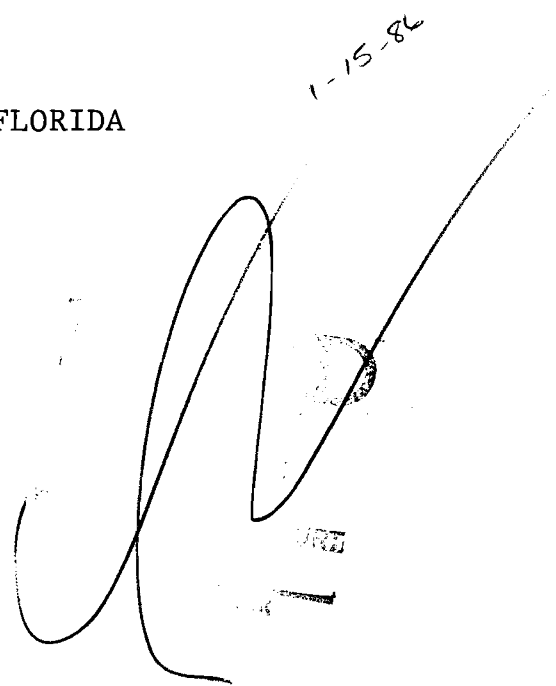
IN THE SUPREME COURT OF FLORIDA

CASE NO: 67,476



CROWN LIFE INSURANCE COMPANY,

Petitioner,

v.

STEVEN PATRICK McBRIDE,

Respondent.

BRIEF OF RESPONDENT ON CERTIFIED QUESTION

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PREFACE

This case is before the Court on a certified question from the Fourth District Court of Appeal. The parties will be referred to as they stood in the lower court or by proper name. The following symbol will be used:

(R) Record on Appeal

STATEMENT OF THE CASE

Plaintiff, Steven McBride sued Crown Life to recover insurance benefits ($1,388.64) owed him as an insured under a group insurance policy with his father's employer (R634-35). Crown Life denied coverage, raising as affirmative defenses that Steven was not covered because he was over 23 years of age when the claim was made, and because Steven was already disabled when the insurance would have become effective (R643). Steven filed a Reply raising issues of estoppel and waiver (R645) and asserting that the policy language excluding coverage of a pre-existing condition was in conflict with §627.6576 F.S. and CROWN LIFE INSURANCE COMPANY v. GARCIA, 424 So.2d 893 (Fla. 3d DCA 1983), which prohibits exclusion of coverage for handicapped family members by a group insurer.[1]

At the beginning of the trial in this case Crown Life argued that estoppel and waiver could not be utilized to establish coverage because they had been pled in Steven's Reply rather than

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1/ Crown Life has abandoned any argument before this Court that Steven was not entitled to coverage because of his pre-existing disability. Under GARCIA and §627.576 Steven cannot be denied coverage for that reason.

in his Amended Complaint (R150). This very same argument had been raised by Crown Life when it moved for Summary Judgment. A predecessor Judge had ruled at the summary judgment hearing that the estoppel and waiver issues were sufficiently and properly pled in Plaintiff's Reply (R156). If the trial court had ruled otherwise, Steven could have amended his complaint at that time, well before trial, to assert those issues. Because Crown Life was again arguing an inadequacy of pleading at the beginning of trial, Steven's counsel made an ore tenus motion to amend his Complaint to assert waiver and estoppel <u>and</u> an oral contract of insurance (R157). The trial court granted the motion (R158). Counsel for Crown Life moved for a continuance claiming he needed more time for discovery (R158). The trial court denied the motion because the same issues had previously been raised in Plaintiff's Reply, stating "I think this has been an issue in the case that all parties have been aware of" (R161).

The trial court instructed the jury that Steven was not entitled to coverage under the terms of his father's group insurance policy <u>as written</u> (R536). The issues the jury was to determine were whether Crown Life had orally agreed to provide coverage for Steven beyond the terms of Mr. McBride's group insurance policy and/or whether Crown Life was estopped to deny coverage to Steven under the group policy (R537). A special interrogatory was submitted to the jury on these issues. The jury found that Crown Life had both orally agreed to provide coverage for Steven beyond the coverage provided in the group policy and <u>was</u> also estopped to deny coverage to Steven (R1104).

Final Judgment was entered for Steven and against Crown Life in the amount of $1,388.64, plus costs and attorney's fees (R1136).

Crown Life appealed to the Fourth District Court of Appeal, raising six different issues. The Fourth District affirmed the jury verdict finding against Crown Life on both the oral contract and estoppel. However, the court only discussed the estoppel issue in its written opinion. The court approved estoppel as a legal basis for recovery against Crown Life and also found that the evidence was sufficient to allow the jury to find that Crown Life was estopped to deny coverage. The court rejected each of the other issues raised on appeal by Crown Life, thus affirming the alternative finding against Crown Life on an oral contract basis.

Because the Fourth District recognized confusion in Florida's case law on the estoppel issue, it certified the following question:

> May The Theory Of Equitable Estoppel Be Utilized To Prevent An Insurance Company From Denying Coverage?

Judge Hersey wrote a specially concurring opinion arguing with the conclusions of the majority opinion that Crown Life should be estopped to deny coverage to Steven. He pointed out, however, that this case was also affirmed on the basis of an oral contract by which Crown Life had agreed to waive certain exclusions that might have otherwise precluded coverage.

This case is before this Court on the certified question.

STATEMENT OF THE FACTS

Mr. McBride, Steven's father, was employed by Mel Webb Signs. He ceased employment there and began to work for his

present employer, Signcraft, on November 7, 1977 (R195-96,229). While working with Mel Webb Signs McBride's children had been covered under a group health insurance policy (R195,252-53). The policy had a conversion provision which gave McBride 31 days after terminating his employment with Mel Webb Signs to convert the group insurance policy to a personal policy (R197,277-78).

When McBride was contemplating going to work for Signcraft he asked the owner whether they had a group health insurance policy. McBride preferred to have his children covered under his new employer's group policy rather than converting his old group coverage to a personal policy (R198). McBride was told that Signcraft had group insurance with Crown Life. He was told to speak with the office manager, Joyce Hardie[2], to determine whether his sons would be covered (R198-200).

