SUPREME COURT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA

JASON K. ALMERICO, et al.

Petitioners,

v.

RLI INSURANCE COMPANY,

Respondent.

CASE NO. 89,131

RESPONDENT'S BRIEF ON JURISDICTION

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[1] Table of Authorities prepared by Lexis.

STATUTES

MISCELLANEOUS

STATEMENT OF THE CASE AND FACTS

The Respondent, RLI Insurance Company,[2] adopts the facts contained in the decision of the Second District Court of Appeal[3] as its Statement of the Case and Facts. However, because Almerico's purported brief summary of the relevant "facts" is inaccurate, RLI would correct those inaccuracies as follows:

The policy at issue was obtained by J. R. Pliego and/or J. R. Insurance Agency who was the licensed agent of American Mutual Fire Insurance Company. (A. 5,7) Mr. Pliego had no authority to act for RLI, nor did he hold himself out as having such authority. (A. 7) When American Mutual Fire Insurance Company stopped issuing umbrella policies, Mrs. Collado was properly informed and requested that Pliego obtain coverage from some other company. (A. 5) Mr. Pliego obtained an application from Poe and Associates who had been appointed the agent to market RLI's policy in Florida. (A. 5) RLI relied upon Poe and Associates to process the applications and had no direct dealings with Mr. Pliego. (A. 5)

The applications submitted to RLI contained material misrepresentations, and it is not disputed that the policy would

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[2] The Respondent, RLI Insurance Company, will be referenced to as RLI or Respondent. The Petitioners, Jason Almerico, Phoenix Insurance Company, Donald Collado, Grace Collado, Daron Mark Collado and American Mutual Fire Insurance Company, will be referred to by name or as Petitioners.

[3] In conformity with Fla.R.App.P. 9.120(d), the decision of the Second District Court of Appeal is attached hereto as an Appendix. All references to the Appendix will be referred to as (A.) followed by citation to the appropriate page number of the Appendix.

not have been issued had the true facts been known to RLI. (A. 5-6)

JURISDICTIONAL ISSUE

WHETHER THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL CONFLICTS WITH ANOTHER REPORTED APPELLATE DECISION FROM THIS COURT OR ONE OF THE OTHER DISTRICT COURTS OF APPEAL?

SUMMARY OF THE ARGUMENT

The decision of the Second District does not expressly and directly conflict with any other reported decision. The present decision does not conflict with Gaskins v. General Ins. Co. of Florida, 397 So.2d 729 (Fla. 1st DCA 1981) because the case is construe the different statutes. The statute construed in Gaskins was subsequently amended to specifically authorize RLI to accept business written by Mr. Pliego without the statutory penalty imposed in Gaskins.

The decision likewise does not conflict with those cases which have held that an insurer will be estopped to claim a breach of a warranty in an application where the insured has given full and complete answers to all questions, and the insurance agent provides responses with information he or she believes would be relevant to the company. First, those facts do not appear in this case, and second, Mr. Pliego was acting as the broker of the Collados, not RLI's agent in this case.

Finally, there is no conflict with the decisions which state that the existence of apparent agency is generally a fact question. The relevant question answered by the Second District here was whether Mr. Pliego was RLI's agent, or a broker for the

insureds. Those decisions involve determinations as a matter of law and have been treated as such on appeal by this Court and the District Courts of Appeal. See, Travelers Ins. Co. v. Quirk, 583 So.2d 1026 (Fla. 1991), AMI Ins. Agency v. Elie, 394 So.2d 1061 (Fla. 3d DCA 1981). This Court should decline to accept jurisdiction.

ARGUMENT

THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL DOES NOT CONFLICT WITH ANOTHER REPORTED APPELLATE DECISION FROM THIS COURT OR ONE OF THE OTHER DISTRICT COURTS OF APPEAL.

Pursuant to Art. V, § 3(b)(3), Florida Constitution (1980), this Court may only exercise its discretionary jurisdiction when an appellate decision expressly and directly conflicts with the decision of another District Court of Appeal or this Court on the same question of law. The conflict must be expressed and contained within the written rule announced by the court. See, Jenkins v. State, 385 So.2d 1356 (Fla. 1980); Dodi Publishing Co. v. Editorial America, S.A., 385 So.2d 1369 (Fla. 1980); Reaves v. State, 485 So.2d 829 (Fla. 1986); Dept. of Health and Rehabilitative Services v. National Adoption Counseling Service, Inc., 498 So.2d 888 (Fla. 1986). Inherent or implied conflict does not serve as a basis for this Court's jurisdiction. Id. at 889.

