico sought partial summary judgment, maintaining that RLI was estopped from rescinding the policy. (R. 139-142) They argued that Pliego was both a statutory agent of RLI pursuant to Florida Statute, § 627.342 and a common-law agent of RLI. (R. 139-142) They further maintained that the application was completed and countersigned by employees of Pliego, who, for at least two years, had been acting as an agent/producer for RLI in completing applications and administering the issuance of RLI personal umbrella policies as part of a network of Florida insurance agents administered by Poe on behalf of RLI. (R. 140) Accordingly, they asserted, any errors or omissions of material facts within Pliego's knowledge were attributable to RLI.

Almerico and Phoenix further asserted that, although the application submitted to RLI did not reflect the existence of youthful drivers as residents of the Collado household, nor did it reflect an RX-7 automobile, those facts were within the knowledge of Pliego, who knew the

family and also produced the primary policy. (R. 140) The named insured, Donald Collado, did not complete the application and did not read it. Instead, the Collados relied upon Pliego who had been provided with all requested and otherwise necessary information to complete the application. (R. 140-141) Almerico and Phoenix 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 could rely upon the agent's superior skill and knowledge in filling out the application. Thus, Almerico and Phoenix claimed entitlement to a partial summary judgment on the issue of RLI's liability for the coverage afforded under the policy. (R. 141-142)

RLI also moved for summary judgment, claiming that the application failed to list all material facts, specifically the existence of youthful drivers and high performance automobiles in the household. (R. 959) RLI also maintained that the evidence showed that Pliego was not its statutory or common-law agent, but, instead, was acting on behalf of the Collados. RLI claimed its only agent was Poe, who processed the application and forwarded it to RLI. (R. 958-959) RLI maintained that Pliego was a "brokering agent" for Poe & Associates, and had no binding authority regarding RLI insurance policies. (R. 958-959)

Memoranda of law in support of the opposing motions were filed by the parties. (R. 963-990; 991-1067)

By order dated January 14, 1994, the trial court entered a "partial summary judgment." (R 1099-1100) The trial court granted RLI's motion in part, finding that the misrepresentations in the application were material and the policy would not have been issued had the true facts been known to RLI. The court also granted partial summary judgment in favor of Almerico and Phoenix, specifically finding that Pliego was RLI's statutory agent pursuant to § 626.342, Florida Statute (1989), thus estopping RLI from rescinding the policy due to the application omissions. (R. 1100) Finding issues of fact, the trial court denied the cross motions on common law agency. (R. 1099) RLI's motion for rehearing, (R. 1101-1108), was denied. (R. 1119-1120) The trial court specifically determined on rehearing that the 1990 amendments to the insurance code merely clarified the distinction between "licensed" and "appointed" agents and that Pliego had knowledge of the material facts upon which RLI based its right to rescission. (R. 1119)

Almerico and Phoenix then moved for summary judgment based upon RLI's breach of the insurance contract, seeking recovery of the full amount of the unsatisfied judgment. (R. 1127-1131) RLI denied breaching its contract, claiming that the policy was void due to material misrepresentations and, further, that RLI had never been provided an opportunity to settle all claims for its policy limits. (R. 1190) RLI further objected to imposition of liability beyond the policy limits. (R. 1189-1192)

By order dated August 7, 1994, the trial court granted in part and denied in part the second motion for summary judgment of Almerico and Phoenix. The court reiterated that RLI was precluded from rescinding the policy. (R. 1247) The court further found that the policy afforded insurance for the February 4, 1990 accident, that the policy insured the Collados for damages exceeding the underlying coverage provided by American Mutual, and that the final judgment entered in favor of Almerico and Phoenix against the Collados was reasonable in amount and not tainted by bad faith, fraud or collusion. (R. 1247-1248)[9] The court then concluded that there was an unresolved issue of fact as to whether RLI breached its contractual duty to settle the aggregated claims. However, the court found that, in the event that RLI was determined to have breached the duty to indemnify its insureds by not timely making available the policy limits, 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 supplemented the record and again moved for summary judgment in November of 1994 (R. 1251-1266) asserting that offers to settle the claims against the Collados for RLI'S policy limits of $1,000,000.00 had been communicated to RLI in August of 1991. (R. 1253) In the absence of RLI's policy limits, the Collados were unable to accept the offers, and, as a result, did not have a viable basis for responding to the settlement offers. (R. 1253) RLI knew that Almerico and Phoenix had made a policy limits demand, yet refused to accept it. (R. 1254; 1263-1266) The Collados, of necessity, entered into judgments and assignments of their

9. The court reached the same conclusion regarding the judgments entered in favor of Prudential and Harbin against the Collados. (R. 1248)

rights in return for an agreement not to enforce the judgments against them. (R. 1254) Finally, as a "direct result of said breach," 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 summary judgment in favor of Almerico and Phoenix Insurance Company. (R. 1303-1306) The court determined that RLI was responsible to pay the unsatisfied amount of the stipulated judgment as a result of the breach of its contractual duty to settle the claims.[10]

On appeal, the Second District reversed the final summary judgment in favor of Almerico and Phoenix, holding that § 626.342, Florida Statutes (1989) did not render Pliego the statutory agent of RLI. The Second District determined that, as a matter of law, Pliego was the Collados' agent and that the Collados, having signed the application, were deemed to have had knowledge of any errors or omissions contained therein. Thus, the Second District directed that the trial court enter final summary judgment in favor of RLI. (A.1-5)

Almerico and Phoenix timely appealed the decision of the Second District as expressly and directly conflicting with other decisions of the District Courts and this Court on the same questions of law. This Court accepted jurisdiction pursuant to article V, section 3(b)(3) of the Florida Constitution and ordered briefing on the merits. (B.1)

10. As the cause of action pursuant to which judgment was entered was traditional breach of contract, the court made no findings, nor was any evidence presented concerning any bad-faith refusal to settle by RLI. (R. 1304-1306) The bad-faith count had previously been stayed by the trial court. (R. 1096-1098; 1118)

ISSUES ON APPEAL

I. WHETHER § 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 IS THE COMMON LAW ACTUAL AND/OR APPARENT AGENT OF RLI, AS A MATTER OF LAW.

A. WHETHER, AT A MINIMUM, GENUINE ISSUES OF MATERIAL FACT EXIST PRECLUDING SUMMARY JUDGMENT ON THE QUESTIONS OF COMMON LAW AGENCY.

III. WHETHER RLI ACTING UNDER A GOOD FAITH, BUT MISTAKEN, BELIEF THAT IT HAD NO COVERAGE, IS LIABLE FOR THE DAMAGES CAUSED ITS INSURED BY ITS BREACH OF ITS CONTRACT OF INSURANCE.

SUMMARY OF ARGUMENT

Pliego was acting as a statutory agent of RLI when it filled out and signed the 1989 PUP application supplied by RLI. The plain and ordinary meaning of § 626.342, Florida Statutes (1989) imposes civil agency liability upon an insurer who supplies an agent with applications and other underwriting materials and thereafter accepts business from that agent. Unlike the Second District below, the First District properly construed the statute as precluding rescission based upon facts known to the supplied agent from whom the insurer accepted the business. Moreover, the Florida insurance code and the legislative history of this statute along with longstanding Florida public policy support imposition of civil liability on RLI in this case.

Additionally, Pliego was the agent of RLI under traditional common law notions. RLI established a network of insurance subagents within the State of Florida with Poe acting as the administrator. Pursuant to this agency network and wholesale/retail structure, RLI authorized Poe to appoint subagents to prepare, review and countersign RLI's self-underwriting applications. Pliego, like other subagents, was issued an RLI agent number which was affixed on the 1989 RLI application. Additionally, Pliego signed the 1988 RLI application in the space reserved for RLI's agent and the 1989 RLI application in the space reserved for RLI's producer. The purpose of having the RLI producer fill out the RLI application, review, and sign it was to ensure that RLI's self-underwriting application process maintained its integrity. Thus, Pliego's actions in filling out the application and submitting it to RLI were performed on behalf of RLI, not the Collados. Moreover, in addition to establishing actual agency, the multitude of indicia of agency provided to Pliego by RLI and relied upon by the Collados created an apparent agency. The facts of record, therefore, support summary judgment in favor of Almerico and Phoenix on the common law agency issues. At a minimum, these facts create genuine issues of material fact precluding summary judgment in favor of RLI.

