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.

FILED
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PETITIONER'S INITIAL BRIEF ON THE MERITS

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QUESTION PRESENTED

DOES THE SPECIAL CONCURRENCE IN NATIONAL STANDARD LIFE INSURANCE V. PERMENTER MODIFY THE STRICT RULE SET FORTH IN LIFE INSURANCE COMPANY OF VIRGINIA V. SHIFFLET THAT ALL MISREPRESENTATIONS MATERIAL TO THE ACCEPTANCE OF RISK WILL INVALIDATE AN INSURANCE POLICY, EVEN IF MADE IN GOOD FAITH?

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PREFACE

This brief is submitted by CONTINENTAL ASSURANCE COMPANY, Defendant below, seeking review of an order of the District Court of Appeal, Fourth District, which certified the following question as one of great public interest:

> DOES THE SPECIAL CONCURRENCE IN NATIONAL STANDARD LIFE INSURANCE V. PERMENTER MODIFY THE STRICT RULE SET FORTH IN LIFE INSURANCE COMPANY OF VIRGINIA V. SHIFFLET THAT ALL MISREPRESENTATIONS MATERIAL TO THE ACCEPTANCE OF RISK WILL INVALIDATE AN INSURANCE POLICY, EVEN IF MADE IN GOOD FAITH?

In this brief, Petitioner will be referred to as CONTINENTAL, the Defendant, or the Insurer. The Respondent, ROGER A. CARROLL, will be referred to by name or as the Plaintiff. Reference to the Record On Appeal will be by "R.". Any emphasis appearing in this brief is that of the writer unless otherwise indicated.

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STATEMENT OF THE CASE

This was 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. CARROLL. The Complaint alleged that the policy was issued on or about July 2, 1982, and that the infant died nine (9) days later, "suddenly and unexpectedly." 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.418).

In its Answer, the Defendant raised as an affirmative defense that the infant was in ill health and suffered from a physical condition which caused his death; that the Plaintiff knew or should have known of that physical condition; and that the Plaintiff misrepresented the state of the infant's health when he applied for the insurance (R.442). An Amended Answer raised the further affirmative defense that Section 627.409, Florida Statutes, barred Plaintiff's recovery on the policy.

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 and the cases construing same barred recovery, since the Plaintiff testified that he knew of material information which

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he did not disclose in the application for insurance. Both motions were denied (R.218,359).

During the charge conference, the Defendant objected to the language in an instruction proposed by Plaintiff to the effect that an incorrect answer would not invalidate the policy when given in good faith or as the result of a misunderstanding or expression of opinion (R.244,248,259). As reworded by the Plaintiff, the crucial portion of the instruction was 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 (R.549). Additional judgments were entered taxing costs in the amount of $870.80 and attorney's fees in the amount of $9,000 (R.565) and taxing prejudgment interest in the sum of $2,800 (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, inter alia, 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 certain jury instructions over

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Defendant's objection (R.550-551). After that motion was denied (R.564), an appeal was timely perfected as to all three judgments.

On appeal, 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 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 a special concurring opinion in 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 the "better rule" was that Permenter had in fact modified the rule in Shifflet, and accordingly affirmed the judgment below. The appellate court noted, however, that it was troubled by the lack of a direct statement from this Court and therefore 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

Brian Scott Carroll was born on May 4, 1982 (R.60). He was examined in the hospital by his pediatrician, Kamal Taslimi, who said, according to the mother, Susan Carroll, that the baby was "very very healthy and he could go home in about two days." (R.61). Mr. and Mrs. Carroll next took Brian to Dr. Taslimi for a regular

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checkup on May 10, 1982 (R.62). Susan Carroll testified that on that visit, Dr. Taslimi said the baby was doing fine, and did not mention anything about a heart murmur (R.62). According to Dr. Taslimi, at that May 10 visit he detected a very minor heart murmur which he considered very insignificant at that time (R.118). There was no indication in his records as to whether he told the parents on that occasion that he had detected a heart murmur (R.119).

