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

REPLY BRIEF OF PETITIONERS

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ARGUMENT

I. RLI'S ASSERTED INTERPRETATION OF THE STATUTE VIOLATES RULES OF CONSTRUCTION AND PUBLIC POLICY

RLI's position that an insurer may establish a network of producing agents throughout our state without complying with the Florida Insurance Code, Licensing Procedures Law, § 626.011 *et. seq.*, must fail. Insurers cannot be encouraged to violate the Code's appointment process and escape the responsibility for producing agents the Code imposes upon insurers for the protection of Florida consumers. Insurers doing business in this state cannot be permitted to avoid the fees and taxes imposed by virtue of the requisite appointment process. *See* § 626.451, Florida Statutes 1989 and Title 4, Chapter 4-211, *et. seq.,* Florida Administrative Code. RLI cannot circumvent the statutorily required responsibility for its agents by constructing a marketing system consisting of only one appointed "strawman" through whom applications are mailed and actually conducting its business through unappointed sub-agents by whom it is not bound. This Court's approval of such a marketing scheme would gut the protections of the Florida Insurance Code/Licensing Procedures Law. In reaching its conclusions, RLI's argument ignores the plain meaning of § 626.342, Florida Statutes, and the important public policies furthered by the Florida Insurance Code, Licensing Procedures Law.

RLI's argument misinterprets the various legislative changes to the Code. Under statutes existing at the time of the issuance of the subject RLI policy, RLI should have "licensed" Pliego pursuant to § 626.451, Florida Statutes, when it decided to authorize Pliego to market its PUP program, countersign RLI's applications, and supply him with the necessary materials to act as its field representative. RLI would then have been required to perform a background check and certify "the moral character, fitness, and reputation" of Pliego. § 626.451(2), Florida Statutes. Upon "licensure", RLI would have the civil liability for the errors of "its agent" long recognized under Florida law. *See, e.g., Johnson v. Life Insurance Company of Ga.,* 52 So. 2d. 813 (Fla. 1951)(facts within the knowledge of an authorized representative of the insurer while acting

within the proper scope of his authority is knowledge of the insurance company); *Russell v. Eckert,* 195 So. 2d 617 (Fla. 2d DCA 1967)(same). This liability was expressly codified in 1990 by amendment to § 626.451 when the Legislature added subsection three. Insurers which did not "license" field agents to whom they supplied materials and accepted business from were rendered subject to civil liability as if such agent had been authorized by the insurer to act in its behalf. § 626.342(3), Florida Statutes. This is the literal application of the statutory scheme as interpreted by *Gaskins v. General Insurance Co. of Florida,* 397 So. 2d 729 (Fla. 1st DCA 1981) *reh'g den.*

Interestingly, RLI does not even attempt to support the rationale of the Second District's construction of § 626.342, Florida Statutes, which, in part, relied upon the statutes' title. Presumptively, RLI now agrees that the term "unlicensed" in the title would refer to unlicensed by the state to act as an agent or unlicensed by a carrier to represent it. (Prior to 1990, § 626.342 referred to agents as, "appointed, licensed, or authorized" to act on its [the insurer's] behalf.)

RLI's "plain meaning" analysis is conclusory and illogical. If RLI's interpretation were correct, then subsection (2) would simply read: "any insurer, general agent, or agent who violates subsection (1) and who accepts or writes any insurance business for such agent or agency, shall be subject to civil liability..." Under the rules of construction, upon which RLI and Almerico and Phoenix agree, this Court must give force and effect to the language within subsection (2), "not licensed to represent the insurer", and impose civil liability upon RLI for the acts of Pliego. RLI does not dispute that Pliego was supplied with the materials enumerated in subsection (2) and that the Collados' policy was accepted from Pliego. Further, RLI agrees that it authorized Pliego to go over the application with the insured and sign the 1988 and 1989 PUP applications as RLI's authorized "agent" or "producer", respectively. Thus, the knowledge of Pliego was held within the scope of the agency statutorily imposed.

Furthermore, RLI now concedes that the Collados' policy was not issued pursuant to the Exchange of Business provisions of the Florida Insurance Code. (Answer Brief at p.25) Remarkably, RLI does not even attempt to support the conclusion of the Second District below

that since RLI and Pliego complied with § 626.752, Florida Statutes, § 626.342(1) was not violated and Pliego did not become the statutory agent of RLI pursuant to § 626.342(2), Florida Statutes. *RLI Ins. Co. v. Collado,* 678 So. 2d 1313, 1316, 1317 (Fla. 2d DCA 1996). Factually, it is undeniable that RLI and Pliego did not comply with § 626.752. Moreover, this statute provides the only circumstance for the proper supply of the materials described by § 626.342(1) to an appointed resident Florida general lines agent (Pliego). *See*, Sections 626.752(2) and (3), Florida Statutes and Florida Administrative Code, Title 4, Chapter 32, Section 32.02 (1985). Finally, the civil liability of such supplying insurers imposed by § 626.342 is expressly reserved by § 626.752(3)(i), Florida Statutes.