Since Pliego was RLI's agent, RLI is charged with knowledge in the possession of Pliego at the time of the 1989 RLI application. As it is undisputed that Pliego possessed the information omitted from the application upon which RLI bases its claim for rescission. RLI is, thus, estopped from rescinding the PUP policy.

Having failed to provide coverage where it was contractually obligated to do so, RLI became liable for full breach of contract damages suffered by the Collados. An insurer which denies coverage does so at its own risk. This is true even where such denials were in mistaken, but honest, believe that coverage did not exist. An insurer whose contracts are, by their very nature, adhesive, should be held to at least the same standard of damages applicable to other contracting parties. Thus, as a breaching party to an insurance contract, RLI is liable for the reasonably foreseeable damages resulting from its breach.

In the present case, those damages are in the amount of the stipulated judgment entered into by the Collados and Jason Almerico as a direct result of RLI's failure and refusal to acknowledge its contractual obligations. It is undisputed that the stipulated judgment is reasonable in amount and not tainted by bad faith or fraud. Thus, RLI owes full breach of contract damages in this amount, less the amount of the partial satisfaction by American Mutual.

Finally, the amended final summary judgment entered by the trial court recites post judgment interest accruing at the rate of 12%. By operation of law, this interest rate is reduced to 8% effective January 1, 1995. If necessary, Almerico and Phoenix agree and stipulate to this reduction in accrual of interest.

Accordingly, the opinion of the Second District Court of Appeal should be quashed.

ARGUMENT

I. 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.

Pliego was acting as a statutory agent of RLI when it filled out and signed the 1989 PUP application supplied by RLI.

A. The Plain and Ordinary Meaning of Section 626.342 imposes civil agency liability.

It is well settled that, when construing a statute, courts must apply the plain and ordinary meaning of the statutory language. *Green v. State*, 604 So. 2d 471 (Fla. 1992); *Newberger v. State*, 641 So. 2d 419 (Fla. 2d DCA 1994). Section 626.342, Florida Statutes (1989), formerly § 626.746, states:

> **626.342 Furnishing Supplies to Unlicensed Life, Health or General Lines Agent Prohibited; Civil Liability and Penalty**
>
> (1) No insurer, general agent, or agent, directly or through any representative, shall furnish to any agent blank forms, applications, stationary or other supplies to be used in soliciting, negotiating, or effecting contracts of insurance on its behalf unless such blank forms, applications, stationary, or other supplies relate to a class of business with respect to which such agent is a licensed agent whether for that insurer or for another insurer.
>
> (2) Any insurer, general agent, or agent who furnishes any of the supplies specified in subsection (1) to any agent or prospective agent not licensed to represent the insurer and who accepts from or writes any insurance business for such agent or agency shall be subject to civil liability 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. The provisions of this subsection do not apply to insurance risk apportionment plans under section 627.351.
>
> (3) This section does not apply to the placing of surplus lines business under the provisions of s.s. 626.913-626.937.

§ 626.342, Florida Statutes (1989)(Emphasis added).

When subsection two of § 626.342 is read in conjunction with subsection one, a critical distinction is evident. Subsection one prohibits insurers from supplying materials to agents who

are not licensed by the state and licensed by some insurer to write that "class of business".[11] Subsection two permits insurers to supply agents who are licensed to write that class of business and licensed by some other insurer, but imposes civil (agency) liability upon the supplier for the conduct of the agent with regard to the supplying insurer's business. Thus, the plain and ordinary meaning of the statute reveals that § 626.342(2) prevents insurers from "setting up" (providing blank forms, applications, stationary or other supplies) any agent and accepting business from such agents without also accepting civil liability for such agent's conduct.

Prior to the instant case, only two reported decisions interpreted the statute or its immediate predecessor. Both interpreted the statute to impose an agency relationship when a carrier supplies underwriting materials to an agent licensed to write the involved class of business but not licensed (appointed) by the carrier accepting business from the agent. *Gaskins v. General Insurance Co. of Florida,* 397 So. 2d 729 (Fla. 1st DCA 1981) *reh'g den.*; *Brown v. Inter-Ocean Insurance Company,* 438 F.Supp. 951 (N.D. Ga. 1977).

In *Gaskins*, the First District Court of Appeal, applying § 626.746, renumbered as § 626.342[12], held that provision of applications and other such materials created an agency relationship wherein the producing agent had authority to "explain the application form, obtain information, and complete the application on behalf of the company. . ." *Gaskins,* 397 So. 2d at 732. As in the case at bar, the *Gaskins* insurer attempted to rescind an auto policy based upon the insureds' failure to list their son on the policy application as a resident driver. At the time of the application, the son resided in the parents' home but operated his own vehicle and had his own insurance. *Id.* at 730 The parents provided this information to the agent who interpreted the application not to require this information. *Id.* Subsequent to execution of the application, the Gaskins moved to a new residence, but their son did not. *Id.* Just weeks prior to the accident

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11. "Class of business" refers to the concept that different types of insurance coverage are sold which require different methodologies and underwriting principles. Examples include General Lines, Life and Disability insurance. The legislature has enacted separate licensing procedures for agents in each class. *See* § 626.011, *et seq.*, Florida Statutes (1989).

12. *See* statutory history, *infra*, at p. 27-30.

giving rise to the attempted recision, the son once again became a resident of their household. *Id.* He was operating the scheduled auto with his parent's permission when the accident occurred. *Id.* Reversing a summary judgment entered in favor of the insurance company, the *Gaskins* court found that the literal language of the statute mandated a finding of civil agency liability where the insurer provided applications to and thereafter accepted business from the agent. *Gaskins*, 397 So. 2d at 731-32.[13]

As did the *Gaskins* insurer, RLI furnished applications and other supplies to Pliego through its PUP administrator, Poe, and then accepted business from Pliego. The purpose of RLI's wholesaling structure was to have local producers gather and verify applications so as to protect the integrity of RLI's self-underwriting system. Pursuant to § 626.342, Pliego was a statutory agent for the purpose of obtaining the necessary information and completing the application on behalf of RLI and RLI is civilly liable for any acts of Pliego within the scope of this agency.

In *Brown*, *supra*, the Georgia federal court, applying Florida law, also determined the plain meaning of then § 626.746 imposed civil liability upon the supplying carrier accepting business from the agent. Jennings Brown completed an application for life and accidental death insurance coverage in Gainesville, Florida on May 20, 1975. *Brown,* 438 F.Supp. at 952 At that time, he paid $360.00 to the insurance agent and received a receipt indicating that the policy was bound effective that date. *Id.* On May 29, 1975, Jennings Brown was killed in a plane crash in Tennessee. *Id.* His ex-wife and children, as named beneficiaries under the policy, demanded payment. *Id.* Inter-Ocean refused payment, stating that its underwriting procedures had not been completed at the time of death so that the policy had not yet been issued. *Id.* at 952-953. The beneficiaries argued that Inter-Ocean was bound by the representations of policy binder made by the agent. *Id.* at 953.

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13. The *Gaskins* court expressly rejected the common law agency analysis set forth in *Auto Owners Insurance Company v. Yates*, 368 So. 2d 634 (Fla. 2d DCA 1979), which did not consider this statute, as being the sole basis for analyzing the existence of an agency relationship with the insurer.

Applying the literal language of the statute, the *Brown* court found the agent to be Inter-Ocean's agent because Inter-Ocean had supplied application forms and accepted business from him. However, the court further found that the scope of agency was expressly limited by the language of the application which stated that the agent had no right to make, alter, modify, or discharge any contract issued on the basis of the application. *Id.* at 954. The *Brown* court concluded that the agent had a limited scope of authority and that the application language placed the applicant on inquiry notice of this fact. Thus, but for the express limitation, the insurance company would have been bound by the agent's representation. In the case *sub judice*, the application contains no express limitation on the authority of Pliego. In fact, RLI admits that it required no such limitation either in the application or as conveyed by the agent himself. (R. 242) Thus, the statute imposes civil agency liability.

The opinion of the Second District Court of Appeal below wholly ignored the existence of *Gaskins*, failing even to attempt to distinguish it. Instead, the Second District superficially analyzed the title to the statute and concluded its purpose was simply to prohibit furnishing indicia of agency to persons not licensed by the state to write that specific class of business. *RLI Insurance Company v. Collado*, 678 So. 2d 1313, 1316 (Fla. 2d DCA 1996). Thus, concluded the Second District, since Pliego was properly licensed to sell the class of insurance in question, and RLI was authorized to furnish Pliego with applications pursuant to the Exchange of Business statute § 626.752, statutory agency was not established. *Id.* at 1316-1317. This cursory analysis misconstrues the plain and ordinary meaning of both § 6126.752 and § 626.342(2), as well as the entire scheme of Florida's insurance code, Chapter 626.