The baby's next visit was May 17, 1982 for a routine PKU test required by state law to test for mental retardation. The test result was normal (R.63). Susan Carroll asked to see the doctor on that day as well because the baby was suffering from colic. The doctor recommended an over the counter drug for colic (a digestive upset causing gas, very common in infants) (R.63).

The third and final visit to Dr. Taslimi took place on June 14, 1982 (R.68). On this visit Susan Carroll was accompanied by her mother-in-law, Marian Carroll. Roger was not present.

Both Susan Carroll and Marian Carroll testified that after examination, Dr. Taslimi told them that he was pleased with the baby's growth, but found a slight heart murmur which was "nothing to be alarmed about" (R.35,69). Both women testified that the doctor wanted to schedule an appointment for an EKG and an X-ray prior to the baby's visit the following month (R.35,69). The tests were set for July 13, 1982 (R.70). According to both women, the doctor said nothing about congenital heart disease (R.36,69), and that the condition was very common in an infant and would be outgrown (R.36).

After this visit, Susan Carroll and Marian Carroll went home and told Roger what the doctor had said (R.38). Roger Carroll testified

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that after he was told of the "possible small heart murmur" he was concerned, but figured that if the testing was not going to be done for another month he should not be that worried or concerned (R.155-156). Marian Carroll testified that her daughter-in-law was "kind of shook up" (R.37), but that she reassured Susan since Susan had herself had a heart murmur as a child which she had outgrown (R.75).

Dr. Taslimi, on the other hand, testified that on the June 14, 1982 visit he detected a little bit louder murmur, which he felt was significant and sounded like a small hole inside the heart (R.120). He told Mrs. Carroll to watch the baby closely, that he wanted to do the EKG before the next visit, that he wanted to see the baby sooner, and that if there was any problem he wanted to know (R.123). He testified that he could not recall whether he had used the term "congenital heart disease", but that he did explain that the baby most likely had a defect in the heart (R.124). Although it was not noted in his chart, the doctor testified that he probably mentioned that shortness of breath or starting to refuse feeding or vomit persistently would be signs that the baby was having a problem (R.125). Both Susan and Marian Carroll denied that they had been given any instruction along these lines (R.37,69).

Susan testified that toward the end of May she and Roger began talking about taking out a life insurance policy on the baby, because Susan's parents had taken one out on her as a child (R.64). After contacting one agent who did not want to issue a small policy, they contacted Ted Jensen, who had handled some of their other insurance matters (R.65-66). They received a memo from Mr. Jensen on June 11 suggesting a $20,000 policy (R.66).

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On June 21, 1982, one week after the visit to Dr. Taslimi, Susan and Roger Carroll took Brian to Ted Jensen's office to fill out an insurance application (R.92). Mr. Jensen filled out the application based on questions which Roger answered in Susan's presence (R.76,157).

Among the questions on the application was question No. 6 which asked:

> Is child, to the best of your knowledge and belief, in good health and free from deformity or defect?

Mr. Carroll replied yes to that question (R.193). He testified at trial that he knew when he answered that question that the baby "possibly had a slight murmur" but explained that "we didn't know for sure if he did have a problem. Naturally, he did have a problem." (R.194-195).

Question 2(A) on the reverse side of the policy asked when the child's doctor was last consulted. After consulting with his wife, Mr. Carroll answered "June 14, 1982" and indicated that it was just for a checkup. The words entered on the application in response to that question were "6-14-82 checkup".

Section (B) of that question asked "What did doctor say about his findings?" The response given on the application was "normal". Mr. Carroll could not remember who chose that particular language, but in any event testified at trial that he did not tell Mr. Jensen the doctor's findings of June the 14th regarding the heart murmur (R.196).

The application next asked "what treatment and drugs did he prescribe?", and Mr. Carroll again answered in the negative. He

explained at trial that he did not consider an X-ray or an EKG to be "treatment" (R.198,201).

The last portion of question 2 asked "Any other consultations with him? If yes, give details." Again, this question was answered in the negative even though another appointment was scheduled for July the 21st. Mr. Carroll explained that "it was a normal appointment" (R.203) and he did not consider that to be a "consultation" (R.204).