Ms Hardie was on vacation the first week McBride went to work for Signcraft (R199-200). As soon as she returned from vacation, McBride spoke with her about the group coverage (R199-200). McBride explained that he had two sons disabled as a result of progeria, an incurable aging disease, and therefore it was important for him to determine whether they would be covered under Signcraft's group policy (R330-31). He explained that his sons were presently covered under a group policy with his prior employer and that he had 31 days to convert that coverage to a personal policy (R329). Ms. Hardee had McBride fill out the necessary forms to send to Signcraft's group insurer, Crown Life

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2/ Joyce Hardie is referred to as Joyce Prader in Crown Life's brief. Ms. Hardie remarried during this litigation and "Prader" became her new married name.

(R199-200). He listed his wife and two sons as dependents (R200). At that time Steven was 20 years of age, was still attending high school in a special education course for handicapped children (R190,192-93) and was totally dependent upon McBride for support (R194).

Ms. Hardie advised McBride that she would contact Signcraft's insurance agent, Walter Burns, to discuss whether their group insurance policy would cover his sons. (R201). The following day Burns met with McBride. Burns wanted to know what the disease was, whether the boys were in school, whether they were in special classes, what they could and could not do, and how they functioned (R202,240). The general discussion pertained to his sons' illness and disability (R332). McBride explained to Burns that Steven had progeria, that he was in a special class in high school, that he was small for his age, that he could ride a bicycle, but that he tired more easily than other children, and had definite signs of aging. Otherwise Steven was normal (R239-40). McBride emphatically denied that he had ever told Burns that Steven could do all the normal things other kids his age (R239,241-42).

Burns advised McBride that he envisioned no problem providing coverage for his sons, but that he would have to send McBride's application to Crown Life's Miami office, and would follow up on it (R202).

Subsequently McBride inquired of Ms. Hardie as to whether she had heard back from Burns. He was getting concerned because it was close to 31 days from the termination of his prior

employment and he had heard nothing (R203). Ms. Hardie called Burns and a meeting was scheduled between Ms. Hardie, Burns, McBride and Crown Life's group sales representative from Miami, Eileen Bishop (R203). At this meeting Ms. Bishop asked McBride questions about his sons. She did not ask their age (R334). She wanted to know if they were in school and what type of school (R334). She asked about their physical condition (R204). McBride told her the same thing he had told Burns: that Steven could ride a bicycle, that he went to school every day, tired more easily than most kids his age, but that he was doing well despite having progeria (R205). When Ms. Bishop asked what progeria was, McBride explained that it was an accelerated aging disease, that Steven only had it 75%, <u>and that he did not know how long Steven would live or how bad his condition would get</u> (R205).

Ms. Bishop did not ask to see Steven. Nor did she ask for medical reports, even though McBride offered them since he had been required to supply them at his prior employment. Ms. Bishop said this was not necessary (R206). She did not ask for permission to contact Steven's doctors (R206). The meeting ended with the understanding that McBride's sons would be covered (R335). Ms. Bishop told McBride that she saw no problem with affording coverage to his sons under Signcraft's group policy (R206). She was going to check the matter out with her home office and contact him back (R335).

About a week later, when it was getting very close to expiration of the 31 day period, McBride told Ms. Hardie he had

to know something one way or the other because his time was running out on converting his old policy (R331). Ms. Hardie called Burns, who came to Signcraft's office. Burns said he had heard nothing from Crown Life, but that he would contact their Miami office (R207). McBride and Ms. Hardie were present when the telephone call was made. Burns told Ms. Bishop that McBride had to have an answer because his conversion date was almost up (R207). When Burns hung up the telephone he turned to McBride and said "congratulations, you are covered and your dependents are covered" (R208,230). McBride questioned Burns about not only immediate, but future, coverage because he knew his sons' illness was incurable and progressive (R333). Burns assured McBride that he and his dependents would be covered by Crown Life's group insurance policy as long as he was employed by Signcraft (R264). Burns also said that Steven would be covered and though he was presently over 19 years of age and even after he had stopped going to school (R266).

Subsequently, McBride's employee enrollment card in the group insurance policy was sent to Ms. Hardie by Crown Life. She showed the card to McBride (R230,302), and it indicated that he had dependent coverage (R210). McBride also received a group insurance certificate dated December 7, 1977 which indicated "you and your dependents are covered for all benefits in this schedule except where the benefit named indicates otherwise" (R273-75). There was no indication in the certificate of any exclusion or limitation on coverage for McBride's sons. McBride testified that he had never asked for any written confirmation that his sons

were covered under the group insurance policy because he had been orally told that they were covered, and because of the language in the employee enrollment card and group insurance certificate (R278-79).

Because McBride had been led by Crown Life to believe his sons were covered under Crown Life's group policy, he did not convert his prior group insurance policy to a personal policy for coverage for his sons (R212). For a period of four years, McBride never submitted any claim for his sons. In 1981 McBride submitted a claim for medical expenses incurred for Steven in the amount of $1,388.64 (R231). Crown Life denied coverage for the reasons that Steven, though a dependent, was over 23 years of age and was disabled on the effective date of the insurance (R217,225-26, Pltf's. Ex.#6).

The testimony of McBride and Ms. Hardie was the same and support the above stated facts. Burns' testimony was as follows. He admitted that Ms. Hardie had contacted him to inquire as to whether McBride's sons, whom he was advised had a premature aging disease, would be covered under Crown Life's group policy (R293). He told her that he did not know. He then contacted Crown Life's Senior Group Manager in its Miami office, Wayne Monek, and asked whether McBride's sons would be covered (R294). Monek told Burns that he should determine whether McBride's sons were disabled or not, and further told him that if they were going to school they were not disabled (R298). Monek suggested that Burns schedule a meeting so that a coverage determination could be made (R294). Crown Life sent Eileen Bishop to Signcraft's office to

investigate the matter and make a decision as to coverage (R445). Prior to that meeting, Burns testified he discussed the matter with Ms. Bishop on the telephone. She asked whether McBride's sons were in school and she was informed that they were (R296-97). Burns acknowledged that Ms. Bishop did not ask anything else about McBride's sons at that time (R296-97).

At the meeting attended by McBride, Ms. Hardie, Burns and Ms. Bishop, Burns testified that the big question was whether McBride's sons were "disabled" (R295-96). According to Burns, the ages of the boys was not a factor (R298). Ms. Bishop had asked how old the boys were and had been told by McBride their ages (R313). The two basic questions they discussed were whether the boys were in school full time and whether they were doing things that other kids did in terms of their activities (R314). McBride told them that his sons were full time in school (R314). Burns testified that if they were in school Crown Life did not consider them disabled (R319).