RLI's treatment of *Gaskins, supra* and *Brown v. Inter-Ocean Insurance Company,* 438 F.Supp. 951 (N.D. Ga. 1977), respectfully, enters the realm of the absurd. RLI concedes *Gaskins* and *Brown* construed the material language now found in § 626.342, Florida Statutes. (Answer Brief at p.24) At the time of *Gaskins*, the statute prohibited the supply of materials to any agent "until" such agent received from the department a license to act as an insurance agent. § 626.746(1), Florida Statutes. The 1980 version maintains the prohibition "unless" the agent is licensed. § 626.342(1), Florida Statutes. Given that *Gaskins* and *Brown* construed the provision of materials to an agent within that agent's licensed class of business, this "change" in subsection (1) is immaterial to the holdings of these cases and a determination of the issues in the instant case. RLI goes so far as to argue that "in light of those decisions [*Gaskins* and *Brown*], the Legislature amended the statute..." (Answer Brief at p.24) This is incredible since the referenced 1980 amendment was made the year before *Gaskins* was decided.

RLI also seems to argue that, because the historical criminal penalties for violation of subsection (1) have been deleted, the imposition of civil agency liability in subsection (2) applies only where there has been a violation of subsection (1). In other words, the coverage of subsections (1) and (2) is now co-extensive. Such an argument ignores the fact that the punitive consequences for violation of subsection (1) have simply been moved to the Florida

Administrative Code at Title 4, Chapter 231, Section 231.110(5). Under that provision, an insurer who violates § 626.342(1) is now subject to having its license suspended for three months. *See* Appendix A.

RLI's efforts to distinguish *Queen Insurance Company v. Patterson Drug Company,* 74 So. 2d 897 (Fla. 1917) are equally remiss. *Queen* is simply not distinguishable based upon the fact that, in *Queen,* the insurer never inquired of the omitted facts. (Answer Brief at p.25) In fact, RLI has never established Pliego inquired about the facts and was in anyway mislead. To the contrary, RLI has contended that Pliego had prior knowledge of the omitted facts material to the risk; albeit RLI spends a great deal of effort on appeal trying to posthumously retract these concessions. (Answer Brief at pp. 37-39) The rules of law announced in *Queen* demonstrate the correctness of Almerico and Phoenix's position.

As noted with great detail by both parties in their initial briefing, RLI conceded early on in the litigation process that J.R. Insurance Agency was aware of the existence of both an underage driver and at least one high performance vehicle as defined by RLI prior to completion of the August, 1989 application. RLI now attempts to change its stated position with regard to knowledge of Pliego in an effort to avoid the summary judgment entered against it at the trial court level. Without any citations to authority, RLI now advances the position that it is entitled, on appeal, to change its stated position.

Specifically, RLI argues that Almerico and Phoenix cannot rely upon either RLI's Answers to Interrogatories or corporate representative deposition questions since the questions were posed in "contention" form. Instead, asserts RLI, a litigant is bound only by responses to requests for admissions regarding the litigant's position in the litigation. This argument ignores the fact that the Standard Interrogatory Forms approved by this Court include "contention" interrogatories at questions number 13, of Form 1, and question numbers 25 and 26 of Form 3. Carrying RLI's argument to its logical conclusion would enable a plaintiff who answers "No" to standard interrogatory number 13, which inquires whether the plaintiff contends that he or she has lost any

income, benefits or earning capacity as a result of the incident described in the complaint, to thereafter appear at trial and present evidence of past and future wage loss over objection by the defendant propounding the interrogatories. As originally noted in Almerico and Phoenix's initial brief, permitting such a change of position in both the hypothetical case and the present case flies in the face of the general purposes of discovery.

Moreover, it is well established that a party cannot change its position after giving deposition testimony in the absence of good cause in order to create fact issues to avoid summary judgment at the trial level, *Gardner v. Hollyfield,* 639 So. 2d 652 (Fla. 1st DCA 1994) *citing Home Loan Company, Inc. of Boston v. Sloan Company of Sarasota,* 240 So. 2d 526 (Fla. 2d DCA 1970). RLI should not be permitted to do at the appellate level what it could not do at the trial court level. If RLI wished to change its position at the trial court level, it could have done so by moving to amend its answers to interrogatories upon good cause shown. RLI failed to do so. It cannot now seek to assert issues it has previously disavowed, under oath, the existence of in order to prevail on appeal.