Mr. Carroll signed the application, paid one year's premium in the amount of $138.40, and was given a conditional premium receipt (R.162-163). The policy was issued by the company on July 2, 1984 (R.165) and sent to Mr. Jensen on approximately July 8 to 10, 1982. Brian died on July 11, 1982, and Roger called Mr. Jensen the following day to advise him of the death and initiate the claim process (R.302). Thus, Mr. Jensen testified that he never had a chance to deliver the policy to Mr. Carroll (R.302).

At Mr. Carroll's request, Mr. Jensen filed a claim with the company for payment of benefits (R.303). On December 7, 1982 the company denied coverage (R.304). The premium was tendered to Mr. Carroll, but Mr. Carroll did not cash the check (R.209).

The medical examiner who performed the autopsy on Brian testified that he died of congenital heart disease (R.224).

Ted Jensen, the insurance agent, testified that if Roger had told him that the baby was scheduled for an EKG and X-rays in connection with a heart murmur, he would not have completed the application at that point (R.292). He further testified that had he continued to fill out the application, with that information, he

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would have answered the question regarding whether Brian was still under medical treatment in the affirmative (R.296).

The Defendant presented the testimony of Terence Savage, the underwriter in charge of this type of policy. He testified that had the application mentioned anything about a heart murmur, the company would have automatically requested a statement from the doctor since a murmur itself does not constitute sufficient identifying data to allow them to decide whether to issue the policy (R.345). He further testified that had the company received information that a follow up by way of X-ray and EKG was scheduled, the application would have been "null" and the premium would have been returned until those examinations were carried out and the exact problem was determined (R.345).

Finally, Mr. Savage testified that had the company had the information as indicated in Dr. Taslimi's report, it would have declined the application entirely (R.346). He further testified that the questions were definitely material to the risk, since the action the company would have taken on the application would have been totally different had they been answered accurately (R.349).

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ARGUMENT

THE SPECIAL CONCURRENCE IN NATIONAL STANDARD LIFE INSURANCE COMPANY V. PERMENTER DID NOT MODIFY THE RULE SET FORTH IN LIFE INSURANCE COMPANY OF VIRGINIA V. SHIFFLET THAT ALL MISREPRESENTATIONS MATERIAL TO THE ACCEPTANCE OF RISK WILL INVALIDATE AN INSURANCE POLICY, EVEN IF MADE IN GOOD FAITH.

It was the Defendant's position on appeal that the trial court erred in several of its rulings, which resulted in substantial prejudice to this Defendant, and which required that the final judgment be reversed. More specifically, Defendant contended that the trial court should have granted its motion for directed verdict on the basis that the dispositive isssues were matters of law which ought not to have been submitted to the jury. Alternatively, Defendant contended that even if the controlling issue were one for the jury, the judgment must be set aside and a new trial conducted because of the rrroneous instruction given to the jury. While different judicial rulings were involved, Defendant contended that they were based upon a single error of law, namely a misunderstanding of the effect of National Standard Life Insurance Company v. Permenter, 204 So.2d 206 (Fla. 1967).

The seminal case dealing with the validity of insurance policies issued in reliance upon material misrepresentations in an insurance application, is clearly Life Insurance Company of Virginia v. Shifflet, 201 So.2d 715 (Fla. 1967). In that decision, this Court construed the predecessor to Section 627.409, Florida Statutes (1983). Subsection (1) of that statute, as it read at all times material to this litigation, provides:

(1) All statements and descriptions in any application for an insurance policy or annuity contract, or in negotiations therefor, by or in behalf of the insured or annuitant, shall be deemed to be representations and not warranties. Misrepresentations, omissions, concealment of facts, and incorrect statements shall not prevent a recovery under the policy or contract unless either:

(a) Fraudulent; or

(b) Material either to the acceptance of the risk, or to the hazard assumed by the insurer; or

(c) The insurer in good faith would either not have issued the policy or contract, or would not have issued it at the same premium rate, or would not have issued a policy or contract in as large an amount, or would not have provided coverage with respect to the hazard resulting in the loss, if the true facts had been made known to the insurer as required either by the application for the policy or contract or otherwise.