First, the Second District misconstrued the plain meaning of § 626.342, and ignored the fact that it is bound to apply such plain language without resort to judicial construction or interpretation. *Starr Tyme, Inc. v Cohen,* 659 So. 2d 1064 (Fla. 1995)(when the language of a statute is unambiguous and conveys a clear and ordinary meaning, there is no need to resort to other rules of statutory construction; the plain language of the statute must be given effect) *citing Polakoff Bail Bonds v. Orange County,* 634 So. 2d 1083, 1084 (Fla. 1994); *Streeter v. Sullivan,*

509 So. 2d 268, 271 (Fla. 1987); *Holly v. Auld,* 450 So. 2d 217, 219 (Fla. 1984). The plain meaning of § 626.342 dictates that Pliego was RLI's agent for purposes of taking the application, since RLI provided Pliego with the type of documents enumerated within the statute and thereafter accepted business from Pliego.

Second, even if the statute were ambiguous, thus, permitting the inquiry into the legislative intent, the Second District's analysis is flawed. The Second District determined the legislative intent by examining the title of the statute.[14] The Second District interpreted the title's reference to unlicensed agents as soley referring to agents unlicensed by the state with respect to a class of business. Remarkably, the court failed to acknowledge that in 1989 agents, licensed by the state for a class of business were then "licensed" by an insurer to represent it.[15]

Therefore, the term "unlicensed" in the title of the statute could refer to unlicensed by the state or unlicensed by an insurer to represent it. The title in no measure supports the limited application afforded the statute by the Second District. The court's conclusion, therefore, are ill-founded. Rather, the title and text make it plain that RLI could not supply the agent it had not licensed to represent it with underwriting materials and thereafter accept business without also accepting agency liability.[16]

Equally misplaced is the Second District's acceptance of RLI's argument that Almerico and Phoenix's statutory analysis is inconsistent with the Exchange of Business statute, § 626.752, Florida Statutes (1989). Contrary to RLI's position, neither of the cases which have previously construed § 626.342, *Gaskins*, *supra*, and *Brown*, *supra*, deals with a crossover in classes of

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14. The significance given to the title of a statute in determining its meaning and application is limited in any event. *Carter v. Government Employees Ins. Co.,* 377 So. 2d 242 (Fla. 1st DCA 1979)(the language of the title is not binding as to the meaning and application of the act.

15. This dual use of the word "unlicensed" as utilized in the 1989 version of § 626.342, Florida Statutes, is supported by Poe's documentation to Pliego. When Pliego first became associated with RLI "PUP" Program, Poe requested that Pliego provide a copy of his state licensing certificate and Poe would, thereafter, automatically take care of "licensing" with RLI.

16. Florida Statute § 626.141 (1989) assures the vitality of otherwise valid insurance contracts procured through an unlicensed agent. The current version of this statute, consistent with the current distinction between licensed and appointed, assures vitality despite procurement by an unlicensed or unappointed agent. § 626.142, Florida Statutes (1995).

business. Moreover, the language of this statute is wholly consistent with Almerico and Phoenix's position.

The Exchange of Business statute provides that an agent who is not licensed to represent a specific insurer may place business with that insurer when such business is excess or rejected business or when it is in the best interest of the insured to do so. Section 626.752 thereafter provides that:

> An insurer may furnish to resident Florida general lines agents who are not licensed by such insurer its forms, coverage documents, binders, applications, and other incidental supplies only for the purpose set forth in this section and only to the extent necessary to facilitate writing of Exchange of Business pursuant to this section . . .

Section 626.752(3)(a), Florida Statutes (1989). Although permitting the writing of business through licensed general lines agents not licensed to represent the insurer, § 626.752 further clarifies that:

> **No provision of this section shall be construed to limit the rights of any person afforded under § 626.342.**

Section 626.752(3)(i), Florida Statutes (1989)(Emphasis supplied).

Reading the two statutes, §§ 626.342 and 626.752, together, it becomes abundantly clear that the trial court correctly construed the statutory provisions. Section 626.342(1) prohibits providing an agent with underwriting materials outside the specific class of business for which he or she is licensed. Section 626.752 permits an insurer to provide underwriting materials to agents for the specified purposes but only within the agents' authorized class of business. Section 626.342(2) then imposes civil agency liability when such materials are provided and business is thereafter accepted by the insurer. Importantly, § 626.752(3)(i) expressly preserves the remedies set forth in § 626.342, including civil liability. If RLI's analysis of the purposes and intent behind the two statutes were correct (i.e. that § 626.342 deals only with situations involving a crossover in class of insurance) then there would have been no need to include the savings clause found at § 626.752(3)(i).

The Third District Court of Appeal in *Gonzalez v. Great Oaks Casualty Insurance*

Company, 574 So. 2d 1182 (Fla. 3d DCA 1991), has implicitly approved this analysis. In *Gonzalez,* the agent was not a state licensed agent for Great Oaks. He was, however, a licensed agent for several other insurance companies. The agent procured an insurance policy for Gonzalez under the Exchange of Business statute, § 626.752, Florida Statutes (1985). Great Oaks thereafter sought to decline responsibility for application errors and omissions by the agent. The *Gonzalez* court, imposing agency responsibility, explained that:

> For purposes of the statute, Great Oaks had expressly authorized Real [the agent] to bind coverage. Great Oaks had provided Real with the necessary manual, instructions, and forms to accomplish that. Pursuant to the authority granted by Great Oaks, Real bound coverage for Gonzalez on behalf of Great Oaks on two occasions.
>
> Plainly, Great Oaks had conferred actual authority on Real to act on its behalf in binding insurance coverage. In so doing, Real acted as agent for Great Oaks. *See, e.g., Gaskins v. General Ins. Co.,* 397 So. 2d 729, 732 (Fla. 1st DCA 1981); *Russell v. Eckert,* 195 So. 2d 617, 620-22 (Fla. 2d DCA 1967); *Hughes v. Pierce,* 141 So. 2d 280, 282-84 (Fla. 1st DCA 1961).

Id. at 1184. Thus, the *Gonzalez,* court quoting *Gaskins*, found Real to have been the agent of Great Oaks and imposed on Great Oaks liability for application errors and omissions by the agent during the application process. The *Gonzalez* court, again quoting *Gaskins*, specifically determined that non-disclosure of Gonzalez' daughter as an automobile driver did not render the policy void pursuant to § 627.409, Florida Statutes (1985) since "facts within knowledge of an authorized representative of the insurer while acting within the proper scope of his authority is knowledge of the insurance company." *Id.* at 1185. Accordingly, while the *Gonzalez* court does not specifically cite § 626.342, in its analysis, by relying heavily upon the *Gaskins* opinion, *Gonzalez* implicitly interpreted § 626.342 to be applicable in the context of the Exchange of Business statute.

The Second District misapplied the "Exchange of Business" statute to this case. RLI never contended that the policy was issued pursuant to an Exchange of Business; they merely contended that the Exchange of Business statute would be nullified by Almerico's interpretation of section 626.342. In light of the savings clause contained within the Exchange of Business statute, as discussed above, RLI's contention is clearly incorrect.

Moreover, even if the Exchange of Business statute applied in this case, the record establishes that RLI violated at least three provisions of that statute.[17] RLI violated subsections (3)(b), (c), and (d) of § 626.752 and may also have violated subsections (3)(a), (e), (f), and (i). Section 626.752(3)(a), Florida Statutes (1989) requires that the insurer assign a unique brokering agent's register number. Subsection (3)(b) requires each compliant application to contain the following statement: "**BROKERING AGENT'S REGISTER NO._____**". Subsection (3)(c) requires the following statement prior to the applications signature: "I understand this application is not a binder unless indicated as such on this form by the brokering agent." Subsection (3)(d) required the following statement in the application prior to the brokering agent's signature:

> This application is in compliance with Section 626.752, Florida Statutes, and is submitted in the best interest on the applicant or insured to whom a copy has been furnished and coverage is: [ ] Bound effective __(time)__ __(date)__; [ ] Not bound.

