IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,476

CROWN LIFE INSURANCE COMPANY,

Petitioner,

v.

STEVEN PATRICK McBRIDE,

Respondent.

On Certification from the District Court of Appeal

Fourth District

PETITIONER'S BRIEF ON THE MERITS

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Preface

Petitioner, Crown Life Insurance Co., was the appellant in the district court and defendant in the trial court. Respondent, Steven Patrick McBride, was the appellee in the district court and plaintiff in the trial court. The parties will be referred to as they stood in the trial court. The following symbol will be used for citation to the record on appeal: (R.).

STATEMENT OF THE CASE AND FACTS

Statement of Case

This case is before the Court on certification from the Fourth District Court of Appeal, which affirmed a final judgment on jury verdict rendered in the trial court in favor of plaintiff, Stephen Patrick McBride (R. 1141).

This action was commenced by the filing of a complaint by Joseph Valery McBride (plaintiff's father, hereinafter "McBride") and plaintiff on or about July 15, 1982 (R. 624-25). Crown Life Insurance Company (hereinafter "Crown Life") was named as defendant. The complaint was an action for declaratory relief pursuant to Florida Statute Chapter 86. It alleged that plaintiff, as the natural son of McBride, was a dependent covered by a claim group policy of insurance written by Crown Life for McBride's employer, Sign Craft, Inc. The complaint alleged that plaintiff had incurred substantial medical expenses in approximately August 1981, and that Crown Life had declined to pay for these

claims. It further alleged that plaintiff and McBride were uncertain of their rights under the policy and requested a judicial determination thereof with regard to plaintiff's past and future medical expenses.

By court order dated November 8, 1982, and pursuant to Crown Life's motion to dismiss, the trial court dismissed the complaint without prejudice (R. 632-33), and the subsequent amended complaint sounded in two counts. (R. 634-35).

Count I sought recovery for benefits allegedly owing under the group insurance policy. Plaintiff alleged that he was a dependent covered by the group insurance policy and was entitled to benefits for medical expenses incurred in approximately August 1981. Count II asked for specific performance of the group insurance policy, but this count was dismissed with prejudice, and McBride was dismissed as a party plaintiff (R. 639-40).

Crown Life filed an answer and affirmative defenses (R. 641-44), denying that plaintiff was a dependent covered by the policy. The answer also raised numerous defenses of non-coverage, including, inter alia, plaintiff's age (23) when medical expenses were incurred and the fact that plaintiff was disabled on the date he otherwise would have become insured and had been disabled at all times subsequent thereto. Plaintiff replied to Crown Life's affirmative defenses (R. 645), pleading that Crown Life was estopped from asserting or had waived the defenses of non-coverage because Crown Life allegedly made certain representations as to coverage

prior to J.V. McBride's taking employment with Sign Craft, Inc.

On November 21, 1983, Crown Life filed an amended motion for summary judgment and supporting memorandum of law (R. 665-70), chiefly contending that plaintiff was explicitly not covered under the policy because he was 23 years old when the expenses were incurred. Plaintiff opposed this motion with McBride's affidavit (R. 671-76) and the Burns line of cases, and it was denied on December 21, 1983 (R. 667).

The case was tried before a jury beginning on March 21, 1984. Following jury selection, the Court granted over our objection plaintiff's ore tenus motion to amend his complaint to assert two new claims for affirmative relief: equitable estoppel and an oral contract of insurance (R. 157-58). Crown Life promptly moved, ore tenus, for continuance (R. 158), which motion was denied, the Court being essentially of the opinion that waiver for one purpose is waiver for all purposes, at least as long as the party whose motion is denied "was aware of" the issue (R. 161). The Court subsequently found that plaintiff was, as as matter of law, not entitled to coverage under the written insurance policy (R. 536), but allowed the newly asserted claims for oral contract of insurance and recovery "by reason of estoppel" (R. 538) to go to the jury. The jury found for appellee under both theories (R. 559), and post-trial motions followed.

