IN THE SUPREME COURT
STATE OF FLORIDA

CONTINENTAL ASSURANCE COMPANY,

Petitioner,

-VS-

ROGER A. CARROLL,

Respondent.

Case No.: 66,324
(4th DCA Case #83-2802)

AMICUS CURIAE BRIEF SUPPORTING
POSITION OF THE RESPONDENT

Respectfully submitted,

THE ACADEMY OF FLORIDA TRIAL LAWYERS Amicus Curiae

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INTRODUCTION

This brief is submitted on behalf of the Academy of Florida Trial Lawyers in support of Respondent, ROGER A. CARROLL.

Its thesis is that the Permenter exceptions to the rule in Shifflet find support in the history of the Florida legislation and in other jurisdictions with identical or similar misrepresentation statutes.

The exceptions were enunciated by Judge Ervin in a special concurring opinion joined by four other members of the Court:

> "An incorrect statement in order to be material and vitiate a policy must be (1) one given by the insured in response to a question he understood or reasonably should have understood, or (2) one which reasonably he could be expected to have sufficient information to answer or state he lacked knowledge to give a responsive answer." (Emphasis added).

In this case, a circuit court jury found that Carroll either did not understand the question concerning his child's health or did not have sufficient information to answer it so that his misrepresentation did not make the policy voidable by Continental

ARGUMENT

A. THE HISTORY, PURPOSE AND INTERPRETATION OF FLORIDA STATUTE SECTION 627.409 SUPPORTS A LIBERAL CONSTRUCTION.

At common law, any incorrect answer on an application for insurance made the policy voidable by the insurer. Even if the answer was given in good faith or was immaterial to the risk, so long as it was incorrect, the company was relieved of its obligation.

This harsh treatment of the insured resulted in many state statutes limiting insurer's ability to void policies because of incorrect answers. These statutes generally provide that a misrepresentation on an application for insurance will permit the insurer to deny coverage if it was fraudulent or material to the risk, or the insurance company would not have issued the policy had it known the correct information. The purpose of these statues was to protect the insured and his beneficiary. Zimmerman v. Continental Casualty Company, 150 N.W.2d 268 (Nebraska, 1967).

The Fifth Circuit, U. S. Court of Appeals in Holston v. Implement Dealers Mutual Fire Insurance Co., 206 F.2d 682 (5th Cir., 1953) commented upon the purpose of the Texas statute relating to misrepresentations in an application for insurance:

> "Its purpose was to prevent insurance companies from

avoiding liability under technical provisions of their policies where the act of the insured breaching such a technical provision did not contribute to bring about the loss."

These statutes are liberally construed to effectuate the purpose which the legislature had in mind. 12 A Appleman, Sec. 7251, p.260; 7 Couch, Sec. 35:15, p.23. They were designed to mitigate or avoid the harshness which sometimes ensued from false warranties made in good faith.

The Fifth Circuit in Life Ins. Co. of Virginia vs. Shifflet, 359 F.2d 501 (5th Cir., 1966), petition granted in 370 F.2d 555 (1967), discussed the effect of Sec. 627.01081, the predecessor of Sec. 627.409, on the common law of Florida. Prior to the statute, the common law rule was that a misrepresentation would not void a policy unless made with conscious intent to deceive.

Effective October 15, 1959, Florida enacted its Insurance Code, particularly Chapter 59-205 of the General Laws of 1959, Sec. 458, Chapter 17 of the Act entitled "This Insurance Contract", which first appeared as Sec. 627.01081, and provided, in pertinent part:

"Misrepresentations, omissions, concealment of facts and incorrect statements shall not prevent a recovery under the policy or contract unless either (1) fraudulent, or (2) material either to the acceptance to the risk or to the hazard assumed by the insurer, or (3) the insurer, in good faith, would

> either not have issued the policy or contract or would not have issued it at the same premium, etc."

Thus, under Sec. 627.01081, a non-fraudulent incorrect statement material to the risk is a sufficient basis for the insurance company to avoid liability.

The Fifth Circuit commented on this change in Florida law:

> "We assume that in the exercise of state power to regulate the insurance business the Florida Legislature had the authority if it so desired to relieve the companies of any business hazard caused by the bona fide factual mistakes of their applicants and at the same time load that burden on those who apply and pay for the policies in good faith. We have been presented with no legislative history or other competent information on which to base any notion of legislative intent. We suppose that there was none to offer."

A review of the legislative history of the bill reveals no statements by the legislature as to their intent.

Thus, the Florida misrepresentation statute, devoid of legislative intent, protects the insured by requiring a material misrepresentation to void the policy, but removes protection by prescribing that nonfraudulent material misrepresentations void the policy.

This partial reversal of the usual effect of such legislation on prior common law resulted in attempts by Florida courts to ameliorate the harsh part of the Legislation.