A glance at the 1989 application conclusively establishes that the requirements of § 626.752 were not met.

B. Statutory Liability Is Consistent With Long Standing Florida Public Policy.

Longstanding Florida public policy estops an insurance company from denying agency liability for application errors and omissions by persons to whom agency status has been expressly granted or statutorily imposed. This principal was first established in the venerable supreme court case of *Queen Insurance Co. v. Patterson Drug Company,* 74 So. 807 (Fla. 1917).[18]

In *Queen*, the Florida Supreme Court found that:

> Where a duly authorized agent of an insurance company places insurance with the assistance of another whom he employs to solicit the same and who delivers the policy, collects the premium, and does all things which the agent himself might do, and to whom he gives the powers and authority of a subagent with whom the

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17. Pertinent provisions of § 626.752, Florida Statutes (1989) are attached hereto as Appendix C.

18. The *Queen* case is based on two statutes imposing agency liability in much the same fashion as the statute currently before this Court. The first of these statutes is reproduced for the Court in Appendix D.1. The *Queen* Court concluded that these statutes were but the legislative expression of the law as laid down in well reasoned authorities. *Queen*, 74 So. 2d at 811.

> insured deals in all matters connected with the application for the policy, and its receipt, and to whom he pays the premium, even if he is not regularly appointed by the agent or the company as an agent, the company cannot avoid responsibility for his acts.

Queen, 74 So. 807, 811. Thus, said the *Queen* Court, "in dealing with him, the insured dealt with the company itself; his knowledge was the company's knowledge, his consent was its consent." *Id*.

The *Queen* court dealt with a case factually similar to the present case. An independent insurance agent, not statutorily licensed to write insurance for Queen, took an application of insurance from Patterson. The insurance agent was aware of certain gasoline storage activities of the insured. He supplied the information he thought relevant to a regularly appointed agent of Queen, then delivered the resulting policy to the insured, accepted the premium, and sent it to Queen's regular agent minus his commission. When a fire resulted in a loss to the insured, Queen sought to avoid the policy on the ground of a material misrepresentation because the gasoline storage practices had not been included in the application.

Disallowing such action, the *Queen* court reasoned that "it would be a dangerous doctrine to promulgate if we held that the company could avoid its responsibilities by repudiating the acts of its own agents. . ." *Id.* This reasoning holds true where the agent, "who may be the only agent of a company in a county. . . authorizes and employs persons in other towns in the county to solicit insurance, deliver the policies and collect the premiums."[19] *Id.*

RLI cannot implement an insurance wholesaling and retailing system whereby its statewide administrator, Poe, provided brochures and applications to producers such as Pliego who were, by design, intended to monitor the application process in a self-underwriting system and thereafter disclaim liability for the acts of those same producers. If RLI chooses to organize its business in this fashion, it must accept the responsibilities imposed by the long standing public policy of this state expressed by the *Queen* court and the language of § 626.342.

C. Legislative History Supports of Statutory Agency.

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19. Section 626.342 is merely a refined codification of the rule of law established in *Queen*.

The legislative history of § 626.342 supports of statutory agency.[20] The current statutory provision can be traced back to the *Queen* statutes. In 1919 the two statutes interpreted in *Queen*, §§ 2765 and 2777, General Statutes of Florida, were renumbered to §§ 4256 and 4265 respectively. They retained their original text. In 1927 the statutes were again renumbered to §§ 6207 and 6222 respectively. These statutes imposed civil agency liability.

In 1929 or 1930, under a comprehensive revision of the insurance licensing scheme, the individual statutes were deleted. In their place, § 6212(5), Compiled General Laws of Florida, Permanent Supplement (1930) entitled **same; notice of appointment of agent; certificate;** provided in pertinent part:

* * *

> No Insurance Company or association doing business in this State, shall furnish to any agent, or prospective agent, named or appointed by it, any blank form, applications, stationary or other supplies to be used in soliciting, negotiating or effecting contracts of insurance, surety or indemnity on its behalf, until such agent shall have received from the State Treasurer a license to act as an insurance agent and shall have duly qualified as such.

* * *

Section 6212(5) further provided that violation of this statute constituted a misdemeanor carrying with it fines and possible incarceration pursuant to § 7454(2), Compiled General Laws of Florida, Permanent Supplement (1930).

Thus, in 1930, the legislature, after rewriting the licensing procedures for insurance agents, temporarily disposed of civil agency liability for setting up unlicensed agents and imposed criminal liability in its stead. This criminal liability persisted through a number of statutory revisions and renumberings. In 1953, § 627.09, Florida Statutes imposed criminal sanctions on fire, marine, casualty and surety insurers for furnishing forms, applications, etc., to any agent who did not possess a state issued license to act as an agent. Section 627.09 specifically referenced §§ 6212(5) and 7454(2) as its historical predecessors. In 1959, § 627.09 became § 626.0119 and

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20. Copies of the historical statutes hereinafter referenced are attached hereto as Appendix E in ascending date order for the court's convenience.

extended the prohibition and punishment to insurers writing any form of coverage.

In 1971 the legislature renumbered § 626.0119 as § 626.746 and reintroduced civil liability. Importantly, the statute distinguished between violations leading to criminal sanctions and those leading to civil liability. Subsection 626.746(1) continued its absolute prohibition on furnishing supplies to agents not licensed by the state. Subsection 626.742(2) imposed criminal sanctions for violation. Subsection 626.746(3), the new provision, imposed civil agency liability upon any insurer, general agent, or agent "that furnishes to *any agent* or prospective agent *not named or appointed by the insurer representative*" any of the supplies mentioned in subsection (1) and thereafter accepting business from that agent regardless of whether subsection (1) had been violated. Section 626.746, Florida Statutes (1971). Thus, were an insurer to supply an unlicensed agent, criminal penalties attached. Where the insurer attempted to supply an agent licensed by the state but not named or appointed by that particular insurer, civil liability would be statutorily imposed.

In 1980, the statute underwent substantial modification and was renumbered as Section 626.342. Subsection 626.342(1) clarified the original prohibition to include supplying agents who, while licensed by the state with respect to one class of business, are not licensed with respect to the class for which they are supplied by the insurer. Subsection 626.342(2) again imposed criminal sanctions for violation. Subsection 626.342(3) continued its of civil liability regardless of violation of subsection (1) where the insurer supplied a licensed but unappointed agent and thereafter accepted his business. Chapter 80-341, Laws of Florida, §§ 8, 9. In 1982 the criminal penalty section was deleted, leaving the statutory provision in effect in 1989.[21]

In sum, the 1989 provisions of § 626.342(2) imposing civil agency liability upon RLI under the present facts are the product of seventy-five years of legislative refinement of the agency liability imposed under the *Queen* statutes. Although few courts have been presented by

21. The sunset provision of § 626.342 was also deleted in 1982.

litigants with the opportunity to apply this statute, its history and clear and unambiguous text make plain its of agency in the instant case.

II. PLIEGO IS THE COMMON LAW ACTUAL AND APPARENT AGENT OF RLI, AS A MATTER OF LAW.

Even in the absence of § 626.342, the actual and apparent authority conveyed by RLI upon Pliego to act on its behalf creates an agency relationship. In the absence of contrary statutes, the "powers of insurance agents are governed by the general laws of agency and the agent possesses powers conferred upon him by his principal, or such as third persons are entitled to assume he possesses under the circumstances." *Russell v. Eckert,* 195 So. 2d 617, 622 (Fla. 2d DCA 1967), *reh'g den.* As affects insurance companies, the law of principal and agent is liberally interpreted in favor of the insured, so that an insurer is bound by the acts of subordinate agents, not only within the scope of their actual authority, but within the scope of their apparent authority. 16 Appleman § 8701 (1981).

