IN THE
SUPREME COURT OF FLORIDA

CASE NO. 90,747

ALLEN GREEN, as Personal Representative of the Estate of HAROLD GREEN, Individually,

Petitioner,

v.

LIFE & HEALTH OF AMERICA,

Respondent.

On Discretionary Review of the Opinion of the District Court of Appeal of the State of Florida, 4th District

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ANSWER BRIEF OF RESPONDENT LIFE & HEALTH OF AMERICA

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INTRODUCTION

Petitioner Allen Green seeks review of a conflict that is asserted to exist between the Fourth District's decision in this case, see Green v. Life & Health of Am., 692 So. 2d 220 (Fla. 4th DCA 1997), and the First District's decision in Carter v. United of Omaha Life Ins., 685 So. 2d 2 (Fla. 1st DCA 1996).

The issue allegedly in conflict is whether a health insurer's use of a policy application stating that the answers given by the applicant are true to the best of the applicant's knowledge and belief prevents the insurer from rescinding the policy pursuant to section 627.409(1), Florida Statutes--which states that an "incorrect statement" that is "material either to the acceptance of the risk or to the hazard assumed by the insurer" shall "prevent recovery under the contract or policy"--if the applicant provided such incorrect statements believing them to be true.

This Court has previously decided that issue. In Continental Assurance Co. v. Carroll, 485 So. 2d 406 (Fla. 1986), this Court held that a health insurance applicant's unintentional misstatements in response to an application stating that the answers were true "to the best of [the applicant's] knowledge and belief," id. at 407-08, did not prevent the insurer from rescinding the policy pursuant to section 627.409(1) where those misstatements materially affected the risk, id. at 409.

Petitioner Green does not now, nor has he ever, challenged the correctness of this Court's ruling in Carroll.

The Fourth District in Green, below, correctly recognized that this Court's ruling in Carroll was controlling precedent. By contrast, the First District in Carter impermissibly ignored the controlling nature of this Court's decision in Carroll. It is axiomatic that lower courts are not permitted to disagree with or deviate from binding precedent decreed by a higher court. Accordingly, this Court should affirm the Fourth District's ruling, which followed this Court's decision in Carroll, and should disapprove the First District's ruling in Carter, which impermissibly deviated from the rule that this Court announced in Carroll.

STATEMENT OF THE CASE AND OF THE FACTS

Shortly before his death, Harold Green ("Green") initiated suit against respondent Life & Health of America ("Life & Health") asserting that the defendant insurance company had wrongfully denied benefits due under a home health care insurance policy. Following Mr. Green's death, his son, Allen Green, was substituted as plaintiff representing his father's estate.

The facts giving rise to this suit have never been in dispute. On March 16, 1991, Green applied to Life & Health for a home health care insurance policy. Record (R.) 9. The policy application posed questions that sought to elicit whether the

applicant was currently experiencing, or had previously suffered from, any serious illnesses or medical conditions. In particular, the application asked:

> Have you or your spouse within the past 5 years had or been told you have the following conditions:
>
> * * *
>
> 12. Kidney Failure
>
> * * *
>
> 15. Chronic Obstructive Lung Disease

Id. These questions did not contain any reference to the insured's "knowledge and belief." Cf. Carroll, 485 So. 2d at 407 (dispositive question asked whether applicant, "to the best of your knowledge and belief, [was] in good health and free from deformity or defect").

Later in the application, immediately above the signature line, the following statement appeared:

> I hereby apply to Life and Health Insurance Company of America for a policy to be issued solely and entirely in reliance upon the written answers to the foregoing questions. I agree that the Company is not bound by any statement made by or to any agent unless written herein. I agree that the insurance provided in the policy only covers the applicant when accepted. I have read the answers to the above questions before signing the application. The answers given by me are full, true and complete to the best of my knowledge and belief. All statements herein are deemed representations and not warranties. I understand and agree that no coverage is in force until the policy is

issued. If issued, coverage will be in force as of the issued policy's effective date.