Interestingly, RLI concedes that Pliego was specifically requested to add Daron and his RX-7 to the American Mutual policy, yet conveniently ignores the fact that RLI, through its agent, then knew, at the very least, that the risk it had intended to insure was no longer insurable. Yet RLI took no action to cancel or rescind the Collados' RLI policy during the five months prior to the accident. Under this analysis, RLI is estopped from rescinding the policy by its own conduct, a defense raised by Almerico and Phoenix, but never addressed by the trial court since it was conceded by RLI that Pliego knew of the material facts prior to filling out the 1989 RLI application.

II. RLI'S COMMON LAW AGENCY ARGUMENTS IGNORE THE FACTS OF THE PRESENT CASE.

RLI continues to engraft wholly inapplicable fact patterns and legal analysis to avoid the inevitable conclusion that Mr. Pliego was its common law agent. RLI cites no case involving a

carrier expressly authorizing its numbered agent/producer, identified as same on the RLI applications, to review the application with prospective insureds, and apply his professional skill and judgment to be sure a correct and complete application was taken. Yet, these are the facts in the instant case. Dooming RLI's effort at avoidance of responsibility for the errors of its agent is the fact that RLI would only accept applications from subproducers such as Pliego.

Under the instant facts, *Auto Owners Ins. Co. v. Yates,* 368 So. 2d 634 (Fla. 2d DCA 1979) provides no safe harborage. RLI recognizes that the "broker" in *Yates* signed at the place designated for the insured. (Answer Brief at p.26) The broker did not have any special relationship with the insurer and was not authorized to act as an agent/producer when signing the insurer's application. The insurer did not even know it was the broker who actually signed the form. (Answer Brief at pp. 26-28) In fact, the propositions of law announced in *Yates* and cited by RLI are supportive of Almerico and Phoenix's arguments.

The *Steele v. Jackson National Life Insurance Company,* _____ So. 2d _____, 22 FLW D817 (Fla. 5th DCA, March 27, 1997), decision is best viewed as fact specific and turning on inquiry notice of limited, actual or apparent authority. The Fifth District held that it is so extraordinary to think that five hospitalizations for mental illness and a diagnosis of paranoid schizophrenia need not be disclosed in a life insurance application as to require insureds to ask for confirmation from the agent that he was authorized to construe the questions as not requiring disclosure. *Id.* at D818.

Almerico and Phoenix respectfully urge that caution be exercised to avoid any tendency demonstrated by the *Steele* court to summarily equate an "independent" insurance agent with a broker. As Judge Altenbernd wrote in *Quirk v. Anthony,* 563 So. 2d 710 (Fla. 2d DCA 1990), the public rarely appreciates any legal significance between dealing with a "captive" agent selling only one insurer's products and an "independent" agent who has producer arrangements with a number of different carriers. *Id.* at 716. As recognized by *Steele*, the independent agent may serve as the dual agent for both insurer and insured. *Id.* at D818. The role of the independent

agent in the selection of appropriate coverages and carrier to provide the policies desired by the insured, is appropriately viewed as the act of a "broker." Upon selecting a particular company, however, the acts of the agent authorized by the selected insurer under any existent special relationship are deemed binding upon the insurer. This rule of law is consistent with the analysis applied in *Travelers v. Quirk* wherein this Court approved the holding that, as a matter of law, an independent agent appointed by the issuing insurer is precluded from making underinsured selection/rejection decisions on behalf of an insured. *Travelers Ins. Co. v. Quirk,* 583 So. 2d 1026 (Fla. 1991).[1]

RLI places great import upon the revelation that Mr. Collado concedes he signed the application. (Answer Brief at p.34) Almerico and Phoenix's consistent position regarding who signed the form is apply supported by the record. (*See* Initial Brief at p.5 and Answer Brief to the Second District Court of Appeal, p.6) Construing the facts in the light most favorable to the non-moving party for purposes of summary judgment, (a standard frequently overlooked by RLI when arguing in favor of its summary judgment), Mr. Collado was presented with and signed the application in 1989.

However, unless this Court chooses to recede from longstanding precedent, the signature by an insured is irrelevant. In the area of insurance applications, an insured is not under a duty to review and correct an application improperly completed by an insurer's agent. The public policy expressed by *Stix v. Continental Assur. Co.,* 3 So. 2d 703 (Fla. 1941) and *Columbian National Life Insurance Co. v. Lanigan,* 19 So. 2d 67, 70 (Fla. 1944) *reh'g den*, continues as important in today's complex financial world as when first announced over fifty years ago. If insureds who sign insurance forms completed and reviewed by the insurer's agents can lose their policies because of errors generated by agents, then agents will be encouraged to not accurately