In construing that statute, this Court held in Shifflet that

> ...misrepresentations in 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 a policy. This conclusion appears to be in harmony with the general rule approved in other jurisdictions [citations from other jurisdictions omitted].

Shifflet, supra, at 719-720. The Court further observed

> Inasmuch as we think the statute is unambiguous and is susceptible of but one interpretation we find there is no necessity for construction. We accord the statute its plain and obvious meaning and hold recovery under the policy is precluded if the misrepresentation is material to the acceptance of the risk or if the insurer in good faith would not have issued the policy in the terms it was issued.

Id. at 719.

It was argued on appeal that recent District Court of Appeal decisions have followed Shifflet and upheld a denial of coverage as a matter of law. In Phillips v. Ostrer, 418 So.2d 1104 (Fla. 3d DCA 1982), for example, summary judgment for an insurer was upheld where it was shown that there were material false statements in an

insurance application and that but for the false application, the insurer would not have issued the policy. Id. at 1106 (citing Shifflet).

In Minnesota Mutual Life Insurance Company v. Candelore, 416 So.2d 1149 (Fla. 5th DCA 1982), the appellate court reversed the trial court's denial of the insurer's motion for directed verdict, on the basis that the insurer showed that it would not have issued the policy at that time had it received truthful answers to the questions on its application. The court held that the materiality of these misrepresentations were a matter of law and that the case should not have been submitted to the jury (citing Shifflet and others).

Similarly, in Preferred Risk Life Insurance Company v. Sande, 421 So.2d 566 (Fla. 5th DCA 1982), the appellate court again held that the question of bad faith is not relevant in determining whether a policy is void as a result of misrepresentation. The court pointed out that

> ...it is only necessary that misrepresentation either material to the acceptance of the risk or that the insurer in good faith would not have issued the policy in the terms it was issued. There is no need for knowledge of incorrectness and untruth to vitiate the coverage.

Id. at 570 (citing Shifflet). Again, the question of the materiality of the misrepresentations on the policy application was held to be a matter of law. The court pointed out that a factual question arises only where there is a dispute as to what was asked by the agent when the policy was issued or the accuracy of the answers on the application itself.

The Plaintiff has contended throughout the litigation that Shifflet is no longer good law because of the subsequent decision in National Standard Life Insurance Company v. Permenter, supra. We contend, on the other hand, that the misinterpretation of Permenter's applicability was the basic cause of error in the present case.

The only holding in Permenter was the following:

> PER CURIAM.
>
> After careful consideration of the record and briefs in this case in the light of the argument of counsel, we conclude that no such conflict has been demonstrated as justifies the exercise of jurisdiction by this court.
>
> The writ issued herein is discharged.

Id. at 206. The majority of the justices concurred in that per curiam opinion. Plaintiff, however, contends that a special concurring opinion of Justice Ervin operated to impliedly overrule Shifflet. Justice Ervin's opinion was that the Shifflet decision "may be too sweeping in scope and might lend itself to application where literally to do so would work injustice." He then went on to cite examples and suggest application of a "good faith" standard.

If Justice Ervin's opinion were indeed the law, a jury question would arise in virtually every case to determine whether the applicant understood the questions, whether he answered in good faith and without intent to deceive, whether he should be expected to have sufficient information to answer the questions, and so forth. Presumably the trial court, laboring under what we believe to be a misapprehension regarding Permenter's precedential value, submitted the case to the jury on that basis. It is evident that

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the jury instructions, which we contend to be erroneous, were based upon language contained in Permenter.

Such reliance upon Permenter as controlling precedent was, we submit, entirely misplaced. As noted above, the decision was simply a per curiam decision holding that no conflict existed and declining to exercise jurisdiction. Mr. Justice Ervin clearly pointed out in his special concurring opinion that he wished "to comment" upon the Shifflet case. Permenter, supra at 206. His specially concurring opinion was clearly dictum and nothing more, and accordingly without force as precedent.