On March 27, 1984, plaintiff filed motions for entry of final judgment (R. 1127), to tax costs (R. 1124), and for attorneys' fees (R. 1126). Crown Life moved to strike the prayer for attorneys' fees under Florida Statute § 627.428, arguing that there was no judgment "under a policy or contract executed by the insured." (R. 1131-32) This motion was denied on April 26, 1984 (R. 1139), and a final judgment (R. 1136), amended to include costs and attorneys' fees, was entered on May 11, 1984. (R. 1141).

Crown Life appealed to the Fourth District Court of Appeal, which affirmed the judgment in its entirety, rejecting all other issues raised by Crown Life but not discussed in the decision. Acknowledging "some confusion" in Florida concerning whether insurance coverage may be affirmatively extended by estoppel, however, that Court certified to this Court the following question of great public importance:

> MAY THE THEORY OF EQUITABLE ESTOPPEL BE UTILIZED TO PREVENT AN INSURANCE COMPANY FROM DENYING COVERAGE?

Statement Of The Facts

On or about November 4, 1977, McBride terminated his employment with Mel Webb Signs (R. 198), starting his employment with Sign Craft, Inc. on or about November 7th. (R. 229). When he began, Sign Craft had a group health insurance policy with Crown Life (R. 287).

After his first week at Sign Craft, McBride met with its office manager, Joyce Prader, concerning insurance coverage for himself, his wife, and his two boys under the

Crown Life group policy (R. 198-200). Both sons, Scott McBride and plaintiff, for whom McBride wanted dependent coverage under the Crown Life group policy, had had progeria since birth. (R. 201).[1/] When McBride began work at Sign Craft, plaintiff was 20 years old (R. 230), in a special class for "underprivileged" children at public school (R. 193), and receiving Social Security Administration Supplemental Security Income benefits (R. 1047).

McBride testified at trial that he was asked to fill out certain forms at the first meeting with Prader who told him that she would contact the insurance broker, Walter Burns, to advise him of the boy's condition and get an answer on coverage (R. 201).

Sign Craft's Crown Life group insurance, in relevant part, defined dependents as:

> Any unmarried child of an insured employee, who is less than 19 years of age.
>
> Any unmarried child of an insured employee, who is at least 19 years of age but less then 23 years of age who is enrolled in and in full time attendance in a recognized college or university. (Plaintiff's Exhibit 7 at Page 35).

The Crown Life policy also contains the following non-waiver provision:

> Changes in the policy.

1/ Progeria is a genetic birth defect also known as Cockayne's Syndrome or premature aging disease. (R. 190, 1048).

> This policy may be changed when and as agreed upon in writing by the policyholder and Crown Life and all changes must be verified by the seal of Crown Life and the signatures of two Officers of Crown Life. No previous course of dealing with the policyholder, any participating employer, or anyone, on the part of Crown Life or anyone on the behalf of Crown Life, whether acting on his own behalf or otherwise, shall be considered to constitute a waiver by Crown Life of any of the conditions of this policy. (Plaintiff's Exhibit #7 at Page 26).

Notwithstanding the fact that plaintiff was 20 when McBride began employment with Sign Craft, (R. 230), and that his education was through high school only (R. 193), McBride continued to request information as to whether his two sons, including plaintiff, would be covered under the Crown life group policy.

After meeting with Prader, McBride met at Sign Craft with the insurance broker who handled Sign Craft's purchase of the group policy, Walter Burns (R. 202). McBride testified that at this meeting Burns wanted to know what the disease was, whether the boys were in school, and what they could and could not do (R. 202). In response to those questions, he told Burns that progeria was an aging disease, that plaintiff, "at the time, was at Forest Hill High School in a special class and that he got along with people real good, that he was small for his age, and that you could see signs of aging. Besides that, he was completely normal." (R. 239, 240-41).

Following the meeting with Burns, McBride said that he met again at Sign Craft with Burns and Eileen Bishop, the group service supervisor for Crown Life's Miami district office (R. 203, 386).

McBride testified that at this meeting, he told Burns and Bishop basically the same thing that he had told Burns previously (R. 242), and answered two basic questions: (1) whether his sons were in school full-time (R. 204, 314), and (2) whether his sons were performing the normal activities of other children of their age and sex (R. 204, 314). He answered both affirmatively. (R. 204-05, 242, 314).