According to Burns, Ms. Bishop also asked whether the boys did things that a child that age normally did, such as ride a bicycle, etc., and McBride answered that they did (R299,314). Burns stated that Ms. Bishop did not ask any questions about the boys' disease itself, did not ask to meet either of the boys, did not ask for medical reports or medical authorizations, or permission to contact the boys' schools (R300). Burns admitted that McBride explained to Ms. Burns that with progeria he did not know how long the boys would live or how bad their condition would get (R205). Burns felt that McBride had answered all the questions posed to him in a straight forward manner (R299).

Burns testified that Ms. Bishop told McBride at the meeting that his sons were covered (R302,316). He said McBride's concern was not only whether they were covered now, but whether they would be covered in the future if they became permanently disabled (R296-97). According to Burns, Ms. Bishop told McBride that once his sons were covered under Crown Life's policy, they would continue to be covered even if they became disabled in the future (R300-301).

Burns was upset when he learned that Crown Life denied coverage to Steven. He wrote Crown Life a letter stating that this was contrary to what Ms. Bishop had agreed to (R303,Pltf's Ex. #8).

Wayne Monek, the Senior Group Manager for Crown Life's Miami office, acknowledged that he had received an inquiry from Burns as to whether McBride's sons would be covered under Signcraft's group policy (R436-38). Monek confirmed the fact that Crown Life sent Ms. Bishop to Signcraft's office to investigate this matter, to hear the facts and make a decision as to whether there was coverage for McBride's sons (R445).

Monek admitted that the supervisors at Crown Life had authority to make binding decisions on behalf of Crown Life; and that if a policy holder had a question about coverage, the policy holder was entitled to rely upon what he was told by Crown Life's supervisor (R442-43). He also admitted that from time to time Crown Life would waive certain conditions or exclusions under an existing policy, in order to accept a person for coverage under that particular policy (R443).

Eileen Bishop, a group sales representative with Crown Life, serviced about 100 Crown Life policy holders (R386,406). She acknowledged that part of her responsibility was to answer questions policy holders might have, and that policy holders were entitled to rely upon what she told them as a representative of Crown Life (R407-08). She knew that the policy holders expected Crown Life to be bound by what she told them (R407-08).

Ms. Bishop testified that Burns called and inquired as to whether Steven would be covered under Signcraft's policy since he was over 19 years of age but was still in his last year of high school (R395). She testified she told Burns that Crown Life could provide coverage "extra-contractually", which meant that they would make an exception to the policy wording on a one time basis, rather than going through the trouble and expense of formally amending the contract (R396-400). Ms. Bishop denied that she was ever informed that McBride's sons were inflicted with a premature aging disease, and denied that she had any knowledge that they were disabled or physically handicapped (R398-400,402).

Ms. Bishop admitted that Crown Life had the right to make exceptions to its policy but she claimed that the only exception she made in this case was to agree to cover McBride's sons until they finished high school (R399-400,415-16). She denied any conversation with Burns other than discussing whether a 20 year old who was still in high school would be covered under Signcraft's group policy. Although Ms. Bishop did not deny ever meeting with Burns and McBride about coverage, she claimed that

she could not remember such meeting and testified that she doubted that this meeting had ever occurred (R403,414).

SUMMARY OF ARGUMENT

Crown Life was not entitled to a directed verdict on the issue of equitable estoppel. An exception to the general rule that there cannot be coverage by estoppel applies where the insurance company assures or misleads an insured to believe that a certain risk is covered, when it is not, and the insured detrimentally relies on that representation.

Crown Life was not entitled to a directed verdict on the oral contract claim. The terms of the oral contract were clearly proven (i.e.), the same terms as the group poicy except modified to elminiate the age and disability limitations.

Case law clearly provides that estoppel may arise as a result of negligent conduct. The jury instruction in this regard was not error.

There was no abuse in allowing Plaintiff to amend his Complaint to assert claims already raised in Plaintiff's Reply. The amendment was discretionary with the trial court and no abuse of discretion has been shown. Crown Life did not need a continuance since the discovery in this case had pertained to the issues of estoppel and oral contract, which were already raised in Plaintiff's Reply.

Plaintiff is entitled to attorney's fees under §627.428 F.S. because he is recovering under the group insurance policy issued by Crown Life, whether under an estoppel theory or under an oral modification to the group policy theory.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN DENYING CROWN LIFE'S MOTIONS FOR DIRECTED VERDICT ON PLAINTIFF'S EQUITABLE ESTOPPEL CLAIM.

1) The Theory Of Equitable Estoppel Can Be Utilized To Prevent An Insurance Company From Denying Coverage - Directed Verdict Not Warranted.

Crown Life has restated the certified question in its brief. Crown Life has changed the question from whether estoppel can be used to prevent an insurance company from denying coverage, to whether it can be used to create coverage. In doing so, Crown Life has made the certified question extremely broad when in fact the Fourth District's decision was quite narrow based upon the facts of this case.

At the outset, Plaintiff recognizes the general rule that estoppel cannot be used to create or extend coverage under an insurance policy, while it may be used to prevent a forfeiture under the policy. There has evolved, however, a recognized exception to this general rule. This exception is discussed at 16B Appleman, Insurance Law and Practice, §9090 beginning at page 590:

> An insurer also may, by its actions, waive, or be estopped from claiming, a defense of noncoverage. . . . The insurer clearly may be estopped to take advantage of a policy provision or limitation inserted in the contract for its own benefit which would frustrate the insured's purposes in applying for the insurance. And an insurer which has misled the insured into believing that a particular risk is within the coverage of the insurance contract will not be permitted to use the contract itself to prove the contrary.

> In addition, even in states not normally allowing the creation or extension of coverage through waiver or estoppel in pais, the doctrine of promissory estoppel may be applicable to bind the insurer.

