IN THE SUPREME COURT OF FLORIDA

CASE NO. 92,577

3d DCA CASE NO. 96-01154

L.T. CASE NO. 93-20474

ANDERSON A. MEDINA, SR.
et al.,

Petitioners,

vs.

DAVID PERALTA,

Respondent.
_____/

RESPONDENT PERALTA'S ANSWER BRIEF

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INTRODUCTION

This is an appeal of a final judgment entered pursuant to a jury's verdict in a negligence action involving a traffic accident. Respondent, DAVID PERALTA, was the Plaintiff in the Eleventh Circuit Court. Petitioners, ANDERSON A. MEDINA and JORGE PEREZ, were Defendants. In the Third District Court of Appeal, ANDERSON A. MEDINA and JORGE PEREZ were Appellants/Cross-Appellees and DAVID PERALTA was the Appellee/Cross-Appellant.

This brief will refer to ANDERSON A. MEDINA and JORGE PEREZ collectively as "PETITIONERS." The Respondent will be referred to as "PERALTA." ALLSTATE INSURANCE COMPANY, PERALTA's underinsured motorist carrier, is a party to this litigation and will be referred to as "ALLSTATE."

The letters "I.B." will be used to refer to PETITIONERS' amended initial brief. The letter "R." will be used to refer to the record on appeal. These citations will be followed by the appropriate page number.

Because PETITIONERS' statement of the case and facts is incomplete and relies on assertions of counsel as proof,[1] this brief has a statement of the case and facts.

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[1] Motions and argument of counsel do not provide proof of facts in appellate court. See Schneider v. Currey, 584 So. 2d 86, 87 (Fla. 2d DCA 1991) (noting "the rule that unproven utterances documented only by an attorney are not facts that a trial court or this court can acknowledge").

STATEMENT OF THE CASE AND FACTS

This action was commenced in the Eleventh Circuit Court on November 1, 1993. (R. 2-10). This case involves an automobile collision occurring in Dade County on April 8, 1990. (R. 3). An Amended Complaint was subsequently filed. (R. 13-23, 34-35). DAVID PERALTA's (hereinafter "PERALTA") underinsured motorist carrier, ALLSTATE INSURANCE COMPANY (hereinafter "ALLSTATE"), was joined as a Defendant. (R. 15-23). ALLSTATE answered the Amended Complaint, (R. 41-43), and filed a cross-claim against Defendants, ANDERSON A. MEDINA and JORGE PEREZ (hereinafter collectively referred to as "PETITIONERS"). (R. 44-45).

Prior to trial, ALLSTATE filed a Motion in Limine as to Insurance Premiums and Insurance Coverage which sought to exclude all reference to insurance. (R. 105-106). PETITIONERS' counsel argued the motion for ALLSTATE and PETITIONERS. (R. 204-206).

PETITIONERS' counsel asserted, "Our motion is essentially to not let the jury know that [ALLSTATE] is a party to this case . . . ." (R. 204). PETITIONERS and ALLSTATE relied upon Colford v. Braun Cadillac, Inc., 620 So. 2d 780 (Fla. 5th DCA 1993), disapproved by Government Employees Insurance Co. v. Krawzak, 675 So. 2d 115 (Fla. 1996), in support of their motion. (R. 205). During that hearing, the trial court declared:

> Does [ALLSTATE] agree that it will not participate in this proceeding? If so, that's an easy thing.
>
> I would think at first blush if [ALLSTATE] says, "I'll be bound by whatever happens in here. If it's an excess judgment, you know, we'll pay in accordance with the

terms of our policy. If not, not."

> They just agree that whatever comes out of the case, it comes out of the case, they're bound as a matter of law, then what's the problem just letting -- [ALLSTATE] doesn't have to be a party to the case except for the purposes of any final judgment, right?
>
> [ALLSTATE's counsel]: I don't have a problem with it.
>
> THE COURT: If that's the case, what do you need [ALLSTATE] in the case for at all? You sever them out from the trial, and after we see what the verdict is, if it's more than a hundred thousand dollars, they say they'll pay everything over a hundred thousand dollars, if that's the numbers. What's the problem?

(R. 206-207). PERALTA's counsel pointed out that ALLSTATE had cross-claimed against PETITIONERS. (R. 207). ALLSTATE then waived its cross-claim. (R. 207-208). PERALTA disputed the defense interpretation of Colford v. Braun Cadillac. (R. 208). The trial court indicated it was going to grant the motion in limine. (R. 208-209).