As was pointed out in the early case of Hart v. Stribling, 25 Fla. 435, 6 So. 455 (1889), dictum is language not essential to a decision and in the eyes of the law is a gratuitous opinion which binds no one, not even the judge that enters it. Id. at 456. This Court more recently reiterated that view, holding

> The bench and bar not infrequently fall into the error of accepting as binding precedent all of the views expressed in the written opinion of an appellate court. Necessarily, the views and decisions of an appellate court on issues which are properly raised and decided in disposing of the case are, unless reversed or modified by a higher court, binding on the lower court as the law of the case. Additionally, under the doctrine of stare decisis, an appellate court's decision on issues properly before it and decided in disposing of the case, are, until overruled by a subsequent case, binding as precedent on courts of lesser jurisdiction. But a purely gratuitous observation or remark made in pronouncing an opinion and which concerns some rule, principle or application of law not necessarily involved in the case or essential to its determination is obiter dictum, pure and simple. While such dictum may furnish insight into the philosophical views of the judge or the court, it has no precedential value. [emphasis supplied].

Bunn v. Bunn, 311 So.2d 387,389 (Fla. 4th DCA 1975). See also, Town of Lantana v. Pelczynski, 290 So.2d 566 (Fla. 4th DCA 1974).

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The Permenter case had no effect on the Shifflet rule, not only because Justice Ervin's comments constituted dictum, but also because they were in the form of a specially concurring opinion and thus had no binding effect as precedent. As was pointed out in Lendsay v. Cotton, 123 So.2d 745 (Fla. 3d DCA 1960), such an opinion represents only the personal view of the concurring judge and does not constitute the law of the case. See also, Ephrem v. Phillips, 99 So.2d 257 (Fla. 1st DCA 1957), cert. den'd. 101 So.2d 816 (Fla. 1958); Mouzon v. Mouzon, 9 FLW 2285 (Fla. 5th DCA, Case No. 83-1028, opinion filed November 1, 1984) [concurring opinions have no precedential value].

In Permenter, the per curiam opinion was the opinion of the majority, and the special concurring opinion thus had no precedential value and could not serve to overrule or limit the Supreme Court's earlier holding in Life Insurance Company of Virginia v. Shifflet. That being the case, the Fourth District Court of Appeal was bound to follow Shifflet as the Third District did in Phillips v. Osterer and the Fifth District did in Preferred Risk v. Sande and Minnesota Mutual v. Candelore, supra.

Until a Supreme Court decision is overruled by that Court, it must be followed by the District Courts of Appeal. Hoffman v. Jones, 280 So.2d 431 (Fla. 1973). Stare decisis is a fundamental principle of Florida law, and where an issue has been decided in the Supreme Court, all courts are bound to adhere to that ruling when considering similar issues, even though they might believe that the law should be otherwise. Particularly, an authoritative construction of a state statute by the Florida Supreme Court is

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binding as to what the statute does or does not mean, Alford v. State, 307 So.2d 433 (Fla. 1975), cert. den'd. 428 U.S. 912.

Having accepted jurisdiction to resolve the issued certified by the District Court of Appeal, this Court may now, if it chooses, limit its ruling to the question certified and answer the question whether the concurring opinion in Permenter modified the Shifflet rule. On the other hand, should this Court so choose, it may of course revisit the question entirely and determine afresh what it considers to be a proper construction of Section 627.409, Florida Statutes.