Out-of-State Cases

There are many out-of-state cases cited under the above Section of Appleman for the above propositions. A few of those cases will be discussed, infra. A case similar to the present case is TRAVELERS INDEM. CO. v. HOLMAN, 330 F.2d 142 (CA Tex. 1964). The insured contacted his insurance agent to inquire whether there was certain coverage under his existing policy, and if not, the insured wanted the coverage. The agent did not undertake to answer this question himself. He sought the information from the insurer. The insurer gave positive assurances that coverage was present. The insured, relying upon this assurance, did not otherwise procure insurance for the risk he was concerned about. A loss occurred and the insurer denied coverage. The trial court found coverage in a declaratory relief action, and the insurer appealed. The appellate court questioned whether an insurance company has some special kind of immunity from legal liability for express commitments made by its direct employee acting strictly in accordance with his authority, and found that no such immunity existed.

The court relied upon a principle in the Restatement of Contracts to the effect that a promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee, and which does induce such action or forbearance, is binding if injustice

can be avoided only by enforcement of the promise. The court found that the facts in that case provided all the ingredients of the above principle:

> Without a doubt there was an implied promise that "for the vacant property that is being filled in by other parties on a gratuitous basis" there is "coverage under this policy", and because of this an OL&T policy would [not] be necessary since coverage is presently provided." This promise was made by one having authority and acting strictly in line of authority. Without a doubt the Insurer knew the promise would induce reliance. Travelers knew better than anyone else that there would be reliance. Both the Travelers agent and the Assured testified categorically that they relied upon this commitment and had the underwriter's statement been different, adequate insurance would have been procured. The reliance was of a definite and substantial nature. And since the Insurer never repudiated what its authorized agent had articulately done until the flood damage had occurred, and it was too late to take corrective action, the facts exactly fit the mold of §90 [Restatement of Contracts] which makes the promise binding "if injustice can be avoided only by enforcement of the promise."

As in HOLMAN, in this case we are not dealing with a situation where an insurance agent gives the insured an opinion on coverage and then the insured attempts to bind the insurer after a loss has occurred. In this case, as in HOLMAN, the insurance agent sought the insurer's opinion on coverage. Crown Life's Senior Group Manager in its Miami office, Wayne Monek, admitted that Ms. Bishop, who was Crown Life's <u>employee</u>, was sent to meet with Burns, McBride and Ms. Hardie, so that she could hear the facts and make a final determination on behalf of Crown Life as to whether coverage existed under the group policy for

McBride's sons with progeria (R445). The insurer itself (through Ms. Bishop) told McBride there was coverage and therefore he allowed the existing coverage for his sons to lapse. Crown Life knew McBride was relying upon Ms. Bishop's determination of coverage, and Monek and Ms. Bishop both admitted that their policy holders were entitled to rely upon such a determination (R442-43,407-08).

In MARTINEZ v. JOHN HANCOCK MUT. LIFE INS. CO., 367 A.2d 904 (N.J. Super 1976) an intermediate appellate court in New Jersey held that an insurer may be estopped to deny coverage when there is a mistake as to the fact or extent of coverage, innocent or otherwise by the insurer or its agent and there is reasonable reliance by insured thereon to its ultimate detriment.

Several years later the New Jersey Supreme Court followed suit in HART v. ALLSTATE INS. CO., 255 A.2d 208 (N.J. 1969). The court analyzed the reason for the development of equitable estoppel, as well as waiver, in the insurance field. It was recognized that insurance companies need reasonable limits on their responsibilities, and that the public is prejudiced when company liabilities are by generous caprice stretched over risks that cannot be profitably underwritten at a just premium. Notwithstanding, the court stated that its appproach to defenses to claims on insurance contracts had changed very substantially in recent years. The court was affording greater protection to the ordinary policyholder untutored in the intricacies of insurance. The court stated that it had realistically faced up to the fact that insurance policies were complex contracts of

adhesion, prepared by the insurer, not subject to negotiation, in the case of the average person, as to terms and provisions and quite unintelligible to the insured even were he to attempt to read and understand their unfamiliar and technical language and awkward and unclear arrangement. Recognition was given to the usual and justifiable reliance by the purchaser on the agent, because of his special knowledge, to obtain the protection he desires and needs, and on the agent's representations, whether that agent be a so-called 'independent' but authorized representative of the insurer, or only an employee. The court stressed that average purchasers of insurance are entitled to the broad measure of protection necessary to fulfill their reasonable expectations; that it is the insurer's burden to obtain, through its representatives, all information pertinent to the risk and the desired coverage before the contract is issued; and that it is likewise its obligation to make policy provisions, especially those relating to coverage, exclusions and vital conditions, plain, clear and prominent to the layman.

In accord with the above rationale, the court in HART adopted the view that where an insurer or its agent misrepresents, even though innocently, the coverage of an insurance contract, or the exclusions therefrom, to an insured before or at the inception of the contract and the insured reasonably relied thereupon to his ultimate detriment, the insurer is estopped to deny coverage after a loss on a risk or from a peril actually not covered by the terms of the policy. The Court stated that under these circumstances estoppel does not

operate to create a new insurance contract, but simply to deny the legal effect to a provision of the policy contract inserted for the benefit of the insurer. The court held that this proposition was one of elementary and simple justice. By justifiably relying on the insurer's superior knowledge, the insured has been prevented from procuring the desired coverage elsewhere. To reject this approach because a new contract was thereby made for the parties, the court held, would be an unfortunate triumph of form over substance.

In LEWIS v. CONTINENTAL LIFE & ACC. CO. 461 P.2d 243, (Idaho 1969) the court held that where a policy holder is induced to enter into a contract in reasonable reliance on promises of or agreements with a representative of the insurance company thereby leaving the insured person or property otherwise unprotected, the insurance company is estopped to deny the liability for which it actually contracted by raising provisions from its own printed policy form. The court rejected the insurer's argument that to so hold would write a new contract and impose a liability on the company for which it had not bargained. The court stated that the purpose of the doctrine of estoppel in insurance cases was to enforce the contract as originally agreed upon by the parties:

> We are not writing a new contract. We are only refusing to allow the insurance company to replace the original bilateral agreement with its own unilaterally drafted insurance form.

In CRESCENT CO. OF SPARTANBURG INC. v. INSURANCE COMPANY OF NORTH AMERICA, 225 S.E.2d 656 (SC 1976), the court held that the scope of risk under an insurance policy can be extended by

estoppel if the insurer has misled an insured into believing a particular risk is within the coverage.