See e.g. Lamb v. Prudential Ins. Co. of America, 179 So.2d 238 (1965) (Parent's failure to notify insurer of child's heart murmur remanded to trial court to consider the questions asked by insurer, the substance of the answers, and the insured's knowledge of the seriousness of the heart murmur. Notwithstanding that Lamb was overruled by Shifflet, it demonstrates the orientation of the courts subsequent to Sec. 627.01081.)

Based on this history, there is ample support for Judge Ervin's liberal construction of Section 627.409 in enunciating the Permenter exceptions.

B. OTHER JURISDICTIONS WITH STATUTES IDENTICAL TO F.S., SECTION 627.409, HAVE ADOPTED THE PERMENTER EXCEPTIONS.

1. Understandable Questions

In Wardel v. International Health & Life Ins. Co., 551 P.2d 623 (Sup.Ct.of Idaho, 1976), insured claimed under a health policy for expenses of surgery to repair an atrial septal defect of the heart. The court held, under an identical Idaho statute, that the insurer had the obligation to keep the application questions free from misleading interpretations. Failure to do so meant that all application ambiguities would be construed against it.

The court applied a reasonable man standard to determine whether the question on the application is ambiguous. The court held that the application question, "Have you ever been medically treated for or medically advised for any other heart or circulatory disorder?" did not require her to disclose a heart murmur, since she reasonably could not be expected to understand that such a question required her to mention it. The court concluded that the non-disclosure of the heart murmur did not constitute a misrepresentation, omission, concealment of facts, or incorrect statement within the meaning of IC Sec. 41-1811.

In Continental Casualty Co. v. Mulligan, 460 P.2d 27 (Appeals Ct., Arizona, 1969), the court, construing an identical Arizona statute, recognized that if a question on an insurance application is vague and ambiguous, an incorrect answer based on

a reasonable interpretation of that question by the applicant may bind the insurer.

2. Insufficient Knowledge

In World Insurance Co. v. Posey, 227 So.2d 67 (4th DCA, 1969), the court held that since Posey neither knew nor had been told of his kidney trouble when he completed the insurance application stating that he had none, his incorrect answer was not a material misrepresentation and, therefore, the policy should be enforced.

In Mutual Benefit Life Ins. Co. v. Abbott, 157 N.W. 2d 806 (Ct. of Appeals, Michigan, Div. 3, 1968), the insurance company sought to avoid liability based on the applicant's failure to disclose prior treatment for ulcers, headaches, nausea, and emotional disturbance. The court construed the questions and answers liberally in favor of the insured. The question on the application was: "Have you during the last five years had any illness? Ans: No. The court held that the evidence supported the conclusion that the insured did not believe he had any illness at the time of the application. The court concluded that the insured's failure to disclose his prior treatment did not constitute a material misstatement of fact and enforced the policy.

In Canal Ins. Co. v. P & J Truck Lines, Inc., 244 S.E. 2d 81 (Ct. of Appeals, Ga., Div. 3, 1978) insurer sought to avoid liability based on a misrepresentation as to ownership of a

vehicle. The court, interpreting the identical Georgia statute, found that since applicant had no knowledge of anyone else's ownership and acted in good faith, his misrepresentation was not material, therefore, the policy was enforced. The court reiterated the overruling of a prior line of cases which held that the innocence of the misrepresentation was irrelevant so long as the misrepresentation was material.

C. OTHER JURISDICTIONS WITH STATUTES SIMILAR BUT NOT IDENTICAL TO F.S. SECTION 409.627 HAVE ADOPTED THE PERMENTER EXCEPTIONS.

1. Understandable Question.

In Merchants Indemnity Corporation v. Eggleston, 179 A.2d 505 (Sup.Ct. N.J., 1963), the insurance company sought to avoid liability under an automobile policy based on the insured's representation that she owned the car when her husband owned it.

The court commented on the relationship between the insurer and the insured:

> "Beneath all this is the concept that good faith is the essence of insurance contracts, (cites omitted) and this means that good faith is required of the insurer as well as of the insured. Good faith demands that the insurer deal with laymen as laymen and not as experts in the subtleties of law and underwriting. The insurer knows what it deems to be material to the risks. It should ask for the information in understandable terms, and if it seeks to rely upon what it incorporates in the contract as a 'representation', the language it employs should be revealing to the ordinary man with whom it thus does business. (Cites omitted)."

The court critized the carrier's questions regarding ownership as unclear:

> "It is not difficult to frame questions which will elicit such facts concerning the subject as bear upon the acceptance of the

> risk. If a carrier is content to ask only for a conclusional statement as to ownership, it should not complain that an untutored insured did not correctly anticipate the view which the highest court of the State might hold. Controversy could be avoided by the use of written applications, plainly worded."
>
> "It would be unjust to visit the loss upon an insured whose good faith is unassailable, and to absolve a carrier which could have asked, but did not, for the facts it regarded as material."

Since insurer did not ask for the material facts, it could not avoid enforcement of the policy.