Burns testified that McBride did not tell Bishop or Burns at this meeting (i) that plaintiff had attended a school for "under privileged children" prior to his attendance at a public high school (R. 314-15), (ii) that progeria was a genetic birth defect (R. 315); (iii) that plaintiff had been disabled since birth (R. 315); or (iv) that plaintiff was receiving Social Security Supplemental income benefits for disability (R. 315-16). McBride testified that at the conclusion of this meeting, Bishop said she would go back to her office and let him know whether plaintiff would be covered as a dependent under the policy (R. 206), but Bishop did not then tell him that plaintiff would be covered (R. 206, 261).

McBride said that approximately one week after this meeting with Bishop and Burns, he again went to see Prader about insurance coverage (R. 206-207). Prader called Burns,

who then came to the Sign Craft office (R. 207). Burns then called someone in the Miami district office of Crown Life and said that he had to have an answer (R. 207). A short discussion followed and Burns thereafter said "O.K., thank you", hung up the phone, turned to McBride and said, "Congratulations, you are covered and your dependents are covered." (R. 207-08).

Although Bishop did not specifically recall any meeting at Sign Craft with McBride and Burns (R. 403), she did recall a telephone call from Burns where he posed a hypothetical question of whether a child over 19 and still in high school would be covered under the group policy until he is out of high school (R. 397). She was told that the child "was going to school and doing the things that a normal kid did" (R. 402), and in response to that hypothetical question, Bishop said that Crown Life would cover the child extra-contractually until the child finished high school (R. 397). "Extra-contractual" coverage is provided where the company agrees to an exception to the policy terms rather than amending the policy form itself (R. 399).

Bishop testified that Burns did not include in this hypothetical any reference to (i) a child who is disabled (R. 397); (ii) a child who was disabled since birth (R. 398); (iii) a child who is in an ungraded school or special class at public school (R. 398); (iv) a child who was 20 years old (R. 398); or (v) a child who was afflicted by progeria (R. 399). She said that knowledge of even one of these facts

would have changed her response that Crown Life would cover plaintiff extra-contractually until he finished high school (R. 397-99).

McBride also testified that he had a conversion privilege under the policy he had at Mel Webb Signs (R. 196), and that he had a right to exercise this conversion privilege for 31 days from the termination of his employment (R. 197-98). McBride testified that Mel Webb Sign's group coverage was with Blue Cross/Blue Shield (R. 251-52), but had no documents from Blue Cross/Blue Shield indicating that he, in fact, had such a policy or conversion option (R. 256). He did not know exactly what sort of benefits were offered under the conversion option (R. 255).[2/] He further testified that he relied on Burn's representations regarding coverage of his children as dependents and thereafter let the conversion option of the Blue Cross/Blue Shield policy lapse (R. 212).

Plaintiff incurred medical expenses in August 1981 and thereafter submitted claim forms for payment to Crown Life (R. 212-15). These claims were denied for two stated reasons: On September 2, 1981, Crown Life sent a letter to Sign Craft stating that "no amount is payable for charges incurred for dependent children, age 23 or over." (R. 383), and on October 15, 1981, the Company wrote Sign Craft stating

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2/ There was even some confusion over whether the policy was Blue Cross. The only documentary evidence was a claim form submitted under a Life of Georgia policy (R. 257, 384-85).

that "no amount is payable under the major medical benefits of the policy, as the dependent was disabled on the effective date of the insurance. ..." (R. 226).

SUMMARY OF ARGUMENT

This Court has unequivocally held that the doctrines of waiver and estoppel cannot be invoked by an insured, in an action against an insurer, for the purpose of creating or extending coverage beyond the terms of the insurance policy. This approach is in fact reflective of the approach taken by the overwhelming majority of courts nationwide. Despite this clear mandate, several of the district courts of appeal have, in the guise of creating "exceptions," virtually adopted a glossy promissory estoppel construction as a method of creating coverage.

