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

PETITIONERS' JURISDICTIONAL BRIEF

LEE D. GUNN, IV, ESQUIRE
Fl. Bar No: 367192
KELLY K. GRIFFIN, ESQUIRE
Fl. Bar No: 985309
GUNN, OGDEN & SULLIVAN, P.A.
100 North Tampa St.. 2900
Post Office Box 1006
Tampa, Florida 33602
813/223 -5111
Councel for Petitioners

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STATEMENT OF THE CASE AND FACTS

As its statement of the case and facts, Petitioners, Jason K. Almerico and The Phoenix Insurance Company', adopt by reference the decision of the Second District Court of Appeal in this matter. (A. 1-10)[2] Almerico additionally provides a brief summary of the following relevant facts.

This insurance coverage dispute arises out of an automobile accident which occurred on February 4, 1990. (A. 2) Eighteen year old Daron Collado was operating his parents' owned 1989 Honda. (A. 2) Almerico was a passenger in the Honda and was seriously injured. (A. 2) RLI issued an umbrella policy that covered the Collados' legal liability for Almerico's injuries. (A. 2) Following the loss, RLI sought to avoid coverage by seeking to rescind its policy. (A. 2-3) RLI asserted it was unaware that there were any household drivers under the age of twenty-six years and that a "high performance" vehicle (Mazda RX-7) was owned by the Collados. (A. 2)

The RLI policy was produced by J. R. Pliego, who operated as J. R. Insurance. (A. 5) Mr. Pliego was a "subproducer"" in RLI's program for soliciting the sale of its policies in our state. (A. 5) Mr. Pliego was authorized to take applications for RLI (A. 5) and had done so prior to the Collados' 1989 application. (A. 7) By virtue of Mr. Pliego's writing of the primary auto policy for the Collados, and otherwise, Almerico contends that the information omitted

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1. The Petitioners, Jason K. Almerico and The Phoenix Insurance Company, will be referred to as Almerico or Petitioners. The Respondent, RLI Insurance Company, will be referred to as RLI or Respondent.

2. All references to the Appendix attached hereto will be referred to as (A.) followed by the appropriate page number.

from the 1989 application was known to Mr. Pliego and imputed to RLI. (A. 3-4) The precise facts surrounding the completion of the 1989 application, including who filled it out and whether Mr. Collado signed it, are conflicting. (A. 6)

As a consequence of being supplied with the items enumerated by the statute, Almerico argues that Florida Statute §626.342 (1988) imposes civil liability upon RLI as if Mr. Pliego was its licensed agent. (A. 3-4) Moreover, Almerico asserts Mr. Pliego was RLI's actual or apparent agent under common law principles. (A. 3-4) The lower court entered summary judgment in favor of Almerico finding RLI statutorily liable for the acts of Mr. Pliego as if he were RLI's licensed agent. (A, 4) The Second District held the statute inapplicable and instructed that summary judgment for RLI be entered on the common law agency theories. (A. 4-5).

JURISDICTIONAL ISSUES

Whether the decision of the Second District Court of Appeal expressly and directly conflicts with other reported appellate decisions from this court and the other district courts of appeal.

SUMMARY OF THE ARGUMENT

The decision of the Second District expressly and directly conflicts with decisions of this court and other district courts of appeal. The decision announces two rules of law. First, that \$626.342 Florida Statutes (1988) only applies to the supplying of insurance agents outside the class of business they are licensed by the state to write. That rule conflicts with Gaskins v. General Insurance Co. of Florida, 397 So.2d 729 (Fla. 1st DCA 1981), *reh'g. den.*

The second rule of law announced by the Second District is that an insured is bound by

the representations in an insurance application, even if prepared by the insurer's agent and not proofread by the applicant. That rule conflicts with the rule repeatedly announced by this court and other district courts of appeal. Blumberg v. American Fire & Casualty Co., 51 So. 2d 182 (Fla. 1951); Columbian National Life Ins. v. Lanigan, 19 So. 2d 67 (Fla. 1944) *reh'g den.;* Stix v. Continental Assur. Co., 3 So, 2d 703 (Fla. 1941); Gonzalez v. Great Oaks Cas. Ins. Co., 574 So.2d 1182, 1184 (Fla. 3d DCA 1991) and Southern Rack and Ladder v. Sexton, 474 So. 2d 847 (Fla. 1st DCA 1985).

The decision of the Second District also misapplied existing rules of law to reach a conclusion opposite from that of other decisions with substantially similar material facts. The court instructed entry of summary judgment on the issue of common law agency despite recognizing conflicting material facts and record evidence that supported, at least, the possibility of the existence of an agency relationship between RLI and its subproducer, Mr. Pliego. That decision conflicts with Gaskins, *supra*, and the following decisions: Orlando Executive Park v. Robbins, 433 So.2d 491 (Fla. 1983); Horizon Leasing v. Lcefmans, 568 So.2d 73 (Fla. 4th DCA 1990); McEvoy v. Union Oil Co., 552 So.2d 1169 (Fla. 3d DCA 1989); Cirou v. Basler, 432 So.2d 628 (Fla. 3d DCA 1983); Scott v. Sun Bank of Volusia County, 408 So.2d 591 (Fla. 5th DCA 1981); Amerven, Inc. v. Abbadie, 238 So.2d 321 (Fla. 3d DCA 1970).