SECURITY INS. CO. OF NEW HAVEN v. GREER, 437 P.2d 243 (Okl. 1968) held that an insurer may by its action or conduct be estopped from denying that its policy affords coverage for a risk which the insured has been led honestly to believe was assumed under the terms of the policy.

In IVEY v. UNITED NAT. INDEM. CO., 259 F.2d 205, (1958, CA9 Cal), the court held that whatever may be the rule elsewhere, the California decisions indicate that an insurance company may by its conduct or dealings apart from the policy itself be estopped from denying that coverage has not been furnished for a risk which the insured has been led to believe is covered under the policy.

The court in UNION PACIFIC INS. CO. v. MEYER, 305 F.2d 107, (1962,CA9 Idaho) held that the state of Idaho had gone along with the California view and held that an insurance company may, through the conduct of its agents, be liable for coverage expressly excluded by the terms of a written policy.

In ALLSTATE INSURANCE CO. v. STATE FARM MUT. AUTO. INS. CO., 679 P.2d 879 (Or 1984), the court held that an insurer may be estopped from denying coverage when the party claiming coverage has acted in reasonable reliance on an agent's representation of coverage. Thus, where the insured's son reasonably relied on the agent's representation that he was covered under his parents' policy, the insurer was estopped from denying the insured's son coverage.

And in DARNER MOTOR SALES, INC. v. UNIVERSAL UNDERWRITERS INS. CO. 682 P.2d 388 (Ariz) the court held that equitable estoppel is available to prevent enforcement of boiler-plate terms of an insurance contract which are more limited than the coverage expressly agreed upon by the parties.

Florida Cases

There are many cases in Florida setting forth the general rule, upon which Crown Life relies, that estoppel cannot create coverage. But there has also developed a line of cases in Florida, in line with §9090 of Appleman's to the effect that waiver and estoppel can be invoked when the conduct of the insurer has misled the insured regarding the extent of the coverage, all to the insured's detrimental reliance, and where it would operate as a fraud on the insured if the insurance company could disavow its conduct and enforce certain exclusions or conditions. RELIANCE MUTUAL LIFE INS. CO. OF ILLINOIS v. BOOHER, 166 So.2d 222 (Fla. 2d DCA 1964); MUTUAL OF OMAHA INS. CO. v. EAKINS, 337 So.2d 418 (Fla. 2d DCA 1976); TRAVELERS INDEM CO. OF R.I. v. MIRLEBRENT, 345 So.2d 417 (Fla. 2d DCA 1977); DEAN v. CENTRAL MUT. INS. CO. 381 So.2d 737 (Fla. 1st DCA 1980).

In EMMCO INS. CO. v. MARSHALL FLYING SERVICE, INC., 325 So.2d 453 (Fla. 2d DCA 1976) the flying service's application for insurance had expressly requested chemical damage coverage, but unbeknownst to it such coverage was excluded by the terms of the policy issued. The Second District held that as a matter of law Emmco Insurance was responsible for chemical damage coverage

where its agent had failed to provide such coverage and failed to notify the flying service that the policy issued excluded such coverage.

In BURNS v. CONSOLIDATED AMERICAN INS. CO., 359 So.2d 1203 (Fla. 3d DCA 1978) Burns claimed that he told his insurance agent that he wanted a homeowner's policy that would include theft coverage. The agent claimed he told Burns that theft coverage was excluded on the policy issued. A summary judgment was entered in favor of the insurer based upon the contention that waiver and estoppel could not be utlized to create coverage for a risk that was expressly excluded by the terms of the policy. The Third District reversed the summary judgment, stating:

> As a general statement of law, Consolidated is correct in asserting that an agent's representations as to coverage cannot operate by way of estoppel to create coverage where the terms of the policy are unambiguous....
>
> But the situation before us cannot be resolved on the basis of broad statements of law which do not take into account the mixed questions of law and fact presented by the instant case (cites omitted)
>
> While estoppel cannot be invoked to create coverage clearly excluded by a written contract of insurance, the concept may be utilized against an insurer when its conduct has been such as to induce action in reliance on it. Mutual Of Omaha Insurance Company v. Eakins, 337 So.2d 418 (Fla. 2d DCA 1976).
>
> Questions of fact as to the requested coverage and the existence vel non of an oral contract of insurance which included terms other than those specified in the written policy remain unresolved. A parol contract to insure may be enforced against a principal as long as all the elements of a written contract are proven. Collins v. Aetna Insurance Company, 103 Fla. 848, 138 So. 369 (1931). The rendition of summary judgment at this point in the proceedings precluded proof of the existence of these elements. An

> insurer may be liable for coverage not included in a written contract if its agent failed to provide it or to notify the insured that such coverage was excluded from the policy issued (cites omitted).
>
> If such a parol contract existed, the issue is not one of estoppel creating coverage, but one of estoppel to deny the existence of an oral contract creating coverage.

In PENINSULAR LIFE INS. CO. v. WADE, 425 So.2d 1181 (Fla. 2d DCA 1983) the insured questioned his insurance agent about whether he had certain coverage under his insurance policy. The agent advised him that he was afforded the questioned coverage. Subsequently a loss was sustained and the insurer denied coverage based on the provision in question. The appellate court affirmed a judgment for the insured. The court stated that its research, which included a review of the law in other jurisdictions, revealed no case directly on point, (i.e.), involving an insurance agent's incorrect representations made as to the meaning of language in the policy <u>after</u> it was issued. However, the court stated that it did find cases in which the insurer was held estopped to deny coverage where the insured was assured of coverage and sustained a loss before learning that the policy actually issued did not provide coverage for the loss in question, citing to Section 9090 of Appleman. The Court found that Wade had been affirmatively misled by the insurance agent's interpretation of the policy coverage provision which had been called to his attention. The Court agreed with other case law holding that:

> . . .where an insurer or its agent misrepresents, even though innocently, the coverage of the insurance contract, or the

> exclusions therefrom, to an insured before or at the inception of the contract, and the insured reasonably relies thereupon to his ultimate detriment, the insurer is estopped to deny coverage after a loss on a risk or from a peril actually not covered by the terms of the policy. The proposition is one of elementary and simple justice. By justifiably relying on the insurer's superior knowledge, the insured has been prevented from procuring the desired coverage elsewhere. . . . If the insurer is saddled with coverage it may not have intended or desired, it is of its own making, because of its responsibility for the acts and representations of its employees or agents. It alone has the capacity to guard against such a result by the proper selection, training and supervision of its representatives.