PETITIONERS' counsel offered, "[M]y recommendation is that counsel who formally represents [ALLSTATE] represent the driver of the vehicle." (R. 209). The trial court rebuffed that suggestion, (R. 209), and opined, "We have a simple case of an injured fellow against a driver and an owner." (R. 210).

Although ALLSTATE remained a party, PETITIONERS were the only Defendants known to the jury. (R. 209). PETITIONERS admitted liability and the case went to trial on the issue of damages alone. (R. 119-120). PERALTA made no claim for economic damages. (R. 194). The record does not include a transcript of the trial

proceedings. (R. 1-227).

The jury awarded PERALTA $15,000.00 in damages. (R. 177-178). PERALTA moved for a new trial or, alternately, additur asserting the failure of the jury to award future damages was completely unsupported by the evidence. (R. 157-159). PETITIONERS moved for entry of judgment suggesting that they were entitled to a set-off for collateral sources. (R. 194-196). The trial court entered judgment in the amount of $15,000.00. (R. 169).

PETITIONERS filed their notice of appeal on April 26, 1996. (R. 165-167).[2] PERALTA filed his notice of cross-appeal on May 2, 1996). (R. 168).

The Third District Court reversed the trial court based upon Government Employees Insurance Co. v. Krawzak, 675 So. 2d 115 (Fla. 1996). (R. 221-222). The court stated:

> We have carefully reviewed the Supreme Court's decision in Krawzak and find the following language to be instructive in the resolution of this issue:
>
> > In Dosdourian v. Carsten, 624 So. 2d 241 (Fla. 1993), we took a strong stand against charades in trials. To have the UM insurer, which by statute is a necessary party, not so named to the jury is a pure fiction in violation of this policy. The unknown consequences of such

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[2] ALLSTATE is a party on appeal although it has apparently elected not to participate. ALLSTATE was served with PETITIONERS' notice of appeal, (R. 166), PERALTA's notice of cross-appeal, (R. 168), PETITIONERS' initial brief (Initial Brief of Appellant, 5), PERALTA's answer brief, (Appellee/Cross-Appellant's Answer Brief, 16), PETITIONERS' reply brief (Reply Brief of Appellants/Cross-Appellees, 5), PERALTA's reply brief (Cross-Appellants's Reply Brief, 4) and PETITIONERS' notice invoking this Court's discretionary jurisdiction, (R. 227). The first document not served on ALLSTATE during appellate review was the Initial Brief of Petitioners filed in this Court.

> a fiction could adversely affect the rights of the insured who contracted and paid for this insurance.
>
> The Court clearly characterizes what happened in Krawzak as a "charade," comparable to the "Mary Carter" agreements outlawed in Dosdourian. The Court further recognized that there are "unknown consequences" to this charade capable of "adversely affect[ing] the rights of the insured." We observe first that the word "charade" is defined as a "readily perceived pretense," or "travesty." "Travesty" is defined as: "1) An exaggerated or grotesque imitation . . . 2) a debased or grotesque likeness; a travesty of justice." Assuming, as we must, that the Supreme Court chose its words carefully, and because the Court has acknowledged that such a "charade," or "fiction," has "unknown consequences," we fail to see how such an error could ever be accurately characterized as harmless. For these reasons, we believe that Krawzak violations are per se reversible and not subject to harmless error review.

(R. 223-224) (original emphasis, insert and omissions) (citations omitted). Chief Judge Schwartz dissented and opined, "[I] think the acknowledged Krawzak error involved in this case was no more than harmless." (R. 225). The majority "concede[d] that if a Krawzak violation is subject to harmless error review, the error in this case would undoubtedly be harmless." (R. 224).

The Third District Court certified conflict with Furtado v. Walmer, 673 So. 2d 568 (Fla. 4th DCA 1996). (R. 224). PETITIONERS filed their notice invoking discretionary jurisdiction on March 10, 1998. (R. 227).

SUMMARY OF THE ARGUMENT

This Court has held that severing a properly joined insurer and hiding its existence from the jury cannot be considered harmless error. It is mandatory to join underinsured motorist carriers in a lawsuit with underinsured tortfeasors under the law applicable to this 1990 traffic accident. Underinsured motorist carriers are necessary parties in such a lawsuit.

