IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. 66,324
(4th DCA Case #83-2802)

CONTINENTAL ASSURANCE COMPANY,)

Petitioner,)

vs.)

ROGER A. CARROLL,)

Respondent.)

_____)

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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QUESTION PRESENTED

WHETHER THE SPECIAL CONCURRENCE IN NATIONAL STANDARD LIFE INSURANCE COMPANY v. PERMENTER MODIFIED THE RULE SET FORTH IN LIFE INSURANCE COMPANY OF VIRGINIA v. SHIFFLET.

STATEMENT OF THE CASE

This is an action to recover the proceeds of a life insurance policy issued by Defendant upon the life of Brian Scott Carroll, the infant son of the Plaintiff, ROGER A. CARROL. The Complaint alleged that the policy was issued on or about July 2, 1982, and that the infant died on July 11, 1982. The Complaint further alleged that the Defendant breached the contract of insurance by refusing to pay the proceeds of the policy to the Plaintiff (R.417-418).

In its Answer and Amended Answer, the Defendant raised as an affirmative defense that the Plaintiff misrepresented the state of the infant's health when he applied for the insurance (R.441-442), and that Section 627.409, Florida Statutes, barred Plaintiff's recovery on the policy (R.461-462). The Plaintiff replied to the affirmative defense, contending that any incorrect statement contained on the application for insurance resulted from a good faith but erroneous expression of opinion or judgment, or an honest misunderstanding of the question (R.463).

The case was tried to a jury. The Defendant moved for a directed verdict both at the close of the Plaintiff's case (R.216) and at the conclusion of all the evidence (R.360), on the basis that Section 627.409 barred recovery. Both motions were denied (R.218,359). The jury was instructed, in accordance with the Permenter decision, as follows:

> You are further instructed that an incorrect answer on an application form for insurance shall not invalidate the policy where: (1) the applicant in good faith makes an erroneous expression of an opinion or judgment or (2) the applicant misunderstands an inquiry which is couched in language or refers to subjects in special fields beyond his understanding. You are also instructed that an incorrect statement will not invalidate a policy of insurance unless the incorrect statement is given in response to a question which the insured understood or reasonably should have understood or to one which he reasonably could not have been expected to have sufficient information to answer or state that he lacked knowledge to get a responsive answer... . . (R.401-402).

The jury returned a verdict for the Plaintiff. Final Judgment was entered in favor of the Plaintiff for the full amount of the policy, $20,000.00 (R.549). Additional judgments were entered taxing costs in the amount of $870.80 and attorneys's fees in the amount of $9,000.00 (R.565), and taxing prejudgment interest in the sum of $2,800.00 (R.566).

The Defendant moved for judgment in accordance with its motions for directed verdict, or in the alternative for a new trial, on the basis that Section 627.409 required that judgment be entered in its favor as a matter of law, and alternatively that the trial court erred in giving the above-described jury instruction (R.550-551). After that motion was denied (R.564), an appeal was timely perfected as to all three judgments.

On appeal to the District Court, the Insurer argued, as it had below, that the controlling case was this Court's ruling in Life Insurance Company of Virginia v. Shifflet, 201 So.2d 715 (Fla. 1967). In that case the court interpreted Section 627.01081, Florida Statutes, the predecessor to Section 627.409, Florida Statutes, and held that misrepresentations or incorrect statements in insurance applications that are material to the acceptance of the risk do not have to be made with knowledge of the incorrectness and untruth to invalidate a policy.

The Plaintiff argued that the rule stated in Shifflet had been modified by National Standard Life Insurance Company v. Permenter, 204 So.2d 206 (Fla. 1967). The District Court of Appeal, after extensively discussing the case law, held that Permenter had, in fact, modified the rule in Shifflet, and accordingly affirmed the judgment below. The appellate court, however, certified the question as quoted at the outset of this brief.

The Insurer timely invoked the jurisdiction of this Court to answer that certified question.