A. Pliego Was The Actual Agent Of RLI.

Pliego was the actual agent of RLI. Actual authority is manifested by express agreement or implied from the agent's express authority or inferred from the circumstances of the transaction. 16 Appleman § 8725 (1981); *See also, Sugarland Real Estate, Inc. v. Beardsley,* 502 So. 2d 44, 45 (Fla. 2d DCA 1987)(an agent's authority may be implied or apparent; it need not be conferred in express terms); 2 Fla. Jur.2d, Agency & Employment § 29 (1977); *The Florida Bar v. Allstate Ins. Co.*, 391 So. 2d 238 (Fla. 3d DCA 1980). Moreover, an insurance company is bound by the acts and knowledge of an agent taking the risk, who has previously taken insurance for the company, and received commissions therefor, though not a regular agent for the company. 16 Appleman § 8725 (1981) Thus, the authorization for actions of an agent may be found by the acquiescence of the principal in a series of acts performed by the agent in the past; and the powers specifically granted to an agent carry with them by implication such other and incidental powers as are directly appropriate to the specific powers granted. 16 Appleman §§ 8671, 8674. Further, the authority to appoint subagents is inferred where the principal knows or has reason to know the agent employs subagents. *See Queen Ins. Co. v.Patterson Drug Co.,* 74

So. 807 (Fla. 1917)(where a duly authorized agent of an insurance company places insurance with the assistance of a subagent with whom the insured deals in all matters connected with the application for the policy, the insurance company cannot escape responsibility for the subagent's acts even if he is not designated or regularly appointed by the agent of the company as an agent.); 16 Appleman § 8701 (where duly authorized insurance agents employ subagents to solicit insurance, and perform other acts in relation thereto, the acts of such subagents within the scope of such delegated authority become the acts of the company).

Pliego was a part of an RLI network of Florida insurance agents that was administered first by Haynes Brinkley and then by Poe. RLI authorized Poe to obtain subagents by creating an insurance marketing scheme whereby subagents, including Pliego, are the ultimate retailers of its insurance policies. Pliego was designated as the "RLI Agent" on the face of the 1988 application. Pliego's RLI agent number appears on the face of the 1989 application. Pliego was expressly authorized to sign the RLI application in the space reserved for RLI's agent in 1988 and RLI's producer in 1989. RLI has made clear representations that Pliego was authorized to act on its behalf in filling out applications and verifying their accuracy.[22] RLI required Pliego and other producers, to effectively perform the underwriting process. Pliego, not Poe, took the application and signed it to insure the integrity of the self-underwriting program. RLI would not have accepted the applications had they not been signed by Pliego. By these actions, RLI expressly authorized Pliego and other producers to take applications on its behalf, thereby establishing actual agency.

B. Pliego Was The Apparent Agent of RLI.

Even in the absence of an actual agency relationship, an insurer is bound by the knowledge of its apparent agents. *Federal Ins. Co. v. Western Waterproofing Co. of America,* 500 So. 2d 162, 165 (Fla. 1st DCA 1986). This Court has set out three elements necessary to establish apparent agency: 1) a representation by the principal; 2) reliance on the representation by a third

22. No explanation is given in the application to the applicant that would lead him to suspect anything other than an agency relationship.

person; and 3) a change of position by the third person in reliance on the representation to his detriment. *Orlando Executive Park, Inc. v. Robbins,* 433 So. 2d 491, 499 (Fla. 1983).

The representations in the RLI applications establish such apparent agency. Pliego is expressly identified as the agent of RLI. *See Centennial Ins Co v. Parnell,* 83 So. 2d 688 (Fla. 1955)(application forms, literature, letterheads, calling cards are indicia of apparent authority); *Russell v. Eckert*, 195 So. 2d 617, 622 (Fla. 2d DCA 1967)(forms furnished by the company to an insurance agent are evidence of his authority and representations to the public concerning it). They were relied upon when the Collados provided information to Pliego for the RLI policy application. Because of the many indicia of apparent authority possessed by Pliego, the Collados justifiably believed that Pliego would perform all of the obligations of the insurer and that, by providing any requested information to Pliego, the application would be properly filled out and submitted. RLI, having created an apparent agency cannot now avoid the policy based upon application error by Pliego.

In *American Casualty Company of Reading, Pennsylvania v. Castellanos*, 203 So. 2d 26, 27 (Fla 3d DCA 1967) the Third District held that an independent insurance agent submitting an original application wherein it was designated as the "producing agency" and then accepting the benefits of subsequent transactions on behalf of the insurer (collecting premiums, securing amendments to the policy, and renewing the policy) was clothed with apparent authority from the insurance company. Like the agency in *Castellanos,* Pliego produced the 1988 and 1989 policies for RLI and Pliego has been the means through which RLI has received the benefits of subsequent transactions with the Collados.

Similarly, in *General Insurance Co. v. Romanovski,* 443 So. 2d 302, 304 (Fla. 3d DCA 1983), the Third District court held that an apparent agency was created by the company's acts of supplying the agent with application forms and an instruction book which the agent then utilized in helping the insured fill out the renewal application. *Id.* The carrier was charged with the agent's knowledge that the insureds had a son in the household with a restricted driver's license and could not later void the policy because this information was omitted from the

application. The *Romanovski* court reasoned that it would be manifestly unjust for an insurance company to try to void its contract obligations to an insured when the actions of its apparent agent in failing to include an insured's son on a renewal application were the direct cause of the material misrepresentation sought to be used as the ground for avoidance. *Id.* Likewise, it would be manifestly unjust for RLI to avoid its coverage obligations under the Collado's PUP policy merely because its agent, Pliego, failed to include in the 1989 application certain information which RLI acknowledges that Pliego possessed prior to accepting the application.

C. Pliego Was Not A Broker Acting For The Collados Regarding RLI's Application.

Pliego was not a broker acting for the Collados regarding RLI's application. Certain case law indicates that an individual acting under no certain relationship with an insurer and who obtains insurance coverage for an insured is necessarily an insurance "broker" and, therefore, the agent of the insured. *See e.g.*, *Ivey v. Hull & Company, Inc.,* 458 So. 2d 439 (Fla. 2d DCA 1984); *Auto-Owners Ins. Co. v. Yates*, 368 So. 2d 634 (Fla. 2d DCA 1979); *AMI Ins Agency v. Elie,* 394 So. 2d 1061 (Fla 3d DCA 1981). These cases are all factually distinguishable from the present case.[23] In none of these cases was there a clear representation, such as is found in this case, that the insurance representative filling out the application was an agent of the insurer. Nor was there an ongoing relationship between the putative agent and the insurer. Instead, each of these cases involved a discrete transaction between the insurer and the putative agent. In the present case, Pliego had an ongoing relationship with RLI as part of its network of retailers and was held out to be RLI's agent. As the *Yates* court recognized, mere titles do not resolve this issue. 368 So. 2d at 636. To the contrary, a person's acts, not what he is called, determine whether he is properly an agent for the insurer or a broker for the insured. 3 Couch on Insurance 2d § 25:92 (1960).[24]

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23. These cases also fail to apply the clear dictates of § 626.342(2) Florida Statutes (1989) and cannot, therefore, control the decision in this case.

24. For example, "[G]iving an insurance agent general authority to insure property with discretion to select the company,..., does not make such agent the agent of the insured,... in the issuance of the policy." *Couch, Cyclopedia of Insurance Law*, §25.100 (1960); *Monogram Products, Inc. v. Berkowitz*, 392 So. 2d 1353, 1355 (Fla. 2d DCA 1980).

D. Even If Pliego Is A Broker, He Was The Agent Of RLI For Purposes of RLI's Application.

Even if this court should determine that Pliego was acting as a broker of the Collados in procuring the requested insurance, this does not preclude a simultaneous finding that Pliego was acting as an agent of RLI with respect to filling out the application and verifying its accuracy. Florida has recognized the concept of dual agency in the insurance context. In *Wolfe v. Aetna Ins. Co.,* 436 So. 2d 997, 1000 (Fla. 5th DCA 1983), the Fifth District held that an insurance agent could act as an agent of both the insurer and the insured. "Dual agency is recognized in the law when the interests of the principals are not adverse..." *Id.*

Appleman tells us that :

> It is not unusual for an insurance agency to represent both insurer and insured... The same person may act as agent for both the insurer and the insured unless the dual agency created requires the assumption of incompatible duties.

16 Appleman § 8736 pp.411-413.

> So far as services are rendered to the insurer, the act of a broker becomes the act of the company.

16 Appleman § 8731.[25]

Other commentaries also support a finding of dual agency:

> It is well recognized that under certain circumstances and for certain purposes and insurance broker may be the agent of both the insurer and the insured. It is likewise generally regarded to be true that an ordinary insurance agent may be the agent of both parties to the policy in matters in which the interests of the two principals are not incompatible or conflicting and where they consent to the agency with full knowledge of the material facts surrounding the transaction.