The language of the "exceptions" and the cases which have applied them are devoid of theoretical, conceptual, or policy underpinnings which would or could determine the proper scope or circumstances in which the exception should apply, have been adopted on an individual basis apparently for reasons of doing "the right thing," and have accordingly created wholesale confusion.

The second claim added by amendment on the second day of trial was a claim based on a theory of oral contract of insurance. The court erred in permitting this amendment and allowing the case to go to the jury under this theory for several reasons. This claim was improper under these facts since the oral contract theory was merely an alter-ego of the

improper estoppel theory. The oral contract claim was also improperly submitted to the jury because Florida's requirements for an oral contract in general, and an oral contract of insurance in particular, clearly were not met.

Additionally, a number of other serious errors by the trial court in this case independently require reversal. On the second day of trial, the court granted plaintiff's ore tenus motion to amend the complaint to add two new causes of action wholly different in the available relief from those previously pled. Though granting such amendment was by itself improper because it prejudiced one party to the other's benefit, the error was easily curable. The trial court, however, compounded the error -- and created prejudice to defendant -- by denying Crown Life's immediate motion for continuance. This denial barred us from undertaking separate (and not previously necessary) discovery required to prepare a defense to newly added affirmative claims for relief.

One of the newly added claims was an action for affirmative relief under the theory of equitable estoppel, sometimes operating under the guise of "estoppel to deny." This cause is properly nonexistent for reasons previously stated, but the court magnified these errors by permitting the case to go to the jury absent proper proof of detrimental reliance, a crucial element. The only such evidence offered was McBride's testimony concerning what he thought was in an insurance policy he allowed to lapse. The policy itself was

never produced, and defendant's "best evidence" objections were improperly overruled.

The court further erred in allowing the case to go to the jury because the evidence adduced at trial did not satisfy the requirements that estoppel proof must be clear and convincing. Moreover, the court improperly charged the jury that negligence is sufficient to create an estoppel, despite the requirements of Florida law calling for fraud, misrepresentation, or other affirmative deception. No such proof was offered.

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING CROWN LIFE'S MOTIONS FOR DIRECTED VERDICT ON PLAINTIFF'S EQUITABLE ESTOPPEL CLAIM.

At the close of plaintiff's case (R. 349-50) and the close of all the evidence (R. 450-51), Crown Life moved for a directed verdict on plaintiff's equitable estoppel cause of action. The trial court denied each motion (R. 366, 456).

Preliminary Comment

The problem raised by this case, and by the "estoppel" doctrine below, is handsomely illustrated by the bald nature of the certified question posed by the Fourth District:

> May the theory of equitable estoppel be utilized to prevent an insurance company from denying coverage?

This phraseology dramatically illustrates the confusion among the courts that have allowed the creation of coverage by what is essentially promissory estoppel, but it does not really address the question. It begs its own question because it does not explain where the "coverage" came from in the first place. In short, it fails to highlight either the issues raised below or the turmoil in Florida law with respect to those issues. A more accurate question, in light of the facts of this case and the theory of recovery under which plaintiff prevailed in the trial court, would be:

> May the doctrine of estoppel be utilized to independently create insurance coverage for claims not covered under any written policy of insurance?

An important distinction has long been recognized in Florida with respect to the operation of the doctrine of estoppel in insurance cases. Until very recently courts uniformly held that insurers may be estopped to deny coverage when such denial would result in a forfeiture of an insured's rights under a policy. This is completely different than applying the doctrine to "estop" an insurer from denying coverage which never existed in the first place under any written policy of insurance. The use of "estoppel" in such a context would do Doug Henning proud. It seeks to affirmatively create insurance coverage out of thin air, and has not been permitted by the majority of the courts in this country, including this one.

This distinction between estoppel preventing forfeitures, which is permissible, and estoppel creating coverage, which is prohibited, is at the conceptual heart of this case. The trial court specifically ruled that the written policy did not cover the plaintiff, but allowed the case to go to the jury on one of the more involuted twists found in the law--the question of whether the insurer was "estopped to deny coverage." In so doing, the court ignored the critical distinction between coverage and forfeiture, and sought to give color to an "exception" to the rule prohibiting coverage by estoppel that is in truth wholly antithetical to that doctrine.[3/] Not incidently, the trial court's decision, and the certified question embodying it, also have raised the spectre of breathing life into one of the most confusing and impossible to articulate "doctrines" to arise in recent history.