The Court concluded:

> As stated in Burns: "While estoppel cannot be invoked to create coverage clearly excluded by a written contract of insurance, the concept may be utilized against an insurer when its conduct has been such as to induce action in reliance on it." 359 So.2d at 1207. We conclude that appellant is estopped to deny full coverage on Mrs. Wade's life, notwithstanding the clear and unambiguous policy provision, after its agent and employee unqualifiedly held himself out as an expert on policies such as appellee's and misinformed appellee as to the meaning of that provision, which actions would be expected to and did induce appellee's reliance on the agent's false representations.[3]

The present case is akin to WADE. Here, McBride was covered under the group policy when he first began employment with Signcraft effective November 7, 1977. Thereafter, McBride specifically questioned whether his sons would be covered under

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3/ The court stated that misrepresentations or misinformation by an insurer's employee or agent is far more egregious conduct than merely failing to notify an insured that the policy issued actually excluded certain coverage applied for.

that group policy. When he was advised that they would be, he did not convert the coverage he already had for his sons under his prior employer's group policy. Under these circumstances estoppel is applicable.

In KRAMER v. UNITED SERVICES AUTO ASS'N., 436 So.2d 935 (Fla. 4th DCA 1983), the insured's daughter bought a new car and telephoned her father's insurer to inquire whether it would be covered under her father's policy. She was advised that her father's existing policy covered her new car. The insurer later denied coverage when an accident occurred. The Fourth District reversed the dismissal of the daughter's lawsuit against the insurer. The court refused to apply the general principle that waiver and estoppel are not available to extend coverage of an insurance policy. It instead relied upon the holdings in BURNS and WADE that estoppel can be utilized where an insurer has misrepresented the coverage under an insurance policy, or has assured the insured of coverage, and the insured has deterimentally relied upon the misrepresentation only to subsequently learn that the policy actually issued did not provide coverage for the loss in question.

The above cases, which create an exception to the general rule prohibiting coverage by estoppel, are applicable here. Throughout its brief Crown Life argues that in the above cases the District Courts have ignored the prohibition against coverage by estoppel. They have not. In each case the courts recognized the general rule, and then applied an exception when the insurer misled or misinformed the insured as to the extent of coverage.

The cases relied upon by Crown Life are totally distinguishable from this case and the above cited cases. They do not concern instances where an insurer misrepresents coverage and because of reliance upon that misrepresentation, the insured does not otherwise secure insurance.[4] The Fourth District correctly found SIX L's and the other cases relied upon by Crown Life "factually distinguishable". The problem with Crown Life's brief, and its approach to this case, is that it refuses to recognize these factual distinctions. The present case, WADE, BURNS, and KRAMER, concern a misrepresentation of coverage by the insurer which is detrimentally relied upon by the insured. The Fourth District's decision is restricted to this narrow factual scenario.

Legal Policy Implications

Crown Life's contention is that if estoppel can be applied to an insurer it will open the door to a flood of fraudulent claims. This argument is no reason to insulate an insurer from responsibility where that insurer misrepresents the coverage to its insured to the insured's detriment. Judges and jurys are

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4/ The case relied upon by Crown Life that is closest to a misrepresentation is STATE LIQUORS STORES #1 v. UNITED STATES FIRE INS. CO., 243 So.2d 228 (Fla. 1st DCA 1971). The insured argued that the insurance agent had told him that the policies that were going to be issued would cover money lost by robbery when the money was being handled by the insured in its customary manner. The policy issued provided this coverage, but only where the loss occurred on, rather than off, the insured's premises. It was held that estoppel could not be utilized to prevent the insured from denying coverage because there had been no misrepresentation or misinformation by the insurer regarding the extent of coverage.

well equipped to discern fraudulent and baseless claims, and will reject them as they presently do in many other areas of the law.

Crown Life's argument that it should have in effect "absolute immunity" from estoppel and waiver where coverage is concerned is totally unconscionable when viewed in light of the facts of this case. Why in one's wildest imagination should Crown Life be exonerated? And why should this insured, who could not have done more to protect himself and his two sons, be left holding a bag of medical bills simply because Crown Life wishes this Court to blindly apply the prohibition against estoppel? As stated, supra, that prohibition does not apply where the facts demonstrate a misrepresentation by the insurer itself as to coverage, upon which the insured relies to his detriment. Under those circumstances, there is no sound reason why estoppel should not apply to the insurer as it does to any other party who has caused another to detrimentally rely upon its misrepresentations.

Plaintiff Proved Estoppel By Clear And Convincing Evidence

There was ample proof of estoppel. Crown Life represented to McBride that his sons were covered under the group insurance policy. Crown Life subsequently denied coverage for Steven. The above cases demonstrate that estoppel is applied in similar cases where an insured is assured of coverage by an insurer who subsequently denies coverage.

Crown Life's argument that Ms. Bishop did not understand the full nature of Steven's condition is not supported by the evidence. McBride forthrightly answered all the questions that were asked of him. If Crown Life was not told something it was

because Ms. Bishop did not question McBride in that regard. Ms. Bishop was not interested in hearing more than she was told. McBride informed her that his sons had progeria, an incurable and progressive, premature aging disease; that he did not know how bad their condition would get or how long they would live (R205). What more need he say to convey the gravity of their illness?

Crown Life next argues that there was insufficient evidence that McBride relied upon Ms. Bishop's representations of coverage. The evidence was more than sufficient. McBride testified that his sons had been covered under his prior employer's group policy, and that he had not continued that coverage based upon Ms. Bishop's representations. McBride did not have to offer a copy of the prior group policy into evidence. At the time of trial, years after he had ceased employment at Mel Webb Signs, he no longer had a copy of the policy. His testimony that his sons had been covered under that policy was sufficient.

POINT II

CROWN LIFE WAS NOT ENTITLED TO A DIRECTED VERDICT ON PLAINTIFF'S ORAL CONTRACT CLAIM.

Steven's claim for relief based upon an oral contract is an entirely separate vehicle for recovery than the claim for recovery based upon estoppel. The jury returned a verdict in Steven's favor based upon both an oral contract and estoppel. The Fourth District affirmed on both grounds. Regardless of this Court's ruling regarding the estoppel issue, the result below should be affirmed based upon the jury's finding of an oral contract.