STATEMENT OF THE FACTS

Viewing the evidence in the light most favorable to the Plaintiff[1], the facts of the instant case are as follows:

The infant decedent, Brian Carroll, was born on May 4, 1982 (R.60). At the time of his birth his parents, Sue and Roger Carroll, had been married for eleven years, and Brian was their first and only child (R.149). Brian was examined in the hospital by a pediatrician, Dr. Taslimi, and at that time Dr. Taslimi told the parents that the baby was very healthy and could go home in a couple of days (R.61). The baby's first check-up at the pediatrician's office occurred on May 10, and at that time Dr. Taslimi told the parents that the baby had gained weight and was doing fine (R.62). Dr. Taslimi never mentioned a heart murmur at that time (R.62.151). The Carrolls brought their son to Dr. Taslimi's office on May 17 for a routine PKU test which is required by state law to test for mental retardation. The test result was normal (R.62-63). While Brian did not have an appointment to be examined by Dr. Taslimi on that date, Sue Carroll did ask to see the doctor because Brian had colic (a

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[1]When reviewing the evidence with regard to whether the trial court erred in denying Defendant's Motion for Directed Verdict, the evidence must be viewed in the light most favorable to the Plaintiff. Fincher Investigative Agency, Inc. v. Scott, 394 So.2d 559 (Fla 3rd DCA 1981); Ansin v. Thurston, 98 So.2d 87 (Fla 3rd DCA 1957).

digestive upset causing gas). Dr. Taslimi told the parents that colic is very common in infants, that Brian would probably outgrow it by the time he was three months old, and Dr. Taslimi prescribed an over the counter drug (R.63).

Sometime toward the end of May, Sue and Roger Carroll began talking about purchasing a small life insurance policy for Brian, since both Sue's parents and Roger's parents had purchased small policies for them when they were very young (R.64,151-152). They were interested in a $1,000.00 or $2,000.00 policy. Roger contacted his life insurance agent, Gary Signor, but Mr. Signor was not interested in selling such a small policy unless Roger took out an additional $10,000.00 coverage on his life, which Roger did not wish to do at that time (R.64-65,152-153). Roger then contacted Ted Jensen, the agent who handled his casualty insurance, and Roger again requested a minimal policy on the baby's life (R.66,153).

On June 11, 1982, Mr. Jensen sent a memo to Roger Carroll recommending a $20,000.00 policy, stating that at Brian's 16th birthday "you can give him the policy telling him he will never have to pay a premium himself as it is paid up. He will have the coverage for the rest of his life without cost. A truly great gift. If interested, give me a buzz." (R.67-68). Pursuant to the memo, Roger called Mr. Jensen and made an appointment to fill out an application for insurance (R.68). The

inquiries about life insurance all took place prior to Dr. Taslimi ever mentioning the term "heart murmur" to the Carrolls.

In the meantime, on June 14, Sue and her mother-in-law took Brian back to Dr. Taslimi for his regular five week check-up (R.68). After Dr. Taslimi examined Brian he told Sue that the baby had gained weight, had grown in length, that he was pleased with the size of the baby's head, arms and legs, that he did detect a slight heart murmur, but that it is very common in infants, is nothing to worry about, and that Brian would probably outgrow it (R.35,69). Dr. Taslimi never said anything to Sue Carroll about suspecting that the bady had congenital heart disease or a hole in his heart, nor did Dr. Taslimi warn Sue to watch the baby for symptoms of heart disorder (R.69). In fact, Dr. Taslimi admitted at trial that he was not "overly concerned" about his findings (R.131). Dr. Taslimi went ahead and scheduled diagnostic testing (x-ray and EKG), to be performed at a local hospital, for thirty days in the future (R.70,92), and he scheduled the baby's next regular five week check-up for July 21 (R.70).

When Sue returned home from Dr. Taslimi's office she told her husband what the doctor had said (R.73-74,155). When she first told Roger of the slight heart murmur he was a little concerned about it. But after discussing the situation with Sue and realizing that if Dr. Taslimi really thought there was

anything wrong with the baby, he would not have scheduled the diagnostic testing for thirty days in the future, which is a long time in the life of a forty day old infant, and after realizing that Sue herself had had a heart murmur as a child which she outgrew with no problem, Sue and Roger realized they should follow Dr. Taslimi's advice and not worry about it (R.74-75,155-156).

Approximately one week later Sue and Roger and the baby went to Ted Jensen's office to fill out the application for insurance (R.75,297). The Carrolls were at Mr. Jensen's office a total of fifteen minutes, part of which was taken up by exchanging pleasantries and talking about the baby and about other insurance which the Carrolls had (R.76,313-314). Mr. Jensen asked the questions from the application and Roger gave the answers (R.75-76). Roger gave Mr. Jensen the name and address of the baby's pediatrician, and Roger signed an authorization allowing the insurance company to obtain medical information from Dr. Taslimi. (Application for insurance, Defendant's Exhibit 1.) Mr. Jensen told Roger that the insurance company would contact the pediatrician to verify the information on the application before issuing the insurance policy (R.76,158-159). The policy was issued on July 2, 1982 (R.165).