This case affords this court a perfect opportunity--at precisely the time when the flood gates are creaking--to restore order to an area of law which has become extremely chaotic in the District Courts, and where insured's counsel are flatly ignoring the prohibition against coverage by

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3/ That these lines of cases are perceived as being two entirely separate approaches is illustrated by the way they are cited in an Annotation in ALR. Six L's is listed as a case supportive of the rule, while Kaminer and Wade are "contrary." See Annotation, Doctrine of Estoppel or Waiver as Available to Bring Within Coverage of Insurance Policy Risks Not Covered by its Terms or Expressly Excluded Therefrom, 1 ALR 3d 1139-1183, (1965), and Supp. (1985).

estoppel. The facts of this case place the legal, conceptual, and policy issues in sharp relief, and invite this court to clearly delineate the limits of the doctrine of estoppel in insurance law. Although the legal posture is somewhat less clear, because the two causes of action under which plaintiff recovered were added by ore tenus amendment on the second day of trial, that should hardly make a difference. No court has thus far been able to articulate just what these causes of action are anyway, much less what their elements are.

A. Under Florida Law Coverage Under A Policy Of Insurance May Not Be Created Or Extended By The Doctrine Of Estoppel.

Plaintiff's approach in the Fourth District to the prohibition against coverage by estoppel was very clever--he ignored it completely. Six L's Packing Co. v. Florida Farm Bureau Mutual Ins. Co., 268 So.2d 560 (Fla. 4th DCA 1972), cert. discharged, 276 So.2d 37 (Fla. 1973), does not even appear in his table of cases, and comment on the doctrine is conspicuous solely by its absence.

This studied indifference, we hope, is a bit hasty. It does, however, serve a useful purpose: it is but a small taste of decisions to come unless the brakes are applied and some semblance of logic restored. So before joining the rush to the funeral, let's back up for a second and trace how this issue got into this case.

The trial court permitted plaintiff to orally amend the complaint to state an affirmative claim for relief based

on "estoppel". Moreover, the case was submitted to the jury on this theory, and the jury granted relief thereunder. But as the court in Raymond v. Halifax Hospital Medical Center, 466 So.2d 253, 255 (Fla. 5th DCA 1985) pointed out:

> Waiver and estoppel are normally asserted as defenses to the assertion of a claim or right. Those concepts do not constitute or create causes of action.

Under Raymond, it was improper for the trial court to try the case under an affirmative estoppel theory. Other decisions, however, have been less concerned with such niceties.

The exact substance of plaintiff's affirmative estoppel claim is naturally possessed of soft edges--it was added by oral amendment. It is easier to perceive the facts plaintiff depends upon. We presume generally that plaintiff's affirmative estoppel theory was premised on certain alleged statements made to McBride concerning coverage after McBride was employed with Sign Craft. This, of course, is to be distinguished from plaintiff's reply to affirmative defenses, which alleged that the representations as to coverage were made prior to McBride's taking employment with Sign Craft. Under either factual predicate, however, Crown Life was entitled to a directed verdict as a matter of law, and the trial court's denial of the motion for directed verdict was reversible error.

The General Rule

Florida courts have consistently held that the doctrines of estoppel and waiver cannot be used to create or to extend coverage. Starlite Services, Inc. v. Prudential

Insurance Company of America, 418 So.2d 305 (Fla. 5th DCA), pet. dismissed, 421 So.2d 518 (Fla. 1982); Radoff v. North American Company for Life & Health Insurance, 358 So.2d 1138 (Fla. 3d DCA 1978); Unijax, Inc. v. Factory Insurance Association, 328 So.2d 448 (Fla. 1st DCA), cert. denied, 341 So.2d 1086 (Fla. 1976); Hayston v. Allstate Insurance Co., 290 So.2d 67 (Fla. 3d DCA 1974); Six L's Packing Co. v. Florida Farm Bureau Mutual Insurance Co., 268 So.2d 560 (Fla. 4th DCA 1972), cert. discharged, 276 So.2d 37 (Fla. 1973); Johnson v. Dawson, 257 So.2d 282 (Fla. 3d DCA), cert. denied, 266 So.2d 673 (Fla. 1972). See also Kaminer v. Franklin Life Insurance Co., 472 F.2d 1073 (5th Cir.), cert. denied, 414 U.S. 840 (1973).