R. 9.

In completing his application, Green asserted, without qualification, that he did not then have, nor had he experienced in the past five years, kidney failure or chronic obstructive lung disease. R. 9. Green signed and submitted his application to Life & Health.

On April 8, 1991, relying on the information that Green supplied in his application, Life & Health issued a home health care insurance policy to Green with an effective date of March 16, 1991, the date of Green's application.

On May 15, 1992, Green filed his first claim for benefits under the home health care policy. R. 199. As part of its ordinary claims-processing procedure, Life & Health obtained Green's medical records. R. 198. Those medical records disclosed that Green had experienced kidney failure within the five-year period preceding his application and was suffering from chronic obstructive lung disease at the time he made his application. R. 112-74.

On October 19, 1992, after comparing Green's medical records with the information that Green supplied in his application for insurance, Life & Health notified Green that it was rescinding the policy because Green's application contained material misstatements of fact. R. 198-99. Life & Health refunded to Green all premium payments that he had made.

Shortly before dying from the illness that gave rise to his claims, Green initiated suit against Life & Health claiming that the insurance company had wrongfully denied benefits under the policy. R. 1-4. Among the defenses that Life & Health relied on was section 627.409(1), Florida Statutes, which states that an "incorrect statement" that is "material either to the acceptance of the risk or to the hazard assumed by the insurer" shall "prevent a recovery under the contract or policy . . . ."

Life & Health eventually moved for summary judgment based on section 627.409(1). In support of its motion, Life & Health submitted the affidavit of Ross Miller, a vice president of the insurance company, stating that Life & Health would not have issued the policy to Green had it known the truth: namely, that Green suffered from kidney failure and chronic obstructive lung disease. R. 197-99. Life & Health also submitted in support of its motion the deposition testimony of Green's treating physicians, which established that Green suffered from kidney failure and chronic obstructive lung disease and that his contrary statements in his insurance application were, at a minimum, incorrect statements. R. 105-95.

In opposing Life & Health's motion for summary judgment, Green sought to establish that his physicians never had informed him, in terms, that he suffered from "kidney failure" or "chronic obstructive lung disease" and that therefore the answers

that he supplied in his application were "true" "to the best of [his] knowledge and belief . . . ."

Life & Health replied that even if the court were to accept Green's assertion that the incorrect statements he made in his insurance application were answered "to the best of [his] knowledge and belief," this Court's decision in Continental Assurance Co. v. Carroll, 485 So. 2d 406 (Fla. 1986), on indistinguishable facts mandated the entry of summary judgment in Life & Health's favor.

The trial court agreed with Life & Health and granted the motion for summary judgment. Green then appealed to the Fourth District Court of Appeal. After Green's appeal had been fully briefed, a different District Court of Appeal, the First District, issued its decision in Carter v. United of Omaha Life Ins., 685 So. 2d 2 (Fla. 1st DCA 1996). Without including in its opinion any detailed examination of this Court's decision in Carroll, the First District held in Carter that "[t]he 'knowledge and belief' provision used by the insurer in the policy application at issue in this case establishes a less stringent standard for determination of misrepresentations, omissions, concealment of facts and incorrect statements than the standard authorized by section 627.409(1), Florida Statutes." Carter, 685 So. 2d at 6-7.

The Fourth District issued its decision in Green's appeal on April 9, 1997. See Green v. Life & Health of Am., 692

So. 2d 220 (Fla. 4th DCA 1997). The court ruled that this Court's decision in Carroll controlled and required that the trial court's grant of summary judgment in favor of Life & Health be affirmed. Green, 692 So. 2d at 221. The Fourth District "acknowledge[d] the line of cases from the Eleventh Circuit which hold that 'knowledge and belief' language in a contract drafted by the insurer imposes a different standard of accuracy than that provided in section 627.409(1)." Id. The Fourth District also acknowledged the First District's contrary decision in Carter and certified the instant conflict. Id. at 222. Nevertheless, the Fourth District concluded that both Carter and the Eleventh Circuit decisions to the contrary were incorrectly decided in light of this Court's decision in Carroll. Id. at 221-22. Judge Pariente dissented, asserting that she would follow Carter and the Eleventh Circuit decisions. Id. at 222-24. Green moved for rehearing before the Fourth District, which denied his motion for rehearing on May 16, 1997.