On July 10, the baby began vomiting; he was unable to keep his formula down (R.79,165). Roger called Dr. Taslimi that evening, and Dr. Taslimi merely told Roger to change the baby's formula (R.166). Roger did so, but on the morning of July 11 Brian was dead (R.166). An autopsy was performed, and the medical examiner testified that the cause of death was a congenital heart condition (R.224-226).

Roger then made a claim for the proceeds of the life insurance policy issued by the Defendant (R.168). After some investigation, the Defendant denied coverage on the ground of material misrepresentation on the application for insurance (R.341,343-344). Roger Carroll then brought suit against the Defendant for breach of the contract of insurance (R.417-418).

ARGUMENT

THE SPECIAL CONCURRENCE IN NATIONAL STANDARD LIFE INSURANCE COMPANY v. PERMENTER DID MODIFY THE RULE SET FORTH IN LIFE INSURANCE COMPANY OF VIRGINIA v. SHIFFLET.

The Permenter decision cannot be cavalierly disregarded, as Petitioner suggests it should be, on the grounds that it is nothing more than a concurring opinion constituting mere dicta. The Permenter court clearly set out to modify the Shifflet decision, not to overrule it, and they have succeeded in doing so. Gaskins v. General Insurance Company of Florida, 397 So.2d 729 (Fla. 1st DCA 1981); Minnesota Mutual Life Insurance Company v. McCombs, 369 So.2d 978 (Fla. 1st DCA 1979); Independent Fire Insurance Company v. Horn, 343 So.2d 862 (Fla. 1st DCA 1976); Travelers Insurance Company v. Zimmerman, 309 So.2d 569 (Fla. 3rd DCA 1975); Garwood v. Equitable Life Assurance Society of The United States, 299 So.2d 163 (Fla. 3rd DCA 1974), cert. den'd., 321 So.2d 553 (Fla. 1975); Tucker v. Travelers Insurance Company, 233 So.2d 198 (Fla. 4th DCA 1970); J. & H. Auto Trim Company v. Bellefonte Insurance Company, 677 F. 2d 1365 (11th Cir. 1982); Garcia v. Aetna Casualty and Surety Company, 657 F.2d 652 (5th Cir. 1981); Hyman v. Life Insurance Company of North America, 481 F.2d 441, 444 n.3 (5th Cir. 1978).

Regarding the fact that the Permenter decision is a concurring opinion by Justice Ervin, Petitioner cites the case of

Ephrem v. Phillips[2] for the proposition that a concurring opinion represents only the personal view of the concurring judge and does not constitute the law of the case. Apparently Petitioner neglected to read the remainder of the sentence from which this statement comes, where the court states that a concurring opinion does not constitute the law of the case nor the basis of the ultimate decision "unless concurred in by a majority of the court". (emphasis supplied) In Permenter, Justice Ervin's concurring opinion was concurred in by a majority of the court, so that it is, in fact, the opinion of the court and is as authoritative as any other decision by a majority of the court. City of Birmingham v. Brasher, 359 So.2d 1153 (Ala. 1978); City of Detroit v. Public Utilities Commission, 288 Mich. 267, 286 NW 368 (1939).

Respondent agrees that the Permenter opinion is technically dicta, in that it was not necessary to the holding that the court did not have jurisdiction. Nevertheless, it cannot be cast aside as mere obiter. Petitioner has overlooked the distinction which has been drawn, in connection with the doctrine of stare decisis, between obiter dicta and judicial dicta, the latter being an expression of opinion on a point deliberately passed upon by the court. 20 Am Jur 2d Courts

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[2]Ephrem v. Phillips, 99 So.2d 257 (Fla. 1st DCA 1957), cert. den'd. 101 So.2d 816 (Fla. 1958).

Sec. 74. Obiter dicta does not, and should not, serve as precedent for future decisions, since its ramifications beyond the case at bar are usually not contemplated by the court. As stated by Chief Justice Marshall in Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 5 L.Ed. 257 (1821):

> . . . The reason for this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relationship to the case decided, but their possible bearing on all other cases is seldom completely investigated.

Id. at 398.

On the other hand, judicial dicta is generally considered binding, or at least extremely persuasive, because it represents an application of the judicial mind to the proposition in question and a thorough consideration of the subject. The Permenter decision is clearly one in which the ramifications of the statute were investigated with care and considered in their fullest extent. As pointed out by the District Court, Permenter came only six months after Shifflet, and it is evident from reading Permenter that the only purpose for the concurring opinion was to modify Shifflet. Additionally, there is not a single case since Permenter in which an appellate court of this state had declined to follow the Permenter exceptions to the Shifflet rule if applicable to the facts of the case.