This court should exercise its discretion and review this case on the merits.

ARGUMENT

THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH OTHER REPORTED DECISIONS FROM THIS COURT AND THE OTHER DISTRICT COURTS OF APPEAL.

Under Article V, Section 3(b)(3), Fla. Const. (1980), this court is vested with

discretionary jurisdiction to review an appellate decision where it expressly and directly conflicts with a decision of this court or another appellate court. See, e.g., Jenkins v. State, 385 So.2d 1369 (Fla. 1980). There are two recognized instances where this court deems conflict jurisdiction appropriate. The first is where the decision announces a rule of law that expressly and directly conflicts with that previously announced by this court or another appellate court. Nielson v. City of Sarasota, 117 So.2d 731, 734 (Fla. 1960) The second circumstance exists where the decision applies an existing rule of law and reaches a result different from that reached by other appellate courts when construing substantially similar facts. ***Id.*** In the instant case, the decision of the Second District expressly and directly conflicts with existing case law under both circumstances.

A. Rule of Law Conflict

The decision of the Second District announced a rule of law that Florida Statute § 626.342[3] applies only to the supplying of insurance agents with an insurer's applications, or other enumerated materials, outside the "class of business" the agent is licensed by the state to negotiate. This rule of law directly and expressly conflicts with the only other Florida appellate decision construing the statute. Gaskins v. General Insurance Co. of Florida, 397 So.2d 729 (Fla. 1st DCA 1981), *reh'g. den.*[4] Surprisingly, the Second District's decision fails to

3. The statute is set forth in full in the Second District's opinion. (A. 8, 9) The current version of the statute remains numbered as § 626.342, but was amended in 1990 to reflect the clarification that the state licenses agents and insurers appoint agents to represent them.

4. This court considered the predecessor statutes to that of § 626.342 in the case of Queen Insurance Company v. Patterson Drug Company, 74 So.2d 807, 810 (Fla. 1917). The text of the current statute is substantially, and arguably, materially different. For purposes of this jurisdictional brief, Queen's application may be limited to "fact misapplication" conflict, infra. Still, Almerico raises the Queen opinion as additional "rule of law" conflict for this

distinguish, or even mention, the Gaskins case.

In Gaskins, the auto insurer sought to rescind its policy after an accident involving the son's use of the parents' owned automobile based upon the failure to list the son on the insurance application. ***Id.*** at 730. Information regarding the insured's son was given to the agent who interpreted the application as not requiring disclosure of the son's household residence and ownership of a non-scheduled auto. ***Id.*** The lower court granted summary judgment in favor of the insurer. ***Id,***

The First District reversed the summary judgment holding that issues of fact existed on the matter of whether the agent was acting on behalf of the insurer when completing the application, thus imputing knowledge of the "true facts" and estopping the insurer from avoiding the policy obligations. ***Id.*** at 732. The court expressly and directly ruled that a literal interpretation of § 626.342[5] created an issue of whether the agency was acting for the insurer in the application process. ***Id.*** at 73 1. In reaching this holding, the Gaskins court noted it was in accord with Brown v. Inter-Ocean Insurance Company, 438 F.Supp. 951 (N.D. Ga. 1977), which had, likewise, literally applied the statute. There is no indication in Gaskins that the involved agent was not licensed by the state to write automobile insurance and the decision did not turn on this distinction. Thus, Gaskins applies the plain meaning test and construes the statute to impose civil liability for the acts of supplied agents in completing insurers' applications, even if the agent is not licensed or appointed by the insurer to represent it.

The decision sought to be reviewed substantially erodes the protections established by

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court's consideration.

5. The statute was then numbered § 626.742 Fla. Stat. (1977).

$626.342, as part of the Licensing Procedures Law, Florida Statutes $626.011, et seq. The Licensing Procedures Law requires insurers to license its agents and $626.342 imposes civil liability upon carriers who seek to circumvent agency liability by not licensing the agents from whom it accepts business. The public policy reflected by the legislative scheme, along with the need to maintain uniformity in the area of insurance law which effects the lives of virtually every citizen of our state, more than justifies this court's exercise of its discretionary jurisdiction.