This Court has generally recognized two situations which authorize the invocation of its conflict jurisdiction. The first situation is when the decision announces a rule of law which conflicts with the rule previously announced by another appellate court. The second is when there is an application of a rule of law

to produce a different result in a case which involves substantially the same controlling facts as a prior case decided by another appellate court. See, Neilsen v. City of Sarasota, 117 So.2d 731, 734 (Fla. 1960). In order for there to be express and direct conflict, the issues in the allegedly conflicting cases must be the same, or alternatively, the facts must be analytically the same. See, In re Interest of M. P., 472 So.2d 732, 733 (Fla. 1985); Dept. of Revenue v. Johnston, 442 So.2d 950, 951-52, (Fla. 1983). The Petitioners have not and cannot demonstrate jurisdictional conflict, and this Court should decline to review the case.

A. RULE OF LAW CONFLICT

Petitioners argue that the Second District's decision conflicts with Gaskins v. General Ins. Co. of Florida, 397 So.2d 729 (Fla. 1st DCA 1981). They further assert Gaskins is the only other Florida appellate decision "construing the statute." (Pg. 4, Jurisdictional Brief) The Petitioners omit, however, that the statute interpreted by the First District in Gaskins was subsequently amended to expressly authorize conduct which was prohibited under the predecessor statute and which formed the basis of the insurer's statutory liability there. The Gaskins court interpreted Fla. Stat. § 627.746(1) and (3) (1977)[4] and held that the literal interpretation of that statute created an issue whether the agency was representing the insurance company in the transaction with the insured.

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[4] (A. 11)

The amended statute interpreted here prohibits an insurer from providing its forms to any agent unless the forms or supplies relate to a class of business with respect to which such agent was a licensed agent, whether for that insurer or for another one. (A. 8) Since Mr. Pliego was licensed to sell the type of insurance in question (A. 9), there was no statutory violation as there was in Gaskins. There simply is no conflict between the present decision of the Second District and Gaskins.

Nor is there express and direct conflict with the rule announced by the Second District in the present case that if Mr. Collado signed the application, he is presumed to have intended to authenticate it and become bound by its contents, and he could not defend against the written contract that he had signed on the ground that he had not read it. The cases cited by the Petitioners for this alleged conflict simply do not support their assertion. For instance, in Blumberg v. American Fire & Cas. Co., 51 So.2d 182 (Fla. 1951), this Court held that an insured was not required to read his insurance policy. The issue for the court's determination was whether the policy, as written and delivered by the carrier, provided coverage to Mr. Blumberg as an individual or whether it was limited to his corporation. The issue of law addressed by the court involved the concept of mutual mistake. This Court held that when the evidence showed the intent of the parties to insurance contracts and the scrivener failed to express that intent, or did so ambiguously, the industrial commission had the authority to interpret the contract to express the intent of the parties when it was made. That rule of law has nothing whatsoever to do with the

rule of law contained within the present decision of the Second District.

This Court's decision in Columbian National Life Ins. Co. v. Lanigan, 19 So.2d 67 (Fla. 1944) likewise is not in conflict with the decision of the Second District. In Lanigan, a medical examiner for a life insurance company interrogated the insured and completed the application with the information the medical examiner believed to be relevant to the insurer. The insured gave full and complete responses to the best of his ability to all questions as asked. This Court stated that when an insured gives truthful answers to questions contained in an application and the company's agent either through fraud or mistake inserts answers in the application which are not in accord with the information given from the insured, the insurer is estopped from raising a breach of warranty in the application. This Court also stated that under such circumstances, an insured could not be held to be contributorily negligent for his failure to read the application and discover the discrepancies.

In this case, the Second District's decision does not remotely suggest that Mr. Collado provided full and complete answers to questions asked by Mr. Pliego or that Mr. Pliego crafted the answers to provide information he thought was relevant to RLI. The court's decision indicates that the evidence was conflicting as it related to the identity of the person who filled out the application, whether the applicants read it before they signed it and whether Mr. Collado even signed it. (A. 6) The Second District merely stated that if signed by Mr Collado, he was bound

by his answers, and if completed by Mr. Pliego, the Collados were still bound because as a broker, Mr. Pliego was acting as the Collados' agent under the circumstances. Lanigan simply has no application to this case.

For the same reason, this Court's decision in Stix v. Continental Assurance Co., 3 So.2d 703 (Fla. 1941) likewise is not in conflict with the decision of the Second District. There was no assertion, nor any facts in the opinion which remotely suggest that the Collados or Almerico ever argued that the answers to the questions were truthfully provided by the Collados and that the agent mistakenly filled in the answers, or through fraud, did not provide accurate information. The Second District did not even discuss these legal principles, and the factual scenarios in which these cases arose are not remotely similar to the present case.