43 Am Jur 2d § 114 p.193.

For purposes of completing RLI's application as an RLI producing agent, Pliego was RLI's agent. RLI's interest in preserving the integrity of its underwriting process by having the producing agent verify the accuracy of the application responses is in complete accord with the

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25. This result is not prevented by the division of representatives of insurance companies by an insurance code into agents and brokers. 16 Appleman §8731.

interest of the Collados in obtaining umbrella coverage. If the application is complete and accurate as intended by RLI's marketing structure, RLI will issue only the policies specified in its underwriting guidelines. If such a policy is issued to the Collados, they will have acquired the desired coverage. If they do not fall within RLI's underwriting guidelines, the application will immediately reveal this fact, and the Collados will know to look elsewhere to satisfy their insurance needs.[26] Thus, a finding of dual agency is both permissible and appropriate in this case.

E. At a Minimum, The Record Facts Create Fact Issues Precluding Entry of Summary Judgment in Favor of RLI.

The trial court denied the parties' cross-motions for summary judgment on the issue of common law agency, finding that the record facts as set forth above revealed questions of fact on that issue. The Second District erroneously directed the trial court to enter summary judgment in favor of RLI. The facts of the record recited above, at a minimum, establish disputed factual questions on this issue. *Orlando Executive Park v. Robbins*, 433 So. 2d 491, 494 (Fla. 1983)(the existence of an agency relationship is ordinarily a question of fact to be determined by the trier of fact.); *Quirk v. Anthony,* 563 So. 2d. 710, 715 (Fla. 2d DCA 1990) *aff'd sub nom; McCabe v. Howard,* 281 So. 2d 362, 363 (Fla. 2d DCA 1973)(same); *Blue Cross/Blue Shield of Florida, Inc. v. Weiner*, 543 So. 2d 794, 797 (Fla. 4th DCA), rev. denied, 553 So. 2d 1164 (Fla. 1989), and cert. denied, 494 U.S. 1028, 110 S. Ct. 1475, 108 L. Ed. 2d 612 (1990)(the determination of an agency relationship can be resolved by summary judgment only when the evidence is capable of just one interpretation.); *Folwell v. Bernard*, 477 So. 2d 1060, 1062 (Fla. 2d DCA 1985)(same), rev. denied, 486 So. 2d 595 (Fla. 1986); *Jaar v. Univ. of Miami*, 474 So. 2d 239, 242 (Fla. 3d DCA 1985)(same), rev. denied, 484 So. 2d 10 (Fla. 1986).

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26. It is undisputed that there was a market for umbrella coverage which the Collados could have accessed had Pliego gone outside of the single excess carrier (RLI) he was affiliated with. (R. 855-856)

III. MATERIAL FACTS IN THE POSSESSION OF RLI'S AGENT ARE IMPUTED TO RLI, ESTOPPING RLI FROM RESCINDING THE POLICY.

RLI has affirmed in its executed answers to interrogatories and in the deposition of its corporate representative that it is *not disputed* that Pliego possessed the information upon which it asserts a right to rescind its policy. RLI cannot now be heard to argue that there exist issues of fact as to whether Pliego possessed the material facts which were omitted from the 1989 application. A party may not, after having given a deposition in a case, subsequently change its testimony without adequate explanation in order to create an issue when the opposing party moves for a summary judgment. *Cary v. Keene Corp.*, 472 So. 2d 851 (Fla. 1st DCA 1985), *pet. for rev. denied*, 480 So. 2d 1294 (Fla. 1985); *Home Loan Co. Inc. of Boston v. Sloane Co. of Sarasota*, 240 So. 2d 526 (Fla. 2d DCA 1970); *Maryland Casualty Co. v. Murphy*, 342 So. 2d 1051 (Fla. 3d DCA 1977), *cert. denied*, 352 So. 2d 173 (Fla. 1977). Moreover, pretrial discovery was implemented to simplify the issues in a case, to eliminate the element of surprise, to encourage the settlement of cases, to avoid costly litigation, and to achieve a balanced search for the truth to ensure a fair trial. *Elkins v Syken*, 672 So. 2d 517 (Fla. 1996); *Dodson v. Persell*, 390 So. 2d 704 (Fla. 1980); *Surf Drugs, Inc. v. Vermette*, 236 So. 2d 108 (Fla. 1970). RLI, both in answers to interrogatories and in its corporate representative deposition, conceded that the facts material to its rescission action were known to Pliego prior to the time the 1989 application was filled out. To permit RLI to now attempt to assert the existence of factual questions on this issue would defeat the very purpose of pretrial discovery and violate the rule against changing positions simply to create an issue of fact when the opposing party moves for summary judgment. Moreover, RLI should be charged with inquiry notice of the existence of youthful drivers, since it issued the 1988 policy with full knowledge of their existence.

At the time of renewal in 1989, the Collados requested that their coverages, including the RLI umbrella, be continued. A representative of Pliego filled out the 1989 RLI PUP application and presented it to Donald Collado to sign. Relying on Pliego's superior knowledge and experience in the field of insurance, Donald Collado signed the application without first having

read it. Unbeknownst to the Collados, Pliego failed to include certain information on the application.

RLI placed substantial emphasis below on the "credibility" of potential witnesses to this issue, claiming that their lack of clear recollection of every detail of the application process created a jury issue. The "factual issues" raised by RLI below, even if disputed, are not material and, therefore, do not preclude summary judgment. The following *material facts* are undisputed. At the time of the application for the 1989 RLI policy, Pliego knew of the presence of household drivers under the age of 26. Pliego also knew of the presence of the RX-7 in the household. Pliego participated in filling out the application as evidenced by the deposition testimony of J. R. Pliego and his employee, Robin Robinson.[27] Finally, Pliego, or his employee, signed the application as "producer," affixed RLI agent number 2020 to the top of the application, and forwarded it, together with the premium to Poe as agent/producer.

It is a long and well established principle of Florida agency law that a principal is charged with notice or knowledge of its agent. *Gonzalez v. Great Oaks Cas. Ins. Co.,* 574 So. 2d 1182, 1184 (Fla. 3d DCA 1991); *Davies v. Owens - Illinois, Inc.,* 632 So. 2d 1065 (Fla. 3d DCA 1994); *Anderson v. Walthal,* 408 So. 2d 291 (Fla. 1st DCA 1985); *Rustal Corp., N.W., Inc. v. Ottati,* 391 So. 2d 308 (Fla. 4th DCA 1980); *Bertraum Yacht Yard v. Florida Wire and Rigging Works*, 177 So. 2d 305 (Fla. 3rd DCA 1965). Under agency principles, RLI is charged with knowledge of the omitted information possessed by its agent at the time the application was taken.

A. The Collados' Failure To Read The Application And/Or Detect The Errors Does Not Change This Analysis.

RLI contended, and the Second District agreed, that the Collados, having signed the 1989 application, were deemed to know its contents. *RLI v. Collado,* 678 So. 2d 1313, 1315 (Fla. 2d DCA 1996) RLI seeks to ignore Florida jurisprudence specific to insurance applications. In 1941, this Court established the rule of law that an insured will not be charged with material

27. One or the other or both of them filled out the application. Regardless of whether it was Pliego, his employee, or a combination thereof, the agency filled out the application and J. R. Pliego, or someone on his behalf, signed it as the producing agent.

misrepresentations merely because he fails to read the application and/or detect errors contained therein. There continues today a compelling public policy to maintain the integrity of issued insurance contracts. This is especially true where an insurer wants to rescind after a covered loss. At that point, an insured is obviously unable to obtain a replacement policy, even at a higher premium or with exclusions, that will protect against the manifest risk. Where, as here, an insurer has established a relationship with an insurance professional to protect it from infirmities in the application process it is the insurer, not the insured, who bears the cost of the agent's failure to fully impart his knowledge to the insurer. *Columbian National Life Insurance Co. v. Lanigan,* 19 So. 2d 67, 70 (Fla. 1944) *reh'g den.*; *Stix v. Continental Assur. Co.,* 3 So. 2d 703 (Fla. 1941); *Blumberg v. American Fire & Casualty Co.,* 51 So. 2d 182 (Fla. 1951); *Peninsular Life Ins. Co. v. Wade,* 425 So. 2d 525 (Fla. 2d DCA 1983); and *Southern Rack and Ladder v. Sexton,* 474 So. 2d 847 (Fla. 1st DCA 1985); *Gonzalez v. Great Oaks Cas. Ins. Co.,* 574 So. 2d 1182, 1184 (Fla. 3d DCA 1991).[28]

In *Stix*, the Florida Supreme Court stated that:

> The law in this state is that when an agent of an insurance company fills in an application for insurance, his act in doing so is the act of the company. If the applicant fully states that the facts to the agent at the time, and the agent writes the answers incorrectly or contrary to the facts stated by the applicant, the company is estopped from making a defense in an action on the policy by reason of the false answer.