The second rule of law expressly and directly in conflict is that an insured is bound by errors within an insurance application, even if completed by the insurer's agent, merely because it is signed by the insured. In doing so, the Second District departed from and created express or direct conflict with the long established rule of law applicable to insurance applications. An insured will not be charged with contributory negligence merely because he fails to read the application and/or detect errors contained therein. See Blumberg v. American Fire & Casualty Co., 51 So. 2d 182 (Fla. 1951); Columbian National Life Ins. v. Lanigan, 19 So. 2d 67 (Fla. 1944) *reh'g den.;* Stix v. Continental Assur. Co., 3 So, 2d 703 (Fla. 1941); Gonzalez v. Great Oaks Cas. Ins. Co., 574 So.2d 1182, 1184 (Fla. 3d DCA 1991); Southern Rack and Ladder v. Sexton, 474 So. 2d 847 (Fla. 1st DCA 1985); Peninsular Life Ins. Co. v. Wade, 425 So. 2d 525

(Fla. 2d DCA 1983).

In Stix, this 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, this 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.

Columbian, 19 So.2d at 70.

The Columbian court reasoned that an applicant who is not skilled in an area is justified in relying on the superior skill and knowledge of a representative of the company 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.***

Again surprising is the failure of the Second District to cite even one of the above conflicting cases or distinguish this court's case law.

B. Facts to Law Conflict

The Second District opinion holds that RLI's established agency network of subproducers authorized to take RLI umbrella applications does not even create an issue of fact on the question of common law agency. The Second District's decision departs from existing agency law precedent and will have profound impact upon the public procuring personal insurance coverage. This court has repeatedly recognized that the public relies upon the superior skill and judgment of insurance agents and rarely appreciates the nuances of the legal relationships that are involved. See, Columbian, *supra*; Travelers Ins. Co. v. Quirk, 583 So.2d 1026 (Fla. 1991) *affirming sub. nom.* and Quirk v. Anthony, 563 So.2d 710 (Fla. 2d DCA 1990) (if a customer turns to the yellow pages and selects an insurance company, companies with captive agents look like companies with independent agents. The customer is not advised that the risks are different if he or she calls a captive agent licensed to sell coverage for only one carrier, as opposed to an independent agent licensed to sell coverage for several carriers.) Moreover, this court and other districts have found an issue of fact precluding summary judgment in the agency context when confronted with similar indicia of agency. Orlando Executive Park v. Robbins, 433 So.2d 491 (Fla. 1983)(the issue of agency is uniquely a question of fact for the jury to decide); Horizon Leasing v. Leefmans, 568 So.2d 73 (Fla. 4th DCA 1990); McEvoy v. Union Oil Co., 552 So.2d 1169 (Fla. 3d DCA 1989)(where there exists any evidence from which a jury could conclude that the acts in question were committed by an agent within the scope of his employment, the questions of agency and scope are to be resolved by the jury); Cirou v. Basler, 432 So.2d 628

(Fla. 3d DCA 1983)(the existence of an agency relationship is ordinarily a question to be determined by the jury as an issue of fact); Gaskins, *supra;* Scott v. Sun Bank of Volusia County, 408 So.2d 591 (Fla. 5th DCA 1981); Amerven, Inc. v. Abbadie, 238 So.2d 321 (Fla. 3d DCA 1970).

The conclusion of the Second District's decision that the subproducer relationship does not preclude summary judgment expressly and directly conflicts with the above-decisions that establish the rule of law that the possibility of an issue of fact supporting agency is sufficient to defeat summary judgment.

CONCLUSION

The decision of the Second District Court of Appeal expressly and directly conflicts with the rules of law of this court and the other district courts. Moreover, it applies established rules of law to substantially the same material facts and reaches a result in opposition with the rulings of this court and her sister districts. Accordingly, this court is afforded the opportunity to hear this case on its merits. The consequences of the Second District's opinion are far-reaching and significantly weaken legislatively and judicially created safeguards established to protect Florida residents when seeking insurance coverage, The opinion validates and encourages the creation of subproducers without appointment to represent the insurer, thereby circumventing the provisions of the Licensing Procedures Law which are designed to hold the insurer accountable for the acts of insurance agents from whom it accepts business. Therefore, petitioner respectfully requests the court to exercise its jurisdiction and review this case on its merits.

Respectfully submitted,

LEE D. GUNN IV
Florida Bar No. 367192
KELLY K. GRIFFIN
Florida Bar No. 985309
GUNN, OGDEN & SULLIVAN, P.A.
AmSouth Building
100 North Tampa Street, Suite 2900
Post Office Box 1006
Tampa, Florida 33601-1006
(813) 223-5111
Attorneys for Petitioners

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 21st day of October, 1996, 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. 0. 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 0. Oehler, Esquire,** at P. 0. 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 1009 West Platt Street, Tampa, FL 33606.

LEE D. GUNN IV
Florida Bar No. 367192
KELLY K. GRIFFIN
Florida Bar No. 985309
GUNN, OGDEN & SULLIVAN, P.A.
AmSouth Building
100 North Tampa Street, Suite 2900
Post Office Box 1006
Tampa, Florida 33601-1006
(813) 223-5111
Attorneys for Petitioners