Crown Life's first argument is that Steven did not prove the elements of the oral contract. The terms of the oral contract were the terms of the group policy, as modified. The only difference is that Crown Life agreed to insure McBride's sons under the policy so that the disabled, dependent provision and any age limitations did not apply to them. Crown Life argues that the problem with this analysis is that the trial court ruled that Steven could not recover under the group contract as written because of the age and disability limitations. But he clearly could recover under the terms of the group policy, as modified by the insurer, to eliminate the age and disability limitations. Even counsel for Crown Life agreed that Plaintiff's theory was one of oral modification of the existing group insurance policy, or oral modification of that policy (R356).

Crown Life cites testimony of Burns to the effect that Ms. Bishop did not specifically state that Steven would be covered after he graduated from high school. Notwithstanding, Burns testified that McBride was concerned about coverage for his sons in the future because he knew that their disease was incurable and progressive (R297,333). Burns and Ms. Bishop discussed this (R297). Ms. Bishop told Burns and McBride that if she made a determination that McBride's sons would be covered by Crown Life, they would continue to be covered in the future even if they became disabled (R300-301). In line with this testimony the jury was instructed that it was to determine whether McBride made a full and true disclosure to Crown life as to the age and physical condition of Steven, and whether Crown Life orally agreed to

provide medical coverage for Steven "and would continue to provide such coverage so long as Joseph McBride remained an employee of Signcraft" (R543). The jury decided this factual issue in Steven's favor.

The present case is distinguishable from SOUTH CAROLINA INS. CO. v. WOLF, 331 So.2d 337 (Fla. 1st DCA 1976), cited by Crown Life because here the terms of the oral contract were definite and were those in the group policy, except as modified by the oral agreement between Crown Life and McBride.

Crown Life's final argument is that the oral contract is barred by the Statute of Frauds. It is not. §725.01 F.S provides:

> No action shall be brought ... upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement or promise upon which such action shall be brought, or some note or memorandum thereof shall be in writing and signed by the party to be charged therewith or by some other person by him thereunto lawfully authorized.

In the present case, the writings evidencing the agreement of the parties are the group policy, which was merely modified by the parties' oral agreement, the employee enrollment card and the Certificate of Insurance. The Statute of Frauds does not apply to an oral modification of a written contract, as here. ORANGE STATE OIL CO. v. CROSBY, 36 So.2d 273 (Fla. 1948). Case law consistently provides that an oral modification of a written contract is valid. BELLA VISTA, INC. v. INTERIOR & EXTERIOR SPECIALTIES CO., INC., 436 So.2d 1107 (Fla. 4th DCA 1983); HARRIS v. AIR CONDITIONING CORP., 76 So.2d 877 (Fla. 1955); LINEAR CORP.

v. STANDARD HARDWARE CO., 423 So.2d 966 (Fla. 1st DCA 1982). Moreover, an oral agreement is rendered completely enforceable by the execution of a sufficient subsequent memorandum, FLAGSHIP NAT. BANK OF MIAMI v. KING, 418 So.2d 275 (Fla. 3d DCA 1982), such as the employee enrollment card and Certificate of Insurance issued by Crown Life for Mr. McBride, which indicated that his dependents were covered.

POINT III

THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY THAT AN ESTOPPEL MAY ARISE AS THE RESULT OF A DEFENDENT'S WILFUL NEGLIGENT CONDUCT.

There is ample case law providing that estoppel consists of words or conduct by which the speaker or actor wilfully, culpably or negligently induces another person to change his position to his detriment. RICHARDS v. DODGE, 150 So.2d 477 (Fla. 2d DCA 1963); ALDERMAN v. STEVENS, 189 So.2d 168 (Fla. 2d DCA 1966); HALLAN v. GLADMAN, 132 So.2d 198 (Fla. 2d DCA 1961); AETNA CASUALTY & SURETY CO. v. SIMPSON, 128 So.2d 420 (Fla. 1st DCA 1961); TRAVELERS INS. CO. v. SPENCER, 397 So.2d 358 (Fla. 1st DCA 1981).

In RINKER MATERIALS v. PALMER FIRST NATIONAL BANK, 361 So.2d 156 (Fla. 1958) the Florida Supreme Court held that a party may maintain a suit based upon estoppel only where there is proof of fraud, misrepresentation or other affirmative deception. However, a fraudulent or willful intent to deceive is not essential to estoppel. GOULD v. NATIONAL BANK OF FLORIDA, 421 So.2d 798 (Fla. 3d DCA 1982). The fraud may be actual or

constructive and intentional or negligent. 22 Fla.Jur.2d Estoppel & Waiver, §§32-34 and 45 provide:

> §32. Intent or motive
> One of the essentials of an estoppel in pais is that the representation or conduct claimed as the basis for the estoppel must have been made or done with the actual or virtual intention that the other party should act upon it. But a fraudulent or wilful intent to deceive is not essential to the creation of an estoppel. However, there must be proof of some affirmative deception.
>
> §33. Wilfulness or culpability
> An equitable estoppel may arise where one by word, act or conduct wilfully or culpably causes another to believe in the existence of a certain state of things, and thereby induces him to act on this belief injuriously to himself, or to alter his own previous position to his injury. But it is not necessary in order to raise an estoppel against a person that he acted wilfully or culpably. The estoppel may be raised if he acted <u>negligently</u>.
>
> §34. Fraud or bad faith
> . . . While neither actual fraud nor bad faith is generally considered an essential element, there must be either actual fraud involving an intent to deceive or constructive fraud resulting from gross <u>negligence</u> or from admissions, declarations, or conduct intended or calculated, or such as might reasonably be expected, to influence the other party and which have so misled him to his prejudice that it would be a fraud to allow the true state of things to be shown. Thus, it has been held that a party may successfully maintain a suit under the theory of equitable estoppel only where there is proof of fraud, misrepresentation, or other affirmative deception.
>
> §45. Negligence - In general
> Equitable estoppel may be based on <u>negligence</u>. Thus, an estoppel may arise where one by words, acts, or conduct <u>negligently</u> causes another to believe in the existence of a certain state of things, whereby he is induced to act so as to change his own previous position injuriously. But general

> carelessness or neglect in respect to the interest of the party to be estopped is not sufficient. Generally, the neglect must be in the transaction itself, and be the proximate cause of leading the party claiming the estoppel into mistake; it must amount to a breach of duty owing to him or to the public. (Emphasis added)

See also 28 Am.Jur.2d Estoppel & Waiver, §§41 and 43 and cases holding that a negligent misrepresentation may be equated with, or regarded as tantamount to, actual fraud. UPCHURCH v. MIZELL, 40 So. 29 (Fla. 1905); 27 Fla.Jur.2d Fraud & Deceit, §47.