1. Of course, an informed insured is not precluded from expressly authorizing the agent to perform the ministerial act of signing the requisite form on behalf of the insured. *Byron v. The Travelers Indemnity Company of Illinois*, 601 So. 2d 1330 (Fla. 2d DCA 1992).

complete forms. If the insurer's agents' mistakes are not picked up by the consumer, then the insurer can later rescind the policy, regardless of what the agent knew and should have placed upon the application. The unscrupulous insurer will then check the applications when a claim is made and rescind wherever possible, keeping the premiums on other "undesirable" risks which do not result in a claim. Such a rule of law is contrary to the stated purposes of the Florida Insurance Code/Licensing Procedures Law and Florida Administrative Code.[2]

Stix and its progeny correctly preclude insurers from advancing facts actually known or about which inquiry should have been made, as a basis for rescinding a policy. Recent case law interpreting the rescission statute supports this conclusion as well. *See e.g. North Miami General Hospital v. Central Nat. Life Ins. Co.,* 419 So. 2d 800 (Fla. 3d DCA 1982)(carriers cannot ignore actual or constructive knowledge that representations are incorrect or untrue). This should be especially true where the rescission is sought after a claim is made. Certainly, if *Steele* and other opinions place the burden of inquiry notice of the scope of authority upon insureds, it is only fair that insurers, likewise, be expected to inquire about apparent changes in material facts. For example, Pliego should have inquired as to why the Collados' children and the RX-7 were on the 1988 application, but not the 1989 application.

RLI's continuing efforts to create an issue of the extent of Pliego's knowledge, (*See* Answer Brief at pp. 37-39), need only be considered if this Court does not require RLI to be bound by its positions below. Even if RLI is relieved of its contentions, this record indisputably establishes that Pliego knew, or was on inquiry notice of, the material facts and, as his principal, RLI is bound by that knowledge.

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2. Title 4, Chapter 211, Section 211.020, Florida Administrative Code states:

> The purpose of these rules is to establish minimum standards and guidelines to provide adequate disclosure of the information necessary to evaluate applicants for appointment as insurance representatives to protect the insurance buying public by appointing fit, trustworthy, competent and qualified insurance representatives.

III. RLI CANNOT RELY UPON CASE LAW REGARDING BAD FAITH ACTIONS TO DEFEAT THE BREACH OF CONTRACT

Despite RLI's contentions to the contrary (Answer Brief at p.42), Almerico and Phoenix have cited the policy language asserted to be the basis of the claimed breach. (Initial Brief at p.5) This language requires indemnity from both existent and anticipated obligations over the primary limits ("are, or would be"). Thus, RLI's policy gives rise to the duty to settle the case or pay its limits toward a judgment. RLI breached its contract and left its insureds to their own devices to protect themselves from the very exposure they had purchased the 1988 and 1989 policies to avoid. RLI's argument that filing a declaratory judgment action insulates it from a claimed breach of contract is unfounded. No authority is cited by RLI for the proposition that a party may cure a breach by bring an action pursuant to Chapter 86, Florida Statutes. RLI's refusal to make its limits available carried the foreseeable risks now manifested before this Court and it should be called upon to answer for its mistakes, regardless of whether Almerico and Phoenix may have the additional remedy of bad faith. Accordingly, *Robinson v. State Farm Fire & Cas. Co.*, 583 So. 2d 1063 (Fla. 5th DCA 1991), *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), considering bad faith claims, are inapplicable.

IV. THE STATUTORY INTEREST RATE AT WHICH POST-JUDGMENT INTEREST IS ACCRUING CONTINUES TO CHANGE.

In its Initial Brief, Petitioners noted, as a procedural matter, that 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. Significantly, since Final Summary Judgment was originally entered in December of 1994, the statutory interest rate has twice been changed. First, beginning January 1, 1995, the statutory rate of interest was reduced from 12% to 8% pursuant to § 55.03, Florida Statutes (1994). Thereafter, § 55.03, Florida Statutes was again amended to reflect that the rate of interest would be set according to certain financial criteria. The current statutory rate of interest beginning January 1, 1997 is 10%. Accordingly, by operation of law, the statutory interest rate applied to the judgment amount was 12% until December 31, 1994. Thereafter, from January 1, 1995 to December 31, 1996, the interest rate was 8%. Interest accruing from January 1, 1997 forward will be 10% until and unless the statutory interest rate is adjusted pursuant to the provisions of § 55.03, Florida Statutes.

CONCLUSION

For the foregoing reasons and those previously set forth in their Initial Brief, Petitioners respectfully request that the opinion of the Second District Court of Appeal be reversed and the Final Summary Judgment entered by the trial court reinstated.

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 9th day of June, 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 100 South Franklin Street, Suite 101, Tampa, Florida 33602, 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 813 West Kennedy Blvd., Suite 100, Tampa, FL 33606.

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