SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
MAY 28 1986
CLERK, SUPREME COURT
By
Chief Deputy Clerk

ALFRED MARCHESANO, ET AL.,

Plaintiffs,

vs

NATIONWIDE PROPERTY AND CASUALTY INSURANCE COMPANY,

Defendant.

Case No. 68,397
SECOND DISTRICT COURT OF APPEAL NO. 85-694

PLAINTIFFS REPLY BRIEF

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TABLE OF CONTENTS

	Page
TABLE OF CITATIONS	ii
ARGUMENT I WHETHER THE APPELLATE COURT ERRED IN REVIEWING A QUESTION WHICH WAS NOT RAISED BY THE INSURER IN THE TRIAL COURT.	1-4
ARGUMENT II WHERE THE INSURED FAILS TO COMPLY WITH ITS RESPONSIBILITY UNDER THE LAW TO OFFER THE UNINSURED MOTORIST COVERAGE LIMITS IN THE ONLY FACE TO FACE PURCHASE WITH AN AGENT, CAN SAID VIOLATION OF THE LAW BE IGNORED BECUAE THE INSURER COMPLIED WITH A SUBSEQUENT AND SEPARATE OBLIGATION UNDER THE LAW OF ANNUALLY SENDING THE INSURED NOTICE OF HIS OPTIONS PERTAINING TO UNINSURED MOTORIST COVERAGE.	5-6
CERTIFICATE OF SERVICE	7

TABLE OF CITATIONS

Cases	Page
Ballen v. Plaza Del Prado Condominium Association, Inc., 319 So.2d 91 (3d DCA 1975)	4
Kimbrell v. Great American Insurance Company, 420 So.2d 1086 (Fla. 1982)	5, 6
Palmer v. Thomas, 284 So.2d 709 (1st DCA 1973)	4
Porter v. Childers, 155 So.2d 403 (3d DCA 1963)	3
Schweigel v. State, 382 So.2d 869 (5th DCA 1980)	4
Other Authorities	
§627.727, Fla.Stat.	5

ARGUMENT I

WHETHER THE APPELLATE COURT ERRED IN REVIEWING A QUESTION WHICH WAS NOT RAISED BY THE INSURER IN THE TRIAL COURT.

Literally every case in a trial court abounds with potential legal issues. If every potential legal issue was litigated a typical trial would last weeks rather than days. Normally the parties are only contesting a very few issues. The way that issues are framed to avoid the unnecessary waste of time on the part of parties, witnesses and the Court is through pleadings and pre-trial conferences. The issues that are admitted or not affirmatively raised are waived. The parties are entitled to rely on the pleadings or absence of pleadings by the other party. The trial court is entitled to rely on the parties to raise the issues they wish determined.

Defendant has had an opportunity to present its side in its brief and apparently is unable to show this Court a single place where it raised the defense now advanced. In their answer to Count I of the Complaint, Defendant did not claim their initial failure to offer equal uninsured motorist limits and obtain a knowing rejection, was later corrected by subsequent notification. Defendant can not

provide a single example to this Court where it asked the trial court to consider the proposition it now advances. Defendant apparently has no explanation for why it stated on the record in the presence of the Court, the Plaintiff and the jury that if the jury's verdict was not affirmative for Defendant on both issues, the Defendant would lose. (156)

At page four of it's brief, Defendant suggests that their defense was raised because "a pure legal issue was framed" by the verdict. If such was true why did Defendant not argue this supposedly obvious and pure legal issue to this trial court. If Defendant believed it was so obvious and felt this defense of later notification existed to defeat Count I why did they never plead it. Apparently Defendant has no explanation for that.

Its plain and simple that the Defendant did not ask the trial court to rule on the issue now framed on appeal. Despite Defendant's assertion to the contrary, this deficiency is not analogous to an attorney failing to cite an authority before the trial court. There is quite a difference between citing authority and raising an issue. A party to a law suit cites authority to support its position on an issue that one side has raised. Case authority is not cited

in a vacuum. There must be an issue the Court is being called upon to address.

> "One of the finest principles of Appellate procedure is that in order to hold a trial court in error, the trial court must have had an opportunity to rule upon the question presented to the Appellate Court for review." Porter v. Childers, 155 So.2d 403 (3d DCA 1963)

It is unfounded for Defendant to assert that the trial court had an opportunity to rule upon the question when the defense was not pled in the answer to Count I and the Defendant's trial counsel conceded its only defense to Count I was that it believed the agent had obtained a knowing rejection. The Defendant never objected to the findings of the Court as set out in its final judgment, it only objected to the basis for the verdict.

Even where a trial court misconstrues a statute in a manner that was material to the determination of an issue, where the contention was a matter of defense to the action which was required to be interposed by the appropriate pleadings in accordance with existing Rules of Procedure, and which the trial court should have been afforded the opportunity of passing upon and arriving at its judgment in the case, the Appellate Court has no authority to reverse the trial court for an alleged error which was neither

properly raised in the trial court nor ruled upon during the course of the proceedings. Palmer v. Thomas, 284 So.2d 709 (1st DCA 1973) It is unfair for the Defendant to contend that the trial court committed error when Defendant can not cite a single place in the Record where they asked the trial court to address this defense. Schweigel v. State, 382 So.2d 869 (5th DCA 1980) Since there is no showing in the briefs or the Record that this defense was every presented to the trial court, the decision of the Second District Court of Appeals should be reversed and the decision of the trial court should be affirmed. Ballen v. Plaza Del Prado Condominium Association, Inc., 319 So.2d 91 (3d DCA 1975)

ARGUMENT II

WHERE THE INSURED FAILS TO COMPLY WITH ITS RESPONSIBILITY UNDER THE LAW TO OFFER THE UNINSURED MOTORIST COVERAGE LIMITS IN THE ONLY FACE TO FACE PURCHASE WITH AN AGENT, CAN SAID VIOLATION OF THE LAW BE IGNORED BECAUSE THE INSURER COMPLIED WITH A SUBSEQUENT AND SEPARATE OBLIGATION UNDER THE LAW OF ANNUALLY SENDING THE INSURED NOTICE OF HIS OPTIONS PERTAINING TO UNINSURED MOTORIST COVERAGE.

Defendant has submitted to this Court that Plaintiffs silence in response to the written communications from the insurer "can only be interpreted as rejection". That statement is against the public policy of the State of Florida regarding the providing of uninsured motorist coverage. It has repeatedly been part of §627.727, Fla.Stat., that the limits of uninsured motorist coverage shall not be less than the limits of bodily injury liability insurance unless a lower amount is selected by the insured. This selection process can not be founded upon the silence of an insured. In the State of Florida, to have lesser limits of uninsured motorist coverage than liability coverage there must be an affirmative act knowingly determined. Kimbrell v. Great American Insurance Company, 420 So.2d 1086 (Fla. 1982)

In the instant case, the jury was never asked to determine

whether Plaintiff knowingly selected lesser coverage on the basis of "stuffers" that were mailed to him. If Defendants really thought that this later notification could have constituted a knowing rejection or a knowing selection then they had the obligation to so plead. Then the jury would have had to determine whether such occurred.

> The question of whether an insured has knowingly ... selected coverage in a lesser amount than that which the insurer is required to make available is an issue to be decided by the trier of fact. Kimbrell supra.

Defendant never tried to litigate that issue before the jury or the trial court. On authorities previously cited in Argument I, Defendant is barred from now litigating a new issue.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY tht a copy of the foregoing has been furnished to Donald Jacobsen, Esq., P. O. Drawer J, Lakeland, Florida 33803, by U. S. Mail, this 9 day of May, 1986.

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