Petitioner relies on the cases of Phillips v. Ostrer[3], Minnesota Mutual Life Insurance Company v. Candelore[4] and Preferred Risk Life Insurance Company v. Sande[5] for the proposition that the Third and Fifth District Courts of Appeal have declined to follow Permenter. As pointed out by the District Court, these cases do not stand for that position. In fact, in the Sande case, the Fifth District recognized the Permenter exceptions to the Shifflet rule, but found that the facts of the case did not fall within those exceptions. The court also found that under the facts of that case the materiality of the misrepresentations was a question of law rather than a question of fact[6].

The Candelore case was also a decision of the Fifth District. The only issue involved in that appeal was whether the insured's failure to indicate on his application that he had

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[3]Phillips v. Ostrer, 418 So.2d 1104 (Fla. 3rd DCA 1982).

[4]Minnesota Mutual Life Insurance Company v. Candelore, 416 So.2d 1149 (Fla. 5th DCA 1982).

[5]Preferred Risk Life Insurance Company v. Sande, 421 So.2d 566 (Fla. 5th DCA 1982).

[6]Petitioner pointed out that the Sande court stated that a factual question arises only when there is a dispute as to what was asked by the agent when the policy was issued or when there is a dispute as to the accuracy of the answers on the application itself. This statement was made with regard to the question of whether a misrepresentation can be considered to be material as a matter of law; this statement was not made with regard to the issue of whether the Permenter exceptions should be applied to the facts of the case.

consulted two physicians during the one month period immediately preceeding his application was, under the circumstances, material as a matter of law. The question of whether the Permenter exceptions to the Shifflet rule should be applied to the facts of the case was not raised by either party, and was not discussed by the court. The Fifth District held that under the facts of the case, the misrepresentation was material as a matter of law.

The Ostrer case involved a "false application" for insurance, but the decision does not discuss the nature of the falsehood contained in the application. The Third District, citing Shifflet, held that summary judgment for the insurer was proper, inasmuch as the insurer would not have issued the policy but for the "false application". In view of the fact that the Third District had previously adopted the Permenter exceptions to the Shifflet rule in Garwood v. Equitable Life Assurance Society of The United States, supra, one can only conclude that the facts and circumstances surrounding the "false application" in Ostrer do not fall within the Permenter exceptions to the Shifflet rule.

It is evident from the Permenter decision and from the state and federal appellate decisions subsequent thereto, that the Permenter court intended to and did modify Shifflet. Thus, the question certified by the District Court should be answered in the affirmative.

With regard to Petitioner's suggestion that this court revisit the issue raised in Shifflet and Permenter, Respondent would point out that the legislative intent is the primary factor to be considered in statutory construction. Tyson v. Lanier, 156 So.2d 833 (Fla. 1963). When the legislature reenacts a statute which has a judicial construction placed upon it, it is presumed that the legislature is aware of the construction and intends to adopt it, absent a clear expression to the contrary. Gulfstream Park Racing Association v. Department of Business Regulation, 441 So.2d 627 (Fla. 1983); Collins Inv. Co. v. Metropolitan Dade County, 164 So.2d 806, (Fla. 1964). In fact, it has been held that where a statute has been reenacted, and thus the judicial construction thereof is presumed to have been adopted in the reenactment, the courts are barred and precluded from changing the earlier construction. Deltona Corp. v. Kipnis, 194 So.2d 295 (Fla. 2nd DCA 1967).

In the instant case the statute involved in Permenter has continually been reenacted, although renumbered, in identical form. The Permenter decision came in 1967, and the numerous state and federal appellate decisions adopting the Permenter

exceptions to Shifflet have been reported since 1970[7]. Thus the 1981 reenactment of Sec. 627.409 F.S. is presumed to have adopted the Permenter construction of that statute.

In addition to the foregoing, the legislature's intent to adopt the Permenter construction of Sec. 627.409 F.S. is evident from the wording of the statute itself, which provides:

> All statements and descriptions in any application for an insurance policy . . . or in negotiations therefor, by or in behalf of the insured . . . shall be deemed to be representations and not warranties. (emphasis supplied)

The distinction between warranty and representation is that a warranty " . . . is a statement on the literal truth or fulfillment of which the validity of the entire contract depends; it is a part of the contract itself . . .", while a representation " . . . is a statement proffered as a basis for an insurance contract, and is not, strictly speaking, part of the insurance contract, but collateral thereto . . ." 45 C.J.S. Insurance, Sec. 595. Recognizing this distinction, consider the hypothetical situation where an applicant for life insurance is

