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.

PETITIONER'S REPLY 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?

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.

The Plaintiff bases his argument in large part upon the contention that various appellate decisions around the state have cited and relied upon the special concurring opinion in National Standard Life Insurance Company v. Permenter, 204 So.2d 206 (Fla. 1967). That circumstance does not, however, imbue that special concurring opinion with any greater legal significance than it would otherwise possess. Stated differently, if a particular opinion is not, under established principles of law, entitled to binding precedential status, the fact that other courts have accorded it such status cannot change the fact that mere dicta in a concurring opinion does not represent the law of the state. We respectfully submit that only this Court, and not the intermediate appellate courts, may properly choose to modify its earlier opinion in Life Insurance Company of Virginia v. Shifflet, 201 So.2d 715 (Fla. 1967).

Defendant disagrees with Plaintiff's contention that if Shifflet does apply, there nonetheless exists a jury question. It is clear that MR. CARROLL knew that Brian's physician had detected a possible heart murmur and had ordered that an EKG be performed before the baby's next visit. Defendant contends that if Shifflet still represents the law in this state, as we believe it does, then the answers to the questions were indeed "clearly incorrect and untrue statements" which would vitiate coverage under the policy. That

determination may be made as a matter of law, as it was in Garwood v. Equitable Life Assurance Society of the United States, 299 So.2d 163 (Fla. 3d DCA 1974). The court there upheld summary judgment for an insurer on the basis that despite an affidavit from the appellant contending that the applicant neither was informed nor knew that he was suffering a heart condition, "we think the insured did have sufficient information to have answered the specific questions on the insurance application differently from the answers which in fact he gave." Garwood, supra at 165.

The fact that MR. CARROLL may have in good faith believed (or hoped) that there was nothing seriously wrong with the baby cannot change the fact that he failed to tell the agent the crucial facts regarding the heart murmur and prescribed EKG. As this Court pointed out in Shifflet, such misrepresentations "do not have to be made with knowledge of the incorrectness and untruth to vitiate the policy." Shifflet, supra at 719. As more recently stated by the Fifth District in Preferred Risk Life Insurance Company v. Sande, 421 So.2d 566 (Fla. 5th DCA 1982),

> It is clear here that a misrepresentation occurred, one that was relied upon by the insurance company in the issuance of the policy; the fact that it was possibly innocently made does not detract from its materiality, and therefore under Section 627.409 recovery should have been denied.

Sande at 570.

Defendant further disagrees with the Plaintiff's contention that there is some distinction between obiter dicta and judicial dicta which would affect the precedential value to be given the Permenter concurring opinion. Accepting Plaintiff's argument that such a

distinction exists, Justice Ervin's opinion does not fall within Plaintiff's own definition of judicial dicta as being an expression of opinion "on a point deliberately passed upon by the court" (Respondent's brief, page 10). In Permenter, the only question passed upon the court at all was one of jurisdiction. The opinion expressed by Justice Ervin dealt of course with an entirely different matter, and thus clearly constituted obiter dicta.

The Defendant further disagrees with Plaintiff's interpretation of the statute in question. It appears from a proper reading of the statute that in drawing a distinction between representations and warranties, the Legislature intended to prevent insurers from relying on harmless or inconsequential errors or omissions in an application in order to avoid the policy. It is equally clear, however, that the statute also intended to allow an insurer to void a policy when the representation was either fraudulent or material to the risk or if the insurer would not have issued the policy had correct answers been given. Thus, the fact that the statute distinguishes between misrepresentations and warranties cannot be read to change the plain wording of the statute.[1] As this Court pointed out in Shifflet, the statute is unambiguous and susceptible of but one interpretation, namely that 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. Shifflet, supra at 719.

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[1] Amicus curiae apparently agrees with this interpretation, and correctly points out that the statute "...protects the insured by requiring a material misrepresentation to avoid the policy, but removes protection by prescribing that nonfraudulent material misrepresentations void the policy." Amicus brief, page 3.

The Defendant does agree with Plaintiff, however, that under the facts of the hypothetical question posed at page 16 of his brief, permitting the insurer to void the contract would indeed be a harsh result. Perhaps the time has come for the Legislature to consider whether the statute should be changed. It cannot be said, however, that the plain dictates of the statute as it now stands should not be followed because of "public policy", as Plaintiff apparently suggests at page 16 of his brief, since it is the Legislature and not the courts which has the responsibility of framing such public policy.[2] State v. Barquet, 262 So.2d 431,433 (Fla. 1972). Absent some constitutional infirmity, a statute must be upheld as written, and this Court will not substitute its judgment for that of the Legislature insofar as the wisdom and policy of an act is concerned. Hamilton v. State, 366 So.2d 8,10 (Fla. 1979). We accordingly ask that this Court reaffirm its interpretation of Section 627.409, Florida Statutes as declared in the Shifflet decision.

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[2] The Amicus brief catalogues cases from other jurisdictions to support its view that "powerful policy considerations" exist in support of Permenter as the better rule. Again, however, these arguments would be better directed to the Legislature, which alone has the power to correct the situation. As this Court said in Webb v. Hill, 75 So.2d 596,605 (Fla. 1954): "We have applied the law as we have found it. We did not make the law.... We have no authority to amend or change the law or adopt or enact a law in accordance with our views."

CONCLUSION

For the reasons set forth above and in its initial brief, Defendant requests this Court to quash the decision of the District Court of Appeal and remand with directions that the judgment be set aside.

Respectfully submitted,

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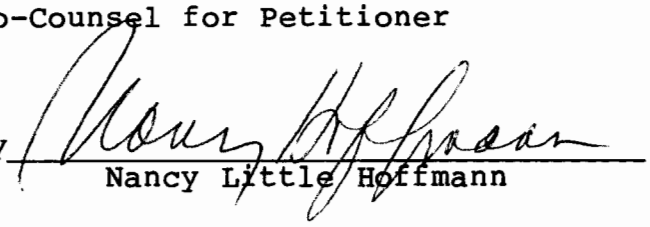
By 
Nancy Little Hoffmann

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing were served by mail this 25th day of February, 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; and Richard A. Barnett, Esq., RICHARD A. BARNETT, P.A., Attorney for Amicus Curiae, Emerald Hills Executive Plaza II, 4651 Sheridan St., Suite 325, Hollywood, FL. 33021.

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