It is our contention that the certified question should be answered in the negative, since for the reasons argued above, the Permenter special concurring opinion was both dictum and without binding precedent. Should this Court agree with that position, then we respectfully submit that the decision of the District Court of Appeal must be quashed, and the judgment of the trial court reversed with directions that judgment be entered for the Defendant. Section 627.409, Florida Statutes, provides that misrepresentations, omissions and the like will prevent a recovery under the policy if they are fraudulent or material to the acceptance of the risk or the insurer in good faith would not have issued the policy, if the true facts had been made known to the insurer as required by the application. The Defendant presented uncontradicted evidence at trial that if Mr. Carroll had told the agent of the fact that Dr. Taslimi had mentioned anything about a heart murmur, the company would have checked further with the doctor (R.345). Furthermore, it was uncontradicted that had the insurance company received

information that a follow up by way of X-ray and EKG was scheduled, the application would not have been accepted and the premium would have been returned until those examinations were carried out and the exact problem was determined (R.345). It was further uncontradicted that if the company had the information as indicated in Dr. Taslimi's report, it would have declined the application entirely (R.346). The questions were clearly material, since the testimony was uncontradicted that the company would have taken different action on the application had the questions been answered accurately (R.349).

If in fact the statute means what it says, as this Court held in Shifflet, then the Defendant was clearly entitled to a directed verdict. We submit that the Permenter decision, so heavily relied upon by the Plaintiff, was no more than an expression by Mr. Justice Ervin of his particular views on the subject and, although concurred in by three other justices, still constituted nothing more than dictum and was wholly ineffective to overrule the Supreme Court's earlier authoritative pronouncements in Shifflet. Under the present state of the law, then, "good faith" does not constitute an exception to the statute, and Plaintiff cannot prevail.

In the event that this Court determines to revisit the question presented in Shifflet, and in the present case, it is our view that this Court's decision in Shifflet represents a proper construction of Section 627.409, Florida Statutes. While there is a certain appeal to the more flexible standards suggested by Justice Ervin in his Permenter concurring opinion, we respectfully suggest that the statute itself does not permit such an interpretation.

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Distilled to its essence, that statute provides that incorrect statements in an insurance application shall not prevent recovery under the policy unless either fraudulent "material to the acceptance of the risk", or if the insurer would not have issued the policy had the true facts been made known as required by the application. There is no statutory exception for "excusable situations" where an applicant either did not intend to deceive the insurer, or where the question was couched in language beyond the applicant's understanding. In the absence of such statutory provisions, we must agree with this Court's decision in Shifflet wherein it found that the statute was unambiguous and susceptible of but one interpretation -- namely that a misrepresentation in an insurance application, if material to the acceptance of the risk, does not have to be made with knowledge of its incorrectness in order to invalidate a policy. Shifflet, supra at 719-720.

If it now appears that the statute as interpreted in Shifflet is unduly harsh, the remedy must be through the legislative process, and not by placing a judicial gloss on the statute which was quite apparently never intended, and which the plain language of the statute will not support.

The facts of the present case are such that a decision by this Court either reaffirming its holding in Shifflet or modifying it along the lines of Justice Ervin's concurring opinion in Permenter, will be dispositive of the outcome of the case. If "good faith" does not constitute an exception to the statute, then no jury question was presented, and the Plaintiff cannot prevail. Should this Court determine that such an exception to the statute does

exist, however, then the facts of this case do fall within those exceptions (at least those outlined by Justice Ervin), clearly a jury question was presented, and there was sufficient evidence in the record to support the jury's verdict.

Again, it is our position that the trial court ought to have ruled as a matter of law that there was no coverage under this Court's binding precedent in Shifflet. Furthermore, the opinion of the District Court of Appeal, Fourth District, should not be permitted to stand since it improperly held that Shifflet is no longer the controlling law of this State.

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CONCLUSION

For the reaons set forth above, we respectfully request this Court to answer the certified question in the negative, to quash the decision of the District Court of Appeal, and to reverse the judgment below with directions that judgment be entered in favor of the Defendant, CONTINENTAL ASSURANCE COMPANY.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing were served by mail this 16th day of January, 1985, upon: Marcia Levine, Esq., FAZIO, DAWSON & DI SALVO, Attys. for Respondent, P. O. Box 14519, Fort Lauderdale, FL. 33302; Clifford B. Selwood, Esq., CLIFFORD B. SELWOOD, JR., P.A., Co-Counsel for Petitioner, Post Office Box 14128, Fort Lauderdale, Florida 33302.

By Nancy Little Hoffmann

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