In Fuchs v. Old Line Life Ins. Co., 174, N.W. 2d, 273 (Sup.Ct. of Wisconsin, 1970), the court affirmed the enforcement of a life insurance policy on the ground that the insurer's question "Are you now free of any sickness or physical impairment?" did not adequately define those terms. Thus, Fuchs' representation that he had no sickness or physical impairment despite prior heart attacks did not discharge insurer's liability since he neither understood the concept of physical impairment, nor the difference between physical impairment and sickness.

In Blair v. Prudential Ins. Co., 366 F. Supp. 859 (U.S.D.C.D.C. 1973), the court affirmed a finding of coverage on the basis that the application questions were beyond insured's understanding:

> "Prudential, a major writer of monthly debit insurance, has millions of these policies. Rarely does it encounter signi-

> ficiant misrepresenation where death occurs within the two-year period after the policy is written, although it investigates all such cases. The risk is extremely slight and can be easily spread. If the general principles of contract law are to be abandoned for policy reasons, as the remand has determined, - a view that has merit as a matter of social policy - then in disputes of this kind a court of equity must recognize the ability of the insurer to protect against false applications by more careful inquiry and the need to balance competing equities in favor of the families of these low-income policyholders."

2. Sufficient Knowledge

In Johnson v. Metropolitian Life Ins. Co., 251 A.2d 257 (Sup.Ct. N.J., 1968), insured's claim under a health policy was denied by the company where he failed to disclose coronary insufficiency but died of Alzheimer's disease. The court found substantial evidence to support the trial court's ruling that Johnson was neither told nor reasonably could be expected to know that he had a heart condition. He thought his distress was a passing experience attributed to the tension of building his business.

The court opined that the insurer had to show not only that insured suffered from the disease, but also that he knew it since the question relating to its existence was addressed to his knowledge not merely medical fact.

Pertinent to this court's inquiry is the observation of the New Jersey Supreme Court that its statute was passed to prevent insurer's avoidance of the policy based on an innocent

misrepresentation of material fact. Despite the statute, Courts of Chancery did not accord that interpretation of the statute binding effect and continued to relieve insurers based on innocent material misrepresentations. Later Chancery cases held that applicants should prevail where questions relating to disease or state of health were addressed to their knowledge and belief, thus limiting the rule permitting the insurer to undo the contract for innocent material misrepresentations.

When there is an innocent misrepresentation, the court characterized the question of policy enforcement as which of the innocent parties should bear the loss. The court reasoned that insurance companies invite business, thus, their offer to take a risk on applicant's representations rather than on their own medical examinations and investigations, entitles them only to an honest not necessarily correct response.

The court held that the question whether insured was ever treated for or told that he had heart disease was ambiguous; therefore, was construed against the insurer. Since Johnson didn't have knowledge of his condition, his misrepresentation was held to be immaterial and the lower court decision enforcing the claim was affirmed.

In Thompson v. Occidential Life Ins. Co. of California, 109 Cal. Rept. 473 (Sup. Ct. of Ca., 1973), the insurance company denied benefits because the applicant failed to reveal that he had arteriosclerosis.

The Supreme Court affirmed the trial court's finding that the insured did not misrepresent or conceal his health.

The court held that if he had no present knowledge of the facts sought by the insurance company, or failed to appreciate the significance of information related to him, his incorrect or incomplete response would not make his policy voidable.

The court concluded that Thompson did not misrepresent his medical condition since he told of his varicose veins and bad circulation, but was unaware of the arteriosclerosis.

In Brayer v. John Hancock Mutual Life. Ins. Co., 179 F.2d 925 (2d Cir., 1950), the court affirmed a judgment for beneficiaries of a policy insuring the life of E. Harold Brayer. The company contended that Brayer failed to tell them not only did he have gastroenteritis, but also pancreatitis. The evidence showed that neither treating physician told Brayer he had pancreatitis. The court addressed itself to insured's knowledge:

> "The insured is required to disclose only information which is in his knowledge, and if he fails to inform insurer that he has been treated for a certain disorder when he is not even aware that such disorder exists, insurer is not relieved of liability."

C O N C L U S I O N

It is respectfully submitted that the legislative history of the Misrepresentation Statutes in general, and F. S. Section 627.409 in particular, as well as the judicial precedents from other jurisdictions with identical or similar statutes, illustrate the powerful policy considerations supporting this court's decision that the special concurrance in Permenter modified the rule set out in Shifflet.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Amicus Curiae Brief supporting position of the Respondent has been mailed to NANCY LITTLE HOFFMANN, ESQ., Hoffmann & Burris, P.A., 644 Southeast Fourth Avenue, Fort Lauderdale, Florida 33301; CLIFFORD B. SELWOOD, ESQ., Clifford B. Selwood, Jr., P.A., Post Office Box 14128, Fort Lauderdale, Florida 33302; and MARCIA LEVINE, ESQ., Fazio, Dawson & DiSalvo, Post Office Box 14519, Fort Lauderdale, Florida 33302 this 8th day of February, 1985.

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