Stix, 3 So. 2d at 704.

In *Columbian National Life Insurance Co. v. Lanigan,* 19 So. 2d 67, 70 (Fla. 1944) *reh'g den.*, the Supreme Court reaffirmed this rule of law by stating:

> In this jurisdiction it is well settled that if the insured gives truthful answers contained in the application for life insurance, and the company's agent, either through fraud or mistake, inserts answers in the application which do not accord with the information given, the insurer cannot insist on breach of warranty and is estopped from making such defense.

The *Columbian* court reasoned that an applicant who is not skilled in this area is justified

28. The Second District failed to address these cases in its opinion.

in relying on the superior skill and knowledge of a company representative with such expertise, and in assuming that, in filling out the application, the expert will include therein such information as will be material to the insurance company. *Id.* at 70. "Moreover, the insured will not be chargeable with such negligence as will render him liable for false or incomplete answers inserted by the representative merely because, in reliance upon the superior position and professional knowledge of such representative of the company, he signs an application filled out by the latter without reading it or correcting the answers." *Id.* at 70-71. Under such circumstances, any information given to the representative of the company is information given to the company. *Id.*

The Collados fall squarely within this recognized exception. They provided any information which was requested of them and simply signed where necessary in reliance on Pliego's superior skill and knowledge. There has been no contention, ever, that the Collados affirmatively mislead Pliego or failed to respond or questions asked. Thus, the exception must be applied in this case.

IV. RLI BREACHED THE POLICY, RENDERING IT LIABLE FOR FULL BREACH OF CONTRACT DAMAGES.

A. RLI Repudiated the Contract by Refusing to Entertain Settlement Proposals and Denying Any Responsibility.

The Collado's were provided primary automobile coverage by American Mutual, which tendered and paid its policy limits for injuries and damages arising from the accident. RLI's policy contractually obligated it to pay damages in excess of the underlying policy limits. RLI wrongfully denied coverage for the accident, thereby breaching its contractual obligations.

RLI was repeatedly presented with the opportunity to pay its limits and obtain Releases for all claims (including the claims of the injured parties other than Almerico), thus avoiding exposure to its insureds. RLI could have fulfilled its contractual duties by accepting Almerico's policy limits demand alone. *Harmon v. State Farm Mutual Automobile Insurance Co.*, 232 So. 2d 206 (Fla. 2d DCA 1970)(where multiple claims arise out of an accident, an insurer has the right to settle with some claimants regardless of whether such action depletes or even exhausts the

policy limits to the extent that other claimants are left without recourse against the insurer). RLI refused to do so. RLI was thereafter advised of the further opportunity to settle the entirety of the claims against the Collados for RLI's policy limits. RLI did not accept this offer either.[29]

In the absence of coverage by RLI, the Collados were financially unable to accept the offer and were left without a viable financial basis for receiving settlement offers. As a result of the position in which they were placed by RLI's breach, the Collados entered into the stipulated judgment and assignment of rights with Almerico and Phoenix as the only possible means of limiting their personal exposure. *Fidelity and Casualty Co. of New York v. Cope*, 462 So. 2d 459 (Fla. 1985)(an assignment of rights is a prerequisite to maintenance of a cause of action against the carrier).

Accordingly, there is no dispute but that RLI breached its contractual obligations to provide coverage for and settle the claims for damages which exceeded the underlying policy limits arising out of the February 4, 1989 accident . Furthermore, this breach gave rise to reasonably foreseeable damages exceeding RLI's policy limits.

Once RLI breached the contract, it gave up the right to assert its policy limits. An insurer which denies coverage does so at its own risk. This is true even where such denial is in mistaken, but honest belief that coverage did not exist. *Thomas v. Western World Insurance Company,* 343 So. 2d 1298, 1302 (Fla. 2nd DCA 1977). "An insurer whose contracts are by their very nature adhesive should be held to at least the same standard of damage applicable to other contracting parties." *Id.* Therefore, an insured is entitled to recover *all* foreseeable damages arising as a consequence of the insurer's breach of its coverage responsibilities pursuant to the contract. The *Thomas* court explained that, since one purchasing coverage should be able to rely upon the general breach of contract standard, an insurer impliedly represents it will be responsible for damages if it fails to provide the contracted for coverages. *Id.*

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29. Although RLI was presented with prior settlement opportunities, this is not critical to RLI's responsibilities. *Florida Farm Bureau Mutual Insurance Company v. Rice*, 393 So. 2d 552, 556 (Fla. 1st DCA 1980)(once a carrier has denied coverage, the existence of a settlement offer is not a prerequisite to the establishment of a claim in excess of policy limits so long as the settlement was reasonable under the circumstances and not tainted by collusion).

This case provides a perfect example of the applicability of a *Thomas* analysis. As in *Thomas*, RLI failed and refused to negotiate at all,[30] unilaterally declaring its policy void. This unilateral abandonment amounts to repudiation, the legal effect of which is a total breach by RLI.[31] In such a case, full breach of contract damages are appropriate. *Thomas,* 343 So. 2d at 1302. This concept is aptly summarized by the California Supreme Court in *Comunale v. Traders and General Insurance Co.,* 328 P. 2d 198 (Cal 1958) wherein that court stated:

> There is an important difference between the liability of an insurer who provides its obligations and that of an insurer who breaches its contract. The policy limits restrict only the amount the insurer may have to pay in performance of the contract as compensation to a third person for injuries caused by the insured; they do not restrict the damages recoverable by the insured for a breach of contract by the insurer.

(Emphasis added).[32]

This result makes practical sense. Policy limits are a contracted-for benefit derived from the premium paid and the risk underwritten. The policy limits are not in the nature of a liquidated damages clause. Rather, coverage in that amount is the contracted-for product. When an insurer

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30. As noted by the *Thomas* court, bad faith, in contrast to breach of contract, presupposes an attempt to exercise some skill, judgment and fidelity on the insureds' behalf. When an insurer totally denies coverage, there has not necessarily been bad faith; rather, there has been no faith at all. This analysis does not render the bad faith cause of action moot or merely duplicative of the recovery which may be had through a breach of contract action. It is well established that a bad faith recovery is not necessarily limited to the excess judgment. *Swamy v. Caduceus Self Insurance Fund*, 648 So.2d 758 (Fla. 1st DCA 1994) *citing Campbell v. Government Employees Insurance Company*, 306 So.2d 525 (Fla. 1977)(an insured may recover punitive damages for a carrier's bad faith failure to settle); *Aetna Life & Casualty v. Little*, 384 So.2d 213 (Fla. 4th DCA 1980)(insured entitled to recover damages for loss of business resulting from carrier's bad faith failure to *supersede* the excess portion of a judgment which resulted in execution on and destruction of the business).

31. *Brewer v. Northgate of Orlando, Inc.,* 143 So. 2d 358 (Fla. 2d DCA 1962). *See also National Education Centers, Inc. v. Kirkland,* 635 So. 2d 33 (Fla. 4th DCA 1993) and *Sampley Enterprises, Inc. v. Laurilla,* 404 So. 2d 841 (Fla. 5th DCA 1981) *citing Sullivan v. McMillan,* 26 Fla. 543, 8 So. 450 (1840)(where one of the parties to a contract notifies the other unequivocally that it will not perform or further perform his part, the latter may treat the contract as put to an end or entirely broken by the former, and, if ready and willing to perform his part, sue him at once for an entire breach of contract). When there is a total breach of contract, such as in the case of anticipatory breach or repudiation, all damages past or future which are reasonably certain to occur to the plaintiff may be recovered. *National Education Centers, Inc. v. Kirkland*, 635 So. 2d 33, 34 (Fla. 4th DCA 1993).

32. The *Thomas* court followed the *Comunale* rationale. *Thomas*, 343 So.2d at 1302.

declares its policy void, it declares the entire policy void, including the policy limits. Thereafter, standard breach of contract damages apply.