Hiding the truth about real parties in interest and underinsured motorist carriers from jurors is an improper charade. The district court correctly reversed the charade which occurred in the trial court hiding ALLSTATE. PERALTA's underinsured motorist carrier, ALLSTATE, was properly joined as a Defendant and it was improper to conceal this fact from the jury.

This Court has approved reversal of just such a trial court ruling and stated, "To have the UM insurer, which by statute is a necessary party, not be so named to the jury is a pure fiction . . . . The unknown consequences of such a fiction could adversely affect the rights of the insured who contracted and paid for this insurance."

Because the district court correctly reversed the trial court for erroneously concealing the existence of ALLSTATE and the underinsured motorist coverage in this case from the jury, the decision of the Third District Court of Appeal should be approved.

ISSUE

WHETHER HIDING THE EXISTENCE OF A PROPERLY JOINED UNDERINSURED MOTORIST INSURER FROM THE JURY OVER OBJECTION IS REVERSIBLE ERROR

Godshall v. Unigard Insurance Co., 267 So. 2d 383 (Fla. 4th DCA 1972), quashed, 281 So. 2d 499 (Fla. 1973), involved personal injuries suffered in a traffic accident just as the instant case. The issue was whether, "'The court erred in ordering the defendant Unigard Insurance Company be severed from the case and not deemed a party at the trial.'" Godshall, 267 So. 2d at 385. This Court held that hiding the existence of a properly joined insurer from the jury was not harmless error.

> The interest which plaintiff has in presenting to the jury the truest possible picture of the existence of financial responsibility is much too important to allow the loss of that interest . . . to be dismissed as "harmless error."

Godshall, 281 So. 2d at 502.

Hiding the truth about real parties in interest and insurance from jurors is an improper charade. See Government Employees Insurance Co. v. Krawzak, 675 So. 2d 115 (Fla. 1996). This is just what the trial court did in the instant case when it granted ALLSTATE's motion in limine and hid the existence of PERALTA's underinsured motorist carrier, ALLSTATE, from the jury. The Third District Court correctly reversed the trial court based on this Court's decision in Krawzak.

PETITIONERS argued at trial, "Our motion [in limine] is essentially to not let the jury know that [ALLSTATE] is a party to this case . . . ." Under section 627.727(6), Florida Statutes

(1989), joinder of the underinsured motorist carrier is mandatory in a lawsuit against the underinsured tortfeasors.[3] See Wardrop v. Government Employment Insurance Co., 567 So. 2d 1012, 1013 (Fla. 3d DCA 1990). Underinsured motorist carriers are necessary parties in such a lawsuit. See Krawzak, 675 So. 2d at 118.

In Krawzak v. Government Employees Insurance Co., 660 So. 2d 306 (Fla. 4th DCA), approved, 675 So. 2d at 118, the plaintiff brought suit against the tortfeasor and her underinsured motorist carrier, GEICO. That jury, like the one in the instant case, determined plaintiff suffered no permanent injury and awarded only damages for past medical expenses and lost wages.[4]

Just as in the instant case, "By motion in limine . . . GEICO moved to sever itself as a party for purposes of trial and to preclude any reference before the jury to the presence of an insurance company in this litigation." Krawzak, 660 So. 2d at 309. Just as in the instant case, "GEICO advised the trial court it would agree to be bound by the verdict." Id. at 309. Just as in the instant case, defense counsel sought to have the underinsured motorist carrier represent the tortfeasor. See id. at 309.

That underinsured motorist carrier relied on Colford v. Braun Cadillac, disapproved by Krawzak, 675 So. 2d at 118, just as PETITIONERS and ALLSTATE did in this case. See Krawzak, 660 So. 2d at 309. That trial court granted the motion in limine just as the

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[3] This cause of action arose April 8, 1990 when the traffic accident occurred.

[4] PERALTA made no claim for economic damages and was awarded only past medical expenses.

trial court below did. See id. at 309.

The Fourth District Court reversed the trial court and held:

> [W]e consider it appropriate that an underinsured motorist carrier who is lawfully sued by a plaintiff and is properly joined as a party to the lawsuit be disclosed to the jury in its actual status as a party defendant. An uninsured or underinsured motorist carrier should not be able to hide its true identity by being severed from the lawsuit while retaining its influence over the conduct of the lawsuit as co-counsel for the tortfeasor. In this case, this procedure seems inherently unfair to the plaintiff, deceptive to the jury, contrary to the insurance contract entered into between the plaintiff and [her] insurer, and contrary to statute. Upon remand we direct that GEICO remain as a party before the jury.