Relying on the conflict that the Fourth District certified between its decision in Green and the First District's decision in Carter, on June 4, 1997 Green served a Notice to Invoke Discretionary Jurisdiction seeking review in this Court. On June 18, 1997, this Court entered an Order Postponing Decision on Jurisdiction and Briefing Schedule.

SUMMARY OF THE ARGUMENT

The plain language of section 627.409(1), Florida Statutes, and this Court's decision construing that statute in Continental Assurance Co. v. Carroll, 485 So. 2d 406 (Fla. 1986), compel the affirmance of the Fourth District's ruling below and the disapproval of the First District's ruling in Carter v. United of Omaha Life Ins., 685 So.2d 2 (Fla. 1st DCA 1996).

Green's application for a home health care policy contained "incorrect statements" of fact, whether or not they were intentionally made, that were material to Life & Health's risk. This is all that the statute, as construed by this Court in Carroll, requires for rescission.

Life & Health's inclusion in its application of an affirmation for the applicant to complete stating that answers given to questions posed are "true" "to the best of [the applicant's] knowledge and belief" does not alter the controlling nature of this Court's decision in Carroll, for an identical affirmation existed there. See Carroll, 485 So. 2d at 407. At most, such a clause merely serves to emphasize to the applicant how important it is for the applicant to answer all questions fully and truthfully.

Answers that an insurance applicant gives on a policy application invariably will be based on the applicant's knowledge and belief, and so the clause merely serves to emphasize how important it is for the applicant to answer the questions fully

and truthfully. By requesting that its applicants certify that answers given to questions posed in an insurance application are "true" "to the best of [the applicant's] knowledge and belief," an insurer does not imply to applicants that only knowingly-made material misstatements can give rise to rescission. Nor does the insurer, by including such a clause, forfeit its ability, pursuant to section 627.409(1), Florida Statutes, to rescind a policy based upon innocent material misstatements. See Carroll, 485 So. 2d at 407-09 (permitting rescission despite such a clause).

Indeed, a review of decisions from appellate tribunals in other states with statutes similar to section 627.409(1), Florida Statutes, shows that such courts have not concluded that an insurer's inclusion of a statement that answers given to questions posed in an insurance application are "true" "to the best of [the applicant's] knowledge and belief" prevents an insurer from rescinding based upon a material misrepresentation that was unknowingly made.

In sum, this Court's decision in Carroll compels affirmance of the Fourth District's decision below and disapproval of the First District's decision in Carter. Green does not seek reconsideration of this Court's decision in Carroll, and a review of decisions from other states indicates that this Court's decision in Carroll remains well within the judicial mainstream.

ARGUMENT

I. The Fourth District Correctly Determined That This Court's Decision In Continental Assurance Co. v. Carroll Required The Entry Of Summary Judgment In Life & Health's Favor

The question presented in this appeal is whether an insurance company may rescind a policy pursuant to section 627.409(1), Florida Statutes, where the policyholder unintentionally made incorrect statements of material fact in the policy application and certified that the answers given in the application were "true" "to the best of [the applicant's] knowledge and belief."

Both the trial court and the Fourth District correctly understood that this Court's decision in Continental Assurance co. v. Carroll, 485 So. 2d 406 (1986), required them to hold that an insurance company may rescind a policy under these circumstances.

In Carroll, the parents of a deceased child brought suit against an insurance company seeking to recover benefits allegedly due under a life insurance policy insuring the child that the parents purchased. One week before applying for the insurance, the child's mother took the child to the doctor, who "assured Mrs. Carroll that her baby was generally healthy, [but] also informed her that Brian had developed a heart murmur and needed both an EKG and x-rays." Id. at 407.