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[7] Tucker v. Travelers Insurance Company, 233 So.2d 198 (Fla. 4th DCA 1970); Garwood v. Equitable Life Assurance Society of The United States, supra; Travelers Insurance Company v. Zimmerman, supra; Independent Fire Insurance Company v. Horn, supra; Hyman v. Life Insurance Company of North America, supra; Minnesota Mutual Life Insurance Company v. McCombs, supra; Gaskins v. General Insurance Company of Florida, supra; Garcia v. Aetna Casualty and Surety Company, supra.

asked, on the application, to describe his health, or where he is asked whether he suffers from any diseases of the brain. Assume further that the applicant does, in fact, have a brain tumor, but he does not know that he has a brain tumor and he does not yet have any symptoms of a brain tumor, so he states that he is in good health and does not suffer from any diseases of the brain. If, six months later, the insured dies as a result of a brain tumor, could the life insurance policy be voided because of an incorrect statement on the application?

If the insured's statements on the application that he was in good health and suffered from no diseases of the brain is considered to be a warranty, the life insurance policy would be voidable. Certainly that was not the intent of the legislature in enacting Sec. 627.409, not only because the statute itself provides that statements on an insurance application are not to be considered as warranties, but also because the very purpose of insurance is to protect the insured from unforeseen risks. Where, as in the hypothetical, the risk of dying as a result of a brain tumor was totally unforeseen by the insured, the insurer should not, as a matter of public policy, be entitled to void the insurance contract.

Of course under the Shifflet rule, the insurer would be entitled to void the policy under Sec. 627.409, because the application contained an incorrect statement which was clearly

material to the risk. Such an interpretation of the statute is contrary to the wording of the statute itself, in which a distinction is made between "warranty" and "representation", and must also be contrary to the public policy of this state.

It should be noted that Petitioner admits that the facts of the instant case fall within the Permenter exceptions to the Shifflet rule, so that Petitioner would not be entitled to a directed verdict under Permenter. However, the converse is not true, i.e., Petitioner would not be entitled to a directed verdict under the Shifflet rule, in that a jury question arises as to whether there were, in fact, incorrect answers given to the questions on the application for insurance. The first question and answer in issue are the following:

> QUESTION: Is child, to the best of your knowledge and belief, in good health and free from deformity and defect? (emphasis supplied)
>
> ANSWER: Yes.

There is an abundance of evidence to support the conclusion that the affirmative answer to that question was correct. (R.31, 61-62, 69, 74-75, 116, 155-156, 166).

After stating the name and address of the child's doctor, Petitioner answered the following questions:

QUESTION: When and why was he last consulted?

ANSWER: 6/14/82 - check-up

QUESTION: What did Doctor say about his findings?

ANSWER: Normal

Once again, there is sufficient evidence for a jury to conclude that the gist of what Dr. Taslimi told Sue Carroll on 6/14/82 was that her baby was normal. (R.31, 69, 74, 155-156).

The remainder of the questions and answers on the application which are in issue are the following:

QUESTION: What treatment and drugs did he prescribe?

ANSWER: None

QUESTION: Is child still under treatment?

ANSWER: No

QUESTION: Any other consultations with him?

ANSWER: No

In view of the fact that the child was not under treatment for anything[8] (R.198, 201), and was not scheduled for a consultation with anyone[9] (R.203-204), the court could not rule as a matter of

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[8]Of course the child was taking an over the counter drug for colic, but this fact was totally insignificant to the insurance agent, who testified that if he was told that the baby was taking an over the counter drug for colic he would not have bothered to write it down on the application. (R.292).

[9]Certainly the jury could conclude that a regularly scheduled five-week check-up with the pediatrician is not a "consultation". (R.62, 68, 70).

law that Petitioner's answers to the above questions were incorrect. Therefore, even under the Shifflet rule, which Respondent does not believe to represent the law of this state, a jury question arises as to whether the application for insurance was voidable under Sec. 627.409 Florida Statutes.

CONCLUSION

For the reasons set forth above, the certified question should be answered in the affirmative, and the decision of the District Court of Appeal should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a copy of the foregoing was served by mail this 31 day of January 1985, upon: CLIFFORD B. SELWOOD, JR., ESQUIRE, Post Office Box 14128, Fort Lauderdale, Florida 33302 and NANCY LITTLE HOFFMANN, ESQUIRE, Hoffmann and Burris, P.A., 644 Southeast Fourth Avenue, Fort Lauderdale, Florida 33301.

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