Krawzak, 660 So. 2d at 310 (emphasis added). This Court approved the district court decision, stating:

> [We have taken] a strong stand against charades in trials. To have the UM insurer, which by statute is a necessary party, not be so named to the jury is a pure fiction in violation of this policy. The unknown consequences of such a fiction could adversely affect the rights of the insured who contracted and paid for this insurance.

Krawzak, 675 So. 2d at 118 (footnote omitted). This Court's opinion makes it clear that reversal and a new trial were required in this case. See id. at 117 ("[I]t is appropriate for a jury to be aware of the presence of a UM insurer which has been properly joined in the action against the tortfeasor."). In the instant case, the district court simply followed the law established by this Court.

Brush v. Palm Beach County, 679 So. 2d 814 (Fla. 4th DCA 1996), pet. for rev. denied sub nom. State Farm Mutual Insurance

Co. v. Brush, 695 So. 2d 701 (Fla. 1997) is likewise on point. As here, that complaint was amended to add plaintiffs' underinsured motorist carrier as a defendant. As here, the trial court granted the underinsured motorist carrier's motion in limine prohibiting any mention that the underinsured motorist carrier was a party. After the jury returned a defense verdict, the trial court denied plaintiffs' motion for a new trial and they appealed. The district court framed the issue:

> At issue in this appeal is the dilemma of reconciling section 627.727(6), Florida Statutes (1991), which provides for the joinder of the underinsured motorist carrier as a party defendant along with the underinsured tortfeasor with the well-established policy against disclosure to the jury of the existence of insurance or insurance coverage by a defendant.

Brush v. Palm Beach County, 679 So. 2d at 815 (citation omitted). The court concluded:

> In the instant case, State Farm and [ALLSTATE] provided UM coverage to the Brushes; therefore, the insurance companies are real parties in interest, and were properly joined as party defendants. As such, we hold as we did in Krawzak, that the failure to disclose their actual status is "inherently unfair to the plaintiff, deceptive to the jury, contrary to the insurance contract entered into between the plaintiff and its insurer, and contrary to statute." . . .
>
> Accordingly, we reverse and remand for a new trial.

Id. at 816 (quoting 660 So. 2d at 310). See also id. at 815 ("This policy is consistent with Dosdourian v. Carsten wherein the supreme court recognized the inherent prejudice to the integrity of the judicial process in depriving the jury of full disclosure of all

facts relevant to the pending lawsuit.") (citation omitted).

In the instant case, the district court correctly reversed the trial court for conducting the charade of reducing trial of this case to one between PERALTA and PETITIONERS while hiding ALLSTATE, which was properly joined as required by statute, completely from the jury. See Krawzak, 675 So. 2d at 117-118; Brush v. Palm Beach County, 679 So. 2d at 816. The courts should not countenance such a charade striking at the integrity of the judicial process and it cannot be considered "harmless." See Krawzak, 675 So. 2d at 117-118; Godshall, 281 So. 2d at 502; Brush v. Palm Beach County, 679 So. 2d at 815.

PETITIONERS' reliance on Furtado v. Walmer, 673 So. 2d 568 (Fla. 4th DCA 1996) is understandable but misplaced.[5] Furtado is a two paragraph opinion by a divided court which simply states, in

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[5] Respectfully, the district court's certification of conflict with Furtado v. Walmer, 673 So. 2d 568 (Fla. 4th DCA 1996) is erroneous. There is no conflict with anything in that two paragraph opinion which never even alludes to UM coverage. Cf. Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986) ("Conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision.").

Furtado merely stated, "Although we conclude that the trial court erred in precluding appellants' counsel from eliciting the identity of the insurance carrier in his redirect examination of Dr. Alexakis, we find such error to be harmless under the circumstances of this case." Id. (citation omitted). The opinion does not state that completely hiding the existence of a UM carrier may be harmless error. See id. Additionally, as the Furtado opinion notes, this Court had not yet handed down its decision in Government Employees Insurance Co. v. Krawzak, 675 So. 2d at 115-118 which fully explained and superseded the Fourth District Court's opinion.