The insurance application that the child's parents completed asked "Is the child, to the best of your knowledge and

belief, in good health and free from deformity or defect?" Id. (emphasis added). In response, the parents answered "Yes." Id. In response to a question asking what did the child's doctor say about his findings when the doctor last saw the child, the parents answered "Normal." Id.

Both the certified question before this Court in Carroll and this Court's recitation of the facts therein make clear that the parents' incorrect statements of fact were "made in good faith." Id. at 406 (quoting certified question); id. at 408-09 (reaffirming holding in Life Ins, Co. v. Shifflet, 201 So. 2d 715 (Fla. 1967) that even unknowing misrepresentations can void a policy if material).

Notwithstanding the fact that the application at issue in Carroll, as quoted by this Court, contained the statement that the answers given were true to "the best of (the applicants'] knowledge and belief," and notwithstanding the fact that both this Court and the Fourth District viewed the parents' misstatements as unknowing rather than purposeful, this Court nevertheless held in Carroll that the insurer had the right under section 627.409(1), Florida Statutes, to rescind the policy.[1]

The facts of the instant case are indistinguishable from the facts that were before this Court in Carroll. Here, as

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[1] In Carroll, this Court explained that an insurance company's right to rescind an insurance policy pursuant to section 627.409(1) reflects the long-standing common law principle that "a contract issued on a mutual mistake of fact is subject to being voided . . . ." Carroll, 485 So. 2d at 409.

in Carroll, the insurance application Green signed stated that his answers were true to "the best of (the applicants'] knowledge and belief." Here, as in Carroll, Green asserts that his misstatements were unknowing rather than purposeful. Here, as in Carroll, there is no dispute that the incorrect statements contained in the insurance application were material to the risk the insurer accepted. Accordingly, here, as in Carroll, this Court should hold that the courts below correctly permitted summary judgment to be entered in favor of the insurance company.[2]

II. The First District's Ruling In Carter And The Eleventh Circuit's Decisions That Carter Followed Do Not Provide Any Persuasive Reason For Reexamination Of This Court's Decision In Carroll

Notwithstanding this Court's decision in Carroll, Green asks the Court to hold that an insurer who uses an application requiring the applicant to certify that all answers are true to "the best of [the applicants'] knowledge and belief" forfeits the right to rescind a policy pursuant to section 627.409(1) if, unbeknownst to the applicant, the application contained incorrect material statements.

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[2] In Carroll, a jury ruled in favor of the child's parents, and the District Court of Appeal affirmed. This Court held that "[t]he trial judge should have directed a verdict in favor of Continental" and remanded for the entry of judgment in favor of the insurance company. See Carroll, 485 So. 2d at 409.

Not only would such a holding contravene this Court's ruling in Carroll, but it would have no basis whatsoever in logic. Under the rule that Green proposes, Life & Health would be permitted to rescind the policy at issue pursuant to section 627.409(1) if the applicant certified that his or her answers are "true" but would not be permitted to rescind the policy pursuant to section 627.409(1) if the applicant certified that his or her answers are "true to the best of [the applicant's] knowledge and belief." See, e.g., Carter v. United of Omaha Life Ins., 685 So. 2d 2, 6 (Fla. 1st DCA 1997) (endorsing this distinction); National Union Fire Ins. Co. v. Sahlen, 999 F.2d 1532, 1536 n.5 (11th Cir. 1993) (per curiam) (same).

In support of this illogical distinction, Green relies on decisions from the Eleventh Circuit and more recently the First District holding that an insurer which uses an application requiring the applicant to certify all answers are true to "the best of [the applicants'] knowledge and belief" forfeits the right to rescind a policy pursuant to section 627.409(1) if, unbeknownst to the applicant, the application contained incorrect material statements. See Carter, 685 So. 2d 2; Hauser v. Life Gen. Sec. Ins. Co., 56 F.3d 1330 (11th Cir. 1995); William Penn Life Ins. Co. v. Sands, 912 F.2d 1359 (11th Cir. 1990).