The Petitioners' reliance upon the First District's decision in Southern Rack & Ladder v. Sexton, 474 So.2d 847 (Fla. 1st DCA 1985) is equally misplaced. In Sexton, the insurance agent assured the individual that he would be covered under the policy, yet the written document did not express that intent. That fact scenario has nothing whatsoever to do with the present case, and there were no rules of law announced by that court which remotely conflict with anything said by the Second District.[5] Simply

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[5] To the extent that the Petitioners attempt to create conflict with Peninsular Life Ins. Co. v. Wade, 425 So.2d 1181 (Fla. 2d DCA 1983), it is inappropriate for several reasons. First and foremost, it is a decision of the Second District and, therefore, would at worst create intra-district conflict which is insufficient to invoke this Court's jurisdiction. Second, like the other cases cited by Petitioners, it does not announce a conflicting rule of law with any announced by the Second District

stated, there is no "rule conflict" that has been identified by the Petitioners.

B. THE FACTS TO LAW CONFLICT

The Petitioners also fail to demonstrate any "fact" conflict upon which to invoke this Court's discretionary jurisdiction. First, the theoretical facts relied upon are inappropriate to create conflict jurisdiction. This Court must rely upon the facts as contained within the ruling of the Second District. See, Reaves v. State, 485 So.2d 829, 830 n. 3 (Fla. 1986); Hardee v. State, 534 So.2d 706, 707 (Fla. 1988). The relevant facts within the opinion state that Mr. Pliego was licensed by American Mutual, a company who decided to no longer issue umbrella policies. (A. 5) The insured, Mrs. Collado, was properly informed and requested insurance from some other company. Mr. Pliego then went to Poe and Associates to obtain an application for an umbrella policy with RLI. (A. 5) Analogous fact patterns do not appear in any of the cases cited to support the alleged "fact" conflict.

In fact, rather than conflict, the Second District's decision is in conformity with cases which do have analytically analogous fact patterns. In Travelers Ins. Co. v. Quirk, 583 So.2d 1026 (Fla. 1991), this Court approved the Second District's decision that the agency which procured the umbrella policy was a broker for the insured. The facts concerning the procurement of the umbrella policy in Quirk are nearly identical to those in this

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here.

case. That is, the agent there was not licensed by the umbrella carrier as its agent, the agent obtained an application from an authorized agent and submitted the application through the authorized agency. The Second District noted in Quirk v. Anthony, 563 So.2d 710, 716 (Fla. 2d DCA 1990) that the procedure used for that policy was virtually identical to that used in Auto-Owners Ins. Co. v. Yates, 368 So.2d 634 (Fla. 2d DCA), cert. den., 378 So.2d 351 (Fla. 1979). In the present case, the Second District, as it did in Quirk, likewise found that the procedure utilized to obtain the RLI application was virtually identical to that used in Yates.

Finally, the Second District's decision does not factually conflict with the cases that have determined that the existence of apparent agency is typically an issue of fact. Determinations that a person selling insurance is a broker for the insured as opposed to an agent for the insurer are determinations of law and have been routinely treated as such on appeal. See e.g., Quirk v. Anthony, 563 So.2d 710, 716 (Fla. 2d DCA), app'd. sub nom, 583 So.2d 1026 (Fla. 1991). See also, T & R Store Fixtures, Inc. v. Travelers Ins. Co., 621 So.2d 1388 (Fla. 3d DCA 1993); Auto-Owners Ins. Co. v. Yates, 368 So.2d 634 (Fla. 2d DCA 1979) (reversing summary judgment for insured with directions to enter judgment in favor of insurer); AMI Ins. Agency v. Elie, 394 So.2d 1061 (Fla. 3d DCA 1981) (determination that broker acting on behalf of the insured and that there was no agency relationship with insurer made as a matter of law). This Court should decline

to exercise its discretionary jurisdiction to review this case on the merits.

CONCLUSION

The decision of the Second District in the present case provides neither "rule" conflict nor "fact" conflict with any of the decisions cited by the Petitioners. Here, Mrs. Collado was informed by her agent, Mr. Pliego, that the company who had licensed him as an agent, American Mutual, no longer wrote umbrella policies. Upon that notification, she instructed Mr. Pliego to obtain umbrella coverage elsewhere. He did so through Poe and Associates, RLI's appointed agent. The Second District here properly recognized that RLI could not be estopped to deny coverage based upon the material misrepresentations which admittedly were contained within the policy. Since there is no conflict, review should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by U.S. Mail to **Lee D. Gunn, IV, Esquire,** Post Office Box 1006, Tampa, Florida 33601-1006; **A. Woodson Isom, Esquire,** 3802 Bay to Bay Blvd., Bldg. B, #12, Tampa, Florida 33692; **Harold D. Oehler, Esquire,** Post Office Box 1531, Tampa, Florida 33601; **David Hyman, Esquire,** Post Office Box 1801, Riverview, Florida 33569-1801; **Peter J. Brudny, Esquire,** 813 W. Kennedy Blvd., Suite 100, Tampa, Florida 33606; and **John McLaughlin, Esquire,** 708 Jackson Street, Tampa, Florida 33602-5008, on November 15, 1996.

George A. Vaka, Esquire