Six L's Packing Company v. Florida Farm Bureau Mutual Insurance Company, supra, involved a value reporting policy and property whose value was reported only after the loss. Plaintiff consistently filed late reports and claimed that the insurer waived the contractual requirement that plaintiff file monthly value reports. In affirming summary judgment for the insurer on the ground that the filing of monthly value reports went to coverage for which the doctrine of waiver and estoppel were not applicable, the Fourth District Court of Appeal held:

> The general rule is well established that the doctrine of waiver and estoppel based on the conduct or action of the insurer (or his agent) is not applicable to matters of coverage as distinguished from grounds for forfeiture. 18 Fla. Jur. Insurance, § 677, and 43 Am. Jur. 2d

> Insurance, § 1184. State Liquor Stores, # 1 v. United States Farm Ins. Co., Fla. App. 1971, 243 So.2d 228; Johnson v. Dawson, Fla. App. 1972, 257 So.2d 282. See also Alaska Foods Ins. v. American Manufacturers Mfr's Mut. Ins. Co. of New York v. O. Henry Tent and Awn. Co., 7th Cir. 1961, 287 F.2d 316. In other words, while an insurer may be estopped by its own conduct from seeking a forfeiture of a policy, the insurer's coverage cannot be extended by the doctrine of waiver and estoppel. (emphasis in original).

Id. at 563. Of greater significance is the fact that when this Court discharged certiorari in Six L's, it did not do so upon jurisdictional grounds but rather stated, "we hold that the District Court of Appeal has correctly decided the cause and its decision is adopted as the ruling of this Court." 276 So.2d at 38.

Similarly, in Unijax, Inc., v. Factory Insurance Association, supra, at 454-55, the First District Court of Appeal affirmed a summary judgment in favor of the insurer and stated as follows:

> Appellant's third argument that appellee is estopped from asserting that Unijax did not sustain an insured loss, is necessarily founded upon the proposition that matters of coverage (as distinct form contentions of forfeiture) are subject to the doctrines of waiver and estoppel. This is an erroneous view of the law, which has been rejected by Florida courts. Six L's Packing Co., Inc. v. Florida Farm Bur. Mut. Ins. Co., Sup.Ct.Fla. 1973, 276 So.2d 37 affirming Fla.App.4th 1972, 268 So.2d 560; Hayston v. Allstate Ins. Co., Fla.App.3d 1974, 290 So.2d 67; Kaminer v. Franklin Life Ins. Co., 472 F.2d 1073 (5th Cir. 1973); Johnson v. Dawson, Fla.App.3d 1972, 257

So.2d 282; and see cases collected in 1 A.L.R. 3d 1139 and Supplement.

More recently, in Starlight Services, Inc. v. Prudential Insurance Company of America, supra, the Fifth District applied the aforementioned body of case law in affirming summary judgment for defendant insurer. Starlight Services sought enforcement of a group insurance contract having an "active work requirement" as a condition of coverage. On defendant's motion for summary judgment, the insured argued that an agent's statement that the claim would be accepted created an issue of fact as to whether the insurer waived the contractual prerequisites to an employee becoming insured. In affirming, the Court invoked the well settled Florida law that the doctrines of waiver and estoppel are not applicable to matters of coverage. The court stated that "[s]ince the active work requirement was one of coverage, the alleged waiver of that provision by Prudential's agent is of no moment." Id. at 307.