Each of these decisions impermissibly ignores the binding nature of this Court's decision in Carroll, and none of

these decisions advances any persuasive reason why Carroll reached an incorrect result or should be reexamined.[3]

Green's argument and the cases on which he relies ignore that there is no rational distinction between the two forms of certification; if anything, an applicant who certifies that his or her answers are "true to the best of [the applicant's] knowledge and belief" would likely be more impressed with the importance of answering all questions as truthfully as possible than an applicant who merely certifies that his answers are "true."

An insurance applicant who is asked to complete an application necessarily must base his or her answers to the questions contained in the application on his or her own knowledge and belief. Thus, in no way could it conceivably have any effect on an applicant's answers to questions posed in an insurance application whether the applicant was asked to certify that his or her answers were "true" rather than "true to the best of the applicant's knowledge and belief." The only difference is that in the first instance the basis for the applicant's answers is implied, while in the second instance the basis is expressed. See Mieles v. South Miami Hosp., 659 So. 2d 1265, 1265-66 (Fla. 3d DCA 1995) (per curiam) (holding that a doctor's certification

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[3] It is especially noteworthy that Green himself does not argue that this Court should reexamine its holding in Carroll. Accordingly, because the facts of Carroll are indistinguishable from the facts of this case, this Court should affirm the Fourth District's ruling.

that "the facts stated are true to the best of [his] knowledge and belief" was equivalent to a statement that "the facts or matters stated or recited in the document are true, or words to that import or effect"); State of Fla., Dep't of Highway Safety v. Padilla, 629 So. 2d 180, 181 (Fla. 3d DCA 1993) (similar), rev. denied, 639 So. 2d 980 (Fla. 1994).

The application at issue both here and in Carroll added the superlative "best" to the phrase "true based on the applicant's knowledge and belief." In context, an applicant who certifies that his or her answers to an insurance application are true to the best of the applicant's knowledge and belief certifies that the applicant has seriously, rather than lackadaisically, considered the questions and attempted to provide truthful answers in response.

It would be perverse for this Court to punish insurers that seek to have applicants appreciate the need to answer applications as truthfully as possible by holding that, as a consequence of including language that the answers given are "true to the best of [the applicant's] knowledge and belief," the insurer cannot rescind based on unknowing material misrepresentations. Yet this would be precisely the result of a ruling in Green's favor.

Life & Health does not dispute that an insurer, in its policy application, could voluntarily relinquish the statutorily-provided right to rescind based on unknowingly made material

misrepresentations, For example, an insurer could provide in its application that "so long as the applicant answers all questions to the best of his or her knowledge and belief, the insurer in exchange relinquishes its right to seek rescission if the application contains material misstatements that were unknowingly made." Cf. Strickland Imports, Inc. v. Underwriters at Llovds, 668 so. 2d 251, 253 (Fla. 1st DCA 1996) (insurance policy that contains express clause permitting insurer to void policy only for intentional misrepresentation established contractual standard that controlled over statute providing that innocent misrepresentations void policy); Travelers Ins. Cos. v. Chandler, 569 So. 2d 1337, 1338 (Fla. 1st DCA 1990) (noting that an insurer may expressly choose to offer greater coverage than is statutorily required), disapproved in part by Travelers Ins. Co. v. Warren, 678 So. 2d 324 (Fla. 1996).

Here, by contrast, no one could reasonably construe Life & Health's policy application as a contractual clause displacing the statute and establishing Life & Health's agreement to relinquish its statutory right of rescission. On the contrary, neither Life & Health's policy nor its application relinquished Life & Health's statutory right to rescind an insurance policy because of material misstatements, whether or not knowingly made and whether or not made on the basis of "knowledge and belief." Rather, Life & Health merely emphasized in its application the importance of giving truthful answers.

Because the First District's decision in Carter and the Eleventh Circuit rulings on which it relies are unpersuasive at best,[4] this Court should adhere to its decision in Carroll and should affirm the judgment on appeal.