This case is not worth this Court's review. It presents a very arcane issue which will quickly cease to arise because the statute applicable to this 1990 accident, § 627.727(6), Florida Statutes (1989), has been amended and no court will follow Colford v. Braun Cadillac, disapproved, 675 So. 2d at 115-118, anymore.

pertinent part:

> Although we conclude that the trial court erred in precluding appellants' counsel from eliciting the identity of the insurance carrier in his redirect examination of Dr. Alexakis, see Krawzak v. Government Employees Ins. Co., 660 So. 2d 306 (Fla. 4th DCA 1995), rev. granted, 670 So. 2d 938 (Fla. 1996), we find such error to be harmless under the circumstances of this case.

Id. See also id. (Polen, J., dissenting) ("The majority acknowledges it was error for the trial court to preclude appellants' counsel from mentioning appellee State Farm Automobile Insurance Co. in his redirect examination of Dr. Alexakis, appellee having opened the door on cross. However, they find the error to be harmless. I disagree, and would reverse for a new trial on this ground.").

Furtado does not hold that completely hiding the existence of a UM carrier may be harmless error. Additionally, at the time the Furtado opinion was issued, this Court had not yet handed down its decision in Krawzak, 675 So. 2d at 115-118, which fully explains and supersedes the district court's opinion.

PETITIONERS' citation of a concurring opinion in State Farm Mutual Insurance Co. v. Miller, 688 So. 2d 935, 936 (Fla. 4th DCA 1996) (Klein, J., concurring) is completely unavailing. That concurrence's analysis is critically flawed, with all due respect.

The concurrence relies on dictum in the district court opinion in Krawzak, 660 So. 2d at 306-310, and inexplicably does not refer to this Court's decision in Krawzak, 675 So. 2d at 115-118, which fully explained and superseded the Fourth District Court's opinion.

This Court's opinion in Krawzak cannot be ignored in any meaningful analysis of such a situation.

The fallacious underpinning of the concurring opinion is plainly revealed when it relies on Stecher v. Pomeroy, 244 So. 2d 488 (Fla. 4th DCA), cert. discharged, 253 So. 2d 421 (Fla. 1971).

The concurring opinion incorrectly asserts, "The Florida Supreme Court approved this court's opinion finding the error to be harmless." State Farm v. Miller, 688 So. 2d at 936 (Klein, J., concurring).[6] This Court did not approve the district court opinion at all. See Stecher, 253 So. 2d at 422. Instead, this Court found that it did not have jurisdiction and discharged its writ of certiorari as improvidently entered. See id. at 422.

In Stecher, insurance limits were mentioned only once in 416 pages of the record. See Stecher, 253 So. 2d at 422-423. This situation is distinguished because that jury was provided with too much information.

In the instant case, the jury had too little information because the trial court engaged in the inappropriate charade of hiding the existence of the UM carrier. The concurring opinion completely fails to distinguish between providing too much information to a jury (mentioned once in 416 pages of record) and hiding the truth from the jury as expressly prohibited by Krawzak. See Krawzak, 675 So. 2d at 118 ("[T]he jury should be aware of the parties to an action about which the jury is to making a

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[6] PETITIONERS repeat this error in their initial brief and encourage this Court to duplicate their mistake. (I.B. 6, 7).

determination.").

The record in the instant case does not include a trial transcript and it is not thereby established that the error was harmless. The harmful nature of the trial court's error is made clear by the fact that PETITIONERS seek to use the verdict tainted by hiding ALLSTATE's status as a properly joined Defendant to seek sanctions pursuant to section 768.79, Florida Statutes (1995). (I.B. 2).

This Court explained its Stecher opinion in Godshall which involved a traffic accident just like the instant case. See Godshall, 281 So. 2d at 500-502. The issue in Godshall was whether, "'The court erred in ordering the defendant Unigard Insurance Company be severed from the case and not deemed a party at the trial.'" Godshall, 267 So. 2d at 385.[7] The district court ruled that severing the defendant insurer and hiding its existence from the jury was harmless error. See id. at 387. This Court quashed that ruling, explaining, "In Stecher, this Court recognized that the jury was entitled to be aware of an insurer as a real party in interest, 'so as to reflect the presence of financial responsibility which should be left apparent before the jury . . .'" Godshall, 281 So. 2d at 501 (original omission).

This Court expressly held that hiding the existence of a

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[7] Joinder was based on Shingleton v. Bussey, 223 So. 2d 713 (Fla. 1969) (authorizing actions directly against insurers), superseded by section 627.4136, Florida Statutes (1997) (nonjoinder of insurers). Krawzak, 675 So. 2d at 117-118, holds section 627.727(6), Florida Statutes (1991) (requiring joinder of UM insurers) prevails over the nonjoinder statute.

properly joined insurer was not harmless error:

> The interest which plaintiff has in presenting to the jury the truest possible picture of the existence of financial responsibility is much too important to allow the loss of that interest, through the granting of severance for any reason except those enumerated in Stecher and repeated in this Court's first opinion in this cause,[8] to be dismissed as "harmless error."