State Liquor Stores No. 1 v. United States Fire Insurance Co., 243 So.2d 228 (Fla. 1st DCA 1971), was an action on a mercantile robbery insurance policy. The insurer denied coverage because the money lost by robbery was not in the process of being "conveyed by a messenger", and, accordingly, not within the coverage. Plaintiff alleged, however, that the insurer's agent was fully apprised of its money-handling procedures, and had assured them that the burglary policy then being offered would fully protect them from loss

under the robbery-at-home circumstances under which it occurred. The representation of coverage, said plaintiff, constituted a waiver. In rejecting this estoppel argument, the District court of Appeal stated:

> . . . the real and basic issue is whether the policies sued upon provide insurance coverage not stipulated therein. It must be recognized that there is substantial difference in law between oral representations concerning the scope and extent of coverage to be afforded by an insurance policy yet to be issued, and oral representations waiving forfeiture provisions of a policy after it is issued.
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> * * *
>
> The terms of the policies are clear and unambiguous and restrict coverage only to those losses which occur while the money is being conveyed by a messenger. When appellants received and accepted the policies, they agreed to the terms and provisions set forth in them and cannot now be heard to contend that they purchased broader coverage then that set forth in their respective contracts. . . . Under the authorities hereinabove cited, appellants were neither authorized to nor justified in relying upon any verbal assurances given them by [the agent] with respect to the scope or extent of coverage to be provided by the policies in question, therefore, their contention that appellee should be estopped from denying the broader coverage contended for must be rejected.

Id. at 233, 234-235 (emphasis added). See also, e.g. Radoff v. North Am. Company for Life and Health Insurance, 358 So.2d 1138 (Fla. 3d DCA, 1978).

The import of these cases is not subject to varying construction. They simply recite the fact that, as a matter of law, the doctrines of estoppel and waiver cannot be used to create or extend coverage.

There is an additional element in this case, however, which is sometimes discussed and sometimes ignored in the decisions. Crown Life's group policy, in concert with nearly all Life and Health policies sold in the United States, contains clear and unambiguous language that no previous course of dealing by Crown Life shall constitute a waiver of any of the conditions in the policy. This language, even without benefit of the case law negating any waiver or estoppel argument, plainly gives notice that no alleged representations concerning coverage may permit recovery contrary to the conditions of the policy, and the trial court's denial of Crown Life's motions for directed verdict on this issue were in error.

Recent Departures From The General Rule

Plaintiff relied principally on two cases at the trial to rebut the long established Florida principle that estoppel and waiver cannot be used to create or extend coverage. These two cases, however, Peninsular Life Insurance Co. v. Wade, 425 So.2d 1181 (Fla. 2d DCA 1983), and Burns v. Consolidated American Insurance Co., 359 So.2d 1203 (Fla. 3d DCA 1978), if approved by this Court in the way used by plaintiff, would begin an ill-defined and illogical course for Florida insurance law, open the gates to a flood of

fraudulent claims based on the thinnest of "they promised" approaches, and have a serious impact on the insurance industry and the public it serves, all in direct contrast to this Court's holding in Six L's, supra.

In Burns, supra, the insured sued both the insurer and the insurance agent to recover for theft losses from a dwelling under construction where the policy excluded such coverage. The insured testified at trial that he asked the insurance agent for "all risks" coverage that included protection against the risk of theft in his home during construction, but was not told of the exclusion until after his first loss. He had apparently never seen a copy of the policy. The trial court granted the insurer's and insurance agent's motion for summary judgment, but the Third District Court of Appeal reversed.

Burns was the camel's nose. Although it acknowledged that the doctrine of estoppel cannot be invoked to create coverage clearly excluded by a written contract of insurance, 359 So.2d at 1207, the Court reversed because of unresolved questions of fact concerning a possible oral contract of insurance. In a particularly noteworthy passage, the Burns Court summarized its conclusion:

> 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.

359 So.2d at 1207. This passage is not necessarily afoul of Six L's at first glance, and when taken in context, because

the Burns contract had apparently never been delivered, and was not available for inspection. It nevertheless clearly created the possibility of extending coverage by estoppel in the face of a non-waiver provision and should be disapproved to that extent.