III. Appellate Courts In Other states With Statutes Similar To Section 627.409 Have Not Prohibited Rescission Based On Unknowing Misstatements Where The Policy Contains The Applicant's Certification That The Answers Given Are True To The Best Of The Applicant's Knowledge And Belief

No reason exists for this Court to reconsider its decision in Carroll, which held that an insurer can rescind based on an unknowing material misstatement even though the policy

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[4] The initial Eleventh Circuit case that departed from this Court's holding in Carroll was William Penn Life Ins. Co. v. Sands, 912 F.2d 1359 (11th Cir. 1990). Sands is a prime example of the truism that difficult cases often produce bad law. In Sands, two life insurance applicants answered that they did not have cancer or a blood disorder to the best of their knowledge and belief. Id. at 1360. Later, it was determined that, unbeknownst to both applicants, each suffered from the virus that causes AIDS and both had cancer at the time of their applications. Id. at 1361. On these unfortunate facts, the Eleventh Circuit held that the insurer's inclusion of the "knowledge and belief" language in the policy application deprived the insurer of an ability to rescind, pursuant to section 627.409(1), Florida Statutes, based upon unknowing misstatements. Id. at 1362-64. The Eleventh Circuit in Sands also attempted, unpersuasively, to distinguish this Court's decision in Carroll. Id. at 1364 n.6.

No one can dispute that, in some instances, the statutorily-provided right of an insurance company to rescind a policy based on unknowing misstatements of material fact will seem unfair. However, the Florida's Legislature, in section 627.490(1), has not limited an insurer's ability to exercise that right only to cases where a court believes it to be fair. Rather, as this Court recognized in Carroll, the right is available even where exercise of the right may seem unfair.

application contained the statement that the answers given are true to the best of the applicant's knowledge and belief.

Indeed, notwithstanding the First District's decision in Carter and decisions of the Eleventh Circuit misconstruing Florida law, appellate courts in other states with statutes Similar to section 627,409 have not prohibited rescission based on unknowing misstatements where the application contains a certification that the answers given are true to the best of the applicant's knowledge and belief.

For example, in Tharrinston v. Sturdivant Life Ins. Co., 443 S.E.2d 797 (N.C. Ct. App. 1994), the court was asked to determine whether the decedent's answer in the negative to a question asking whether, "[t]o the best of (her] knowledge and belief," id. at 799, the insured had been treated for a condition Of the lungs would permit the insurer to rescind where the answer, while objectively untruthful, reported the facts as the decedent understood them to the best of her knowledge and belief, id. at 799-801. Notwithstanding the "knowledge and belief" language contained in the application, the Court of Appeals ruled in favor of the insurer, explaining:

> In this jurisdiction it is well settled that a misrepresentation of a material fact, or the suppression thereof, in an application for insurance, will avoid the policy even though the assured be innocent of fraud or an intention to deceive or to wrongfully induce the assurer to act, or whether the statement be made in ignorance or good faith, or unintentionally.

Id. at 801 (internal quotations omitted). Accordingly, the Court of Appeals affirmed the trial court's grant of summary judgment in favor of the insurer.

Similarly, in Hite v. American Family Mut. Ins. Co., 815 S.W.2d 19 (Mo. Ct. App. 1991), the insured stated in her application for health insurance that she had not had any indication of shortness of breath, chest pain, heart palpitation or heart murmur within the past ten years. Id. at 20. The application contained the applicant's certification that "all statements and answers in this application are . . . true to the best of my knowledge and belief . . . ." Id. Later, the insured required surgery for a heart condition, and the insurer refused coverage because its investigation upon receipt of the claim disclosed that the applicant had in fact suffered from shortness of breath, chest pain, heart palpitation and heart murmur within the ten-year period before applying for coverage. Id. at 21.