The jury instruction given on estoppel was correct under the above law. However, even assuming for argument's sake error was involved, it was harmless error since the jury found against Crown Life not only on the theory of estoppel, but also on the oral contract theory. Clearly no error has been demonstrated on appeal in regard to Plaintiff's recovery under the oral contract theory.

POINT IV and V

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ALLOWING PLAINTIFF TO AMEND ITS COMPLAINT AT THE BEGINNING OF TRIAL AND IN DENYING CROWN LIFE'S MOTION FOR CONTINUANCE.

These points will be argued together because they are logically and legally related.

Amendment

Crown Life incorrectly states that at the beginning of the trial the sole issue to be litigated was whether Steven could recover under the group policy. Also, there was the issue of whether Crown Life was estopped to assert non-coverage under the

group policy because of an oral modification of that policy. At the beginning of the trial the trial court allowed estoppel and oral contract to be raised affirmatively.

There was no abuse of discretion in allowing the amendment. These issues had been raised from the very beginning in Plantiff's Reply to Crown Life's Answer. For this reason, prior to trial, Plaintiff had not felt it necessary to formally amend his Complaint. However, when Crown Life once again argued at trial that the issues of estoppel and oral contract could not be tried since they were not raised in Plaintiff's Complaint, out of an abundance of caution, Plaintiff moved to amend his Complaint. The trial court did not err in allowing the amendment, although it was unnecessary. In GULF LIFE INS. CO. v. FERGUSON, 59 So.2d 371 (Fla. 1952) the court held that the plaintiff could introduce evidence of estoppel or waiver if a reply to the defendant's affirmative defense of fraud had been interposed raising those issues.

The trial court's ruling that Plaintiff could amend his Complaint to state issues that were already raised by the pleadings was not error, must less harmful error. Additionally, a trial judge is permitted to grant amendment within his sound discretion. TRENT v. CHANNEL 10, WPLG-TV v. POST-NEWSWEEK STATIONS, FLORIDA, INC., 309 So.2d 631 (Fla. 3d DCA 1975). It is the policy of the courts of Florida to freely allow amendments to pleadings in order that causes may be tried on their merits and justice may be achieved, and in exercising the discretion inherent in the trial court to allow or disallow amendments, all doubts should be resolved in favor of the former. SINGH v. TOLZ,

380 So.2d 1326 (Fla. 4th DCA 1980). The court may permit either party to amend a defect in pleading either before, at the beginning, or during trial, and in some instances after the verdict. CARROLL v. GOCE, 143 So.2d 633 (Fla. 1932). The matter of permitting amendments during trial is within the court's sound judicial discretion. KNOBB v. RECONSTRUCTION FINANCE CORP., 197 So.2d 707 (Fla. 1940); HART v. PIERCE, 125 So. 243 (Fla. 1929); EVANS v. KLOEPPEL, 73 So. 180 (Fla. 1916); HARTFORD FIRE INS. CO. v. BROWN, 53 So. 838 (Fla. 1910).

Crown Life argues that new issues were raised. There were no new issues. The same issues raised in Plaintiff's Reply were simply made part of Plaintiff's Complaint.

Continuance

The granting or denial of a motion for continuance is left to the sound discretion of the trial court. FORD v. FORD, 8 So.2d 495 (Fla. 1942). A trial court's ruling in that regard will not be disturbed on appeal unless there is a gross or flagrant abuse of discretion clearly shown. BUCKLEY TOWERS CONDOMINIUM, INC. v. BUCHWALD, 340 So.2d 1206 (Fla. 3d DCA 1976); EDWARDS v. PRATT, 335 So.2d 597 (Fla. 3d DCA 1976). No abuse of discretion occurred in this case. Contrary to Crown Life's contention, there were no new issues raised. And Crown Life had already fully completed discovery on the issues raised in Plaintiff's Reply, which were the same issues Plaintiff was allowed to amend his Complaint to assert (R733-1032). This is evidenced by the questioning in the depositions of McBride,

Bishop and Burns, taken by Crown Life (R733-1032). Accordingly, the trial court was correct in finding that these issues had always been issues in the case and that Crown Life had been aware of them from the start (R161). Thus, there was no need for a continuance.

The cases relied upon by Crown Life involved new witnesses, or new issues, or the inability to depose the defendant's before trial. None of those situations pertain to this case.

POINT VI

THE TRIAL COURT DID NOT ERR IN AWARDING PLAINTIFF ATTORNEY'S FEES PURSUANT TO §627.428 F.S.

Crown Life misperceives Plaintiff's theory of recovery. The trial court's instruction to the jury was that Steven could not recover under the group policy _as written_. The jury was also instructed that it was to determine whether Crown Life was estopped to deny coverage under the group policy, and/or whether Crown Life had modified the group policy by orally agreeing to provide coverage outside certain of its policy provisions. _Clearly the basic contract sought to be enforced was the group policy, which was executed by Crown Life_. Accordingly, Plaintiff was entitled to attorney's fees under §627.428 F.S.

If Crown Life is not responsible for attorney's fees in this case, a grave injustice is done to Steven. For $1,300 in benefits, Steven has been dragged through the appellate courts of this State. He clearly could not afford representation in defending these appeals, in light of the amount of money

involved, if he were not entitled to attorney's fees. The purpose of §627.428 is to award an insured attorney's fees where he has successfully litigated a coverage issue with his insurer. Steven has done exactly that in this case. Steven has established coverage for himself under the written group policy executed by Crown Life, albeit through estoppel and oral modification. Accordingly, §627.428 is applicable.

CONCLUSION

The Final Judgment in Steven's favor should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been mailed to: ROBERT D. FRIEDMAN, 1500 Edward Ball Bldg., 100 Chopin Plaza, Miami Center, Miami, FL 33131, this 21st day of DECEMBER, 1985.

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MN07/MCBRIDE BRIEF