Damages in a breach of contract action attempt to place the injured party in the position he or she would have occupied had the contract been performed. *Hobbley v. Sears, Roebuck & Co.,* 450 So. 2d 332 (Fla. 1st DCA 1984). Recoverable damages following a breach are those which arise naturally from the breach or those which were in the contemplation of both parties as a probable result of a breach at the time of contracting. *Id.* The parties need not have contemplated the precise injuries which ultimately occur, so long as the actual consequences could have reasonably been expected to flow from a breach. *Natural Kitchen Inc. v. American Transworld Corp.,* 449 So. 2d 855 (Fla. 2d DCA 1984).[33]

In the present case, the stipulated judgment in excess of RLI's policy limits was reasonably certain to occur as a result of RLI's breach. RLI knew that, in the absence of umbrella coverage, its insureds could face devastating liability. It sent them a letter assuring them that, with RLI as their insurer, they could rest easy knowing that liability was protected against. When RLI repudiated its contact, the Collados were financially unable to protect themselves. Left with no alternative, they entered into a stipulated judgment and assignment of rights. The foreseeable and consequential damages flowing from this breach are the amount of that judgment, plus fees and costs incurred in securing payment by RLI.

Other courts have followed a similar analysis. *Shook v. Allstate Insurance Company,* 498 So. 2d 498, 500 (Fla. 4th DCA, 1986); *Steil v. Florida Physicians Insurance Reciprocal,* 448 So. 2d 589, 592 (Fla. 2d DCA 1984). The *Shook* court permitted an injured party to recover the

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33. Thus, a contractor would ordinarily be entitled to recover profits it would have realized had projects been completed but which were uncompleted due to an anticipatory breach of contract, *U.S. Home Corporation v. Suncoast Utilities, Inc.,* 454 So. 2d 601 (Fla. 2d DCA 1984); and, in a laundry operator's action for breach of a contract governing the laundry facilities, a trial court did not abuse its discretion in assessing damages to compensate the laundry operator for profits lost as a result of the breach. *Clearwater Association v. Hicks Laundry Equipment Corp.*, 433 So. 2d 7 (Fla. 2d DCA 1983). *See also McCray v. Murray*, 423 So. 2d 552 (Fla. 1st DCA 1982)(where a contractor's failure to line a fish pond with clay and construct a berm was found to be a total breach of contract, it was not error to award the landowners the cost of restoring the property to its original condition). In each of these cases, the court found that the awarded damages were those damages reasonably certain to occur as a result of the breach.

amount of a reasonable settlement from a carrier who had abandoned its insured, upon assignment of the insured's claims against the insurer to the injured party. *Shook,* 498 So. 2d at 500.[34] The *Shook* court, reasoned that "if an insurer wrongfully refuses to defend, the insured is entitled to make a reasonable settlement without requiring the suit to be carried to judgment." *Id.* This is true even where the settlement amount is in excess of the policy limits so long as it is not unreasonable in amount or tainted by a bad faith. *Id.* In the present case, it is undisputed that the judgment is both reasonable in amount and the product of good faith negotiations. Thus, Almerico is entitled to recover the judgment amount as breach of contract damages.

RLI incorrectly asserted below that recent cases have adopted a different rule of law. RLI cited *State Farm Mutual Automobile Insurance Company v. LaForet,* 658 So. 2d 55 (Fla. 1995) and *John J. Jerue Truck Broker, Inc. v. Insurance Co. of N. America*, 646 So. 2d 780 (Fla. 2d DCA 1994) for the proposition that, in any case where an excess insurer denies coverage, an excess judgment may only be awarded upon a finding of bad faith.[35]

Contrary to RLI's position, the *LaForet* court, recognized the continued viability of a traditional breach of contract analysis, as set forth in *Thomas*, for determining the measure of damages in the insurance setting. *LaForet*, 658 So. 2d at 58. The *LaForet* court took great pains to explain that the bad faith remedies addressed therein were supplemental and alternative to those permitted under a pure breach of contract analysis, which limits damages to those reasonably foreseeable at the time the contract was entered into. *Id.* It is incomprehensible that by creating the additional remedy of bad faith Florida has impaired the rights of insureds to

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34. While no Florida Court has addressed this issue in the context of an excess insurer who abandons its insured through a wrongful denial of coverage, the excess insurer is similarly obligated to fulfill its contractual obligations and the same analysis for failure to do so applies. *See e.g. State Farm Fire and Casualty Co. v. Olivares,* 441 So. 2d 175 (Fla. 4th DCA 1983) (applying standard rules of construction regarding ambiguities in umbrella policy context.)

35. Neither of these cases involved the question of the proper measure of damages in a breach of contract case. Instead, both cases involved the proper standard to be applied in determining whether the insurer has exhibited bad faith in violation of § 624.155, Florida Statutes. The merits of Almerico's bad faith claim against RLI, having been stayed by the trial court, are not before the Court at this time. Accordingly, *LaForet* and *Jerue* analyses have no application to this appeal.

recover under traditional notions of contract law. By their breach of contract action, Almerico and Phoenix seek recovery of those damages which reasonably, foreseeably flowed from the breach. Therefore, as a matter of law, Almerico and Phoenix are entitled to recover from RLI the entirety of the outstanding judgment.

B. Provision of A Defense by American Mutual Does Not Limit the Damages Attainable.

The *Thomas* court specifically addressed the possibility that an adequate defense may have been provided to the insured. The *Thomas* court concluded that, when an insured, although adequately defended, is financially unable to meet a reasonable settlement offer within the policy limits, the policy limits are not binding. *Thomas,* 343 So. 2d at 1302. Here, although the Collados were provided a defense by their primary carrier, the damages suffered by Jason Almerico were so extensive that the Collados could never have resolved the claim in the absence of RLI's indemnity dollars, regardless of the adequacy of the defense with which they were provided. When an opportunity to settle Almerico's claims within RLI's limits was presented, RLI refused. Thus, the Collados were obligated to enter into the stipulated judgment and assignment of rights in order to protect themselves. In such circumstances, the fact that an adequate defense was provided by American Mutual is irrelevant and does not limit the damages recoverable against RLI to the policy limits.

V. INTEREST ACCRUES ON THE AMENDED FINAL JUDGMENT AT THE RATE OF 8% AS A MATTER OF LAW.

Finally, as a procedural matter, the amended final judgment entered January 17, 1995, which imposed 12% interest upon RLI should be reformed to reflect the new statutory rate of interest. On December 29, 1994, the trial court entered final summary judgment in favor of Almerico setting forth the then applicable 12% interest rate. Due to an unrelated clerical error, Almerico moved the trial court for entry of an amended final summary judgment which was entered on January 17, 1995. Both the original final summary judgment and the amended final summary judgment state that interest shall accrue thereon at the rate of 12%. However, beginning January 1, 1995, the statutory rate of interest was reduced from 12% to 8% pursuant to § 55.03,

Florida Statutes (1994). Thus, by operation of law, the statutory interest rate to be applied to the judgment amount will be 8% after January 1, 1995. Even in the event that the statutory effect is not to reduce the interest rate for periods after January 1, 1995, as a matter of law, Almerico will and does stipulate to amendment of the judgment to conform to the new statutory rate.

CONCLUSION

For the foregoing reasons, as a matter of law, Pliego acted as RLI's agent with knowledge of the facts necessary to accurately complete RLI's application and RLI is thus estopped from rescinding the Collados' policy. Consequently, RLI is liable for the damages caused by breach of its coverage obligations. Accordingly, Petitioners request that the opinion of the Second District Court of Appeal be quashed.

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 on this 14th day of April, 1997, to: **John McLaughlin, Esquire,** of Wagner, Vaughan & McLaughlin, P. A., at 708 Jackson Street, Tampa, FL 33602, to **James J. Evangelista, Esquire**, of Fowler, White, Gillen, Boggs, Villareal and Banker, P. A., at P. O. Box 1438, Tampa, FL 33601, to **A. Woodson Isom, Jr., Esquire**, at 3802 Bay to Bay Boulevard, Building "B", Suite No. 12, Tampa, FL 33629, to **Harold O. Oehler, Esquire**, at P. O. Box 1531, Tampa, FL 33601, **George A. Vaka**, Fowler, White, Gillen, Boggs, Villareal & Banker, P.A., P.O. Box 1438, Tampa, FL 33601, and to **Peter J. Brudny, Esquire**, of Prugh & Associates, P. A., at 813 West Kennedy Blvd., Suite 100, Tampa, FL 33606.

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