In ruling that the insurance company was entitled to the entry of judgment in its favor, the Court of Appeals stated that "[i]t is irrelevant whether [the applicant] was aware of the conditions she denied in her application." Id. at 22. Thus, the court held that even if the misrepresentations had been "innocently made," id. , the insurer was nevertheless entitled to rescind. Once again, the insurer's inclusion in the application of the "knowledge and belief" language did not deprive the

insurer of its right to rescind based upon an unknowingly made material misrepresentation.

The Court of Appeals of Georgia, in Oakes v. Blue Cross Blue Shield of Columbus, Inc., 317 S.E.2d 315 (Ga. Ct. App. 1984), expressly rejected the holding that Green urges this Court to adopt. In Oakes, the court explained:

> Appellant asserts that, even if he failed to mention all of his wife's illnesses to appellee, the information he supplied was "complete and true to the best of [appellant's] knowledge and belief," as required by the terms of the application for insurance. However, OCGA § 33-24-7(b), pursuant to which a recovery on an insurance policy may be precluded in certain instances, applies to "incorrect statements" as well as to "misrepresentations, omissions, [and] concealment of facts."

Id. at 317. Accordingly, the court of appeals affirmed the trial court's order directing a verdict in the insurance company's favor. Id.

Courts applying the law of Illinois and Indiana are also in accord. See Methodist Medical Ctr. v. American Med. Sec. Inc., 38 F.3d 316, 318-20 (7th Cir. 1994) (applying Illinois law, affirming grant of summary judgment in favor of insurer, and holding that an innocent misrepresentation permits rescission even where the applicant, in the policy application, certifies that "all the statements contained in this Evidence of Insurability Form are, to the best of my knowledge, true and Correct"); Curtis v. American Comm. Mut. Ins. Co., 610 N.E.2d 871, 872-74 (Ind. Ct. App. 1993) (affirming summary judgment in

favor of insurer and holding that insurer may rescind based on misrepresentation innocently made in response to questions asking whether the applicant, "[t]o the best of [his or her] knowledge and belief," had certain medical conditions).

These decisions establish that appellate courts in other states that have considered the precise question presented herein have ruled, in accordance with Carroll, that an insurer can rescind a policy where an application contains innocently made misrepresentations even though the policy asked the applicant to answer to the best of his or her knowledge and belief. In short, this Court's decision in Carroll remains comfortably within the judicial mainstream.[5]

In order to prevail in this appeal, Green must convince this Court to depart from its decision in Carroll. Yet Green has not asked this Court to reconsider its ruling in Carroll, nor, as Life & Health has shown, is there any reason to depart from that decision. Accordingly, this Court should affirm the Fourth District's ruling in favor of Life & Health.

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[5] In Life Ins. Co. v. Shifflet, 201 So. 2d 715, 719 (Fla. 1967), a ruling which this Court reaffirmed in Carroll, this Court first held that "misrepresentations in an application for insurance, material to the acceptance of the risk, do not have to be made with knowledge of the incorrectness and untruth to vitiate the policy." In Shifflet, this Court observed that its ruling "appears to be in harmony with the general rule approved in other jurisdictions." Id. at 720. Likewise, adherence to Carroll and affirmance of the Fourth District's ruling below would be in harmony with the general rule approved in other jurisdictions.

CONCLUSION

For the foregoing reasons, respondent Life & Health of America respectfully requests that the decision of the Fourth District below be affirmed and the decision of the First District in Carter be disapproved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the above and foregoing was furnished by U.S. Mail to: Jerold Hart, Esq., P.A., 4000 Hollywood Boulevard, Hollywood, Florida 33021, Co-counsel for Petitioner; Shelley H. Leinicke, Esq., Wicker, Smith, Tutan, O'Hara, McCoy, Graham & Ford, P.A., One East Broward Boulevard, Suite 500, Post Office Box 14460, Fort Lauderdale, Florida 33302; Attorney for Petitioner; and Jeff Tomberg, J.D., P.A., 626 S.E. 4th Street, Post Office Drawer EE, Boynton Beach, Florida 33425, Attorney for Petitioner's Amicus, the Academy of Florida Trial Lawyers, this 8th day of August, 1997.

Respectfully submitted,

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