Godshall, 281 So. 2d at 502.

"To have the UM insurer, which by statute is a necessary party, not be so named to the jury is a pure fiction . . . . The unknown consequences of such a fiction could adversely affect the rights of the insured who contracted and paid for this insurance." Krawzak, 675 So. 2d at 118. In Krawzak, this Court simply reaffirmed that hiding the truth about insurers who are real parties in interest from jurors is an improper charade. See id. at 118.

Krawzak violations are even more egregious than those which occurred in Godshall since it is the plaintiffs who paid for the UM coverage which is wrongfully hidden from the jury. Harmless error statutes cannot impair PERALTA's contract with ALLSTATE. See U.S. Const. art. I, § 10; Art. I, § 10, Fla. Const. Just as in Godshall, Krawzak violations cannot be harmless error. See Godshall, 281 So. 2d at 502 ("The interest which plaintiff has in presenting to the jury the truest possible picture of the existence

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[8] Godshall v. Unigard Insurance Co., 255 So. 2d 680, 681 (Fla. 1971) ("a justiciable issue relating to insurance, such as a question of coverage or the applicability or interpretation of the insurance policy or other such valid dispute on the matter of insurance coverage") (emphasis omitted).

of financial responsibility is much too important to allow the loss of that interest . . . to be dismissed as 'harmless error.'"). See also Krawzak 675 So. 2d at 118 ("The unknown consequences of such a fiction could adversely affect the rights of the insured who contracted and paid for this insurance.").

PETITIONERS' claim that ALLSTATE is not a party to these proceedings is untrue. ALLSTATE is a necessary party whose interests will be directly affected by this Court's ruling. See Krawzak, 675 So. 2d at 118 ("the UM insurer is a necessary party"). As a properly joined defendant at trial, ALLSTATE remains a necessary party on appeal. See Miami Bank & Trust Co. v. Rademacher Co., 149 Fla. 24, 5 So. 2d 63 (1941). See also Fla. R. App. P. 9.020(g) (defining parties); id. committee notes (1977) ("The term 'appellee' has been defined to include the parties against whom relief is sought and all others necessary to the cause."). If ALLSTATE is not a party, these proceedings should be dismissed. See Miami Bank & Trust Co. v. Rademacher Co., 149 Fla. at 26, 5 So. 2d at 64 (dismissing appeal because defendant not party). Although ALLSTATE has apparently elected not to participate in appellate court, its interests continue to be represented by PETITIONERS who likewise argued ALLSTATE's motion in limine in the trial court.

PERALTA's underinsured motorist carrier, ALLSTATE, was properly joined as a Defendant and it was improper to conceal this fact from the jury. See Krawzak, 675 So. 2d at 117-118; Godshall, 281 So. 2d at 502. This Court has approved reversal of just such

a trial court ruling and explained, "To have the UM insurer, which by statute is a necessary party, not be so named to the jury is a pure fiction . . . . The unknown consequences of such a fiction could adversely affect the rights of the insured who contracted and paid for this insurance." Krawzak, 675 So. 2d at 118. See also Godshall, 281 So. 2d at 502 (not harmless error to hide properly joined insurer from jury).

Because the trial court erroneously precluded the jury from learning the truth about the existence of ALLSTATE and the underinsured motorist coverage in this case, the district court correctly reversed the trial court and ordered a new trial. This Court should decline to exercise its discretionary jurisdiction in this case or should approve the decision of the Third District Court of Appeal.

CONCLUSION

WHEREFORE the Respondent, DAVID PERALTA, respectfully requests this Honorable Court to approve the district court's judgment reversing the trial court and ordering a new trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was mailed this 1st day of May, 1998 to: **Christopher J. Lynch, Esq.**, Angones, Hunter, McClure, Lynch & Williams, P.A., 66 W. Flagler St., Concord Bldg., Ninth Floor, Miami, FL 33130; **Victor Rams, Esq.,** 150 W. Flagler St., Miami, FL 33130; and **Ronald Rodman, Esq.,** Friedman & Rodman, P.A., 3636 W. Flagler St., Miami, FL 33135.

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