That the quoted Burns language has no hope of staying in context, however, is well illustrated by the fact that both the trial court and appellee have said with full sincerity that it constitutes an alternate theory of relief in this case. This is a massive (though foreseeable) inductive leap, and removes any substantive difference between extending coverage by estoppel and appending an oral contract of insurance to a written policy which by its terms prevents oral modifications. As used by the trial court in this case--and doubtless hundreds to come unless the spigot is turned off now--this merely creates an alternative form of pleading to finesse and relief the Six L's rule. It does not illustrate a legitimate reasoned exception to the rule that estoppel cannot extend coverage, at least in part because it was probably never intended to be a general expression of doctrine.

To the extent that it was intended to be such an expression, and Burns sought to define a new theory for all insurance cases, the logic wastes away. Another passage, and the one most quoted to date:

> 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).

359 So.2d at 1207. This creation is simply false (when applied to coverage questions, and a conundrum to boot. It says that estoppel cannot be invoked to create coverage except when it can, and does nothing more to highlight the unique facts before it that created the legal possibility of a survivable "oral contract" in the first place.[4/] Since it is axiomatic that any estoppel claim demands a showing of detrimental reliance, this statement just begs the question of whether estoppel may create coverage. See Rinker Materials Corp. v. Palmer First National Bank & Trust Co., 361 So.2d 156, 157 (Fla. 1978); Hialeah Gardens vs. Dade County, 348 So.2d 1174, 1179 (Fla. 3d DCA 1977), cert. denied, 359 So.2d 1212 (Fla. 1978); Gottesman v. Gottesman, 202 So.2d 775, 777 (Fla. 3d DCA 1967), cert. denied, 209 So.2d 671 (Fla. 1968); Boynton Beach State Bank v. Wythe, 126 So.2d 283, 285 (Fla. 2d DCA 1961). Moreover, a look at the case cited for this anomalous proposition reveals not only that Burns engaged in certain poetic license, but, most important, did not acknowledge that Eakins was a forfeiture case.

4/ In truth, a binder was probably issued, but the case is silent on this issue.

In that case, Mutual of Omaha v. Eakins,[5/] 337 So.2d 418 (Fla. 2d DCA 1976), the insurer's agent completed the insured's application for a health and disability policy, since the insured had a limited education and difficulty reading. The insurer rejected Eakins because of misrepresentations in the application, but its home office thereafter mailed premium notices to the insured. The trial court granted the insured's motion for summary judgment, accepting that the insurer had waived its rights by mailing the renewal notices and was thereby estopped from contesting the validity of the policies.

The Second District reversed, holding that the insurer could not waive its right to contest validity unless it did so with full knowledge of the facts, and the record contained inferences that sending the renewal notices was a mistake.

The facts and the holding in Eakins offer absolutely no basis for the proposition for which it is cited and applied in Burns, primarily because Burns quotes the language

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5/ The Eakins court in turn relied on Reliance Mutual Life Insurance Co. v. Booher, 166 So.2d 222 (Fla. 2d DCA 1964) for this proposition. In Booher, however, the Second District Court of Appeal distinguished conditions going to coverage as opposed to those furnishing a ground for forfeiture when considering waiver or estoppel. Id. at 226. Booher, in fact, has been cited for the proposition that the doctrines of implied waiver and estoppel are not available to extend additional coverage to an insured. See English & American Insurance Co. v. Swain Groves, Inc., 218 So.2d 453, 456 (Fla. 4th DCA 1969).

from Eakins without noting the crucial fact that it was a forfeiture case (to which estoppel may properly apply). Eakins involved neither the use of estoppel to deny the existence of an oral contract creating coverage, nor the use of estoppel to create or extend coverage beyond the terms of the policy. In fact, had the Eakins court held the insurer estopped to contest the validity of the policy, this would have been fully in accordance with the rule of Six L's, which recognizes that while estoppel may not create or extend coverage beyond the policy terms, it may nevertheless prevent an insurer from seeking a forfeiture of a policy. See Six L's, supra, at 563.

The distinction between estoppel preventing forfeitures and estoppel creating or extending coverage, ignored by the Burns court, is fundamentally important. A forfeiture occurs when an insured through fault, error, or omission, materially breaches a duty under an insurance policy, and this breach allows the insurer to avoid its duty to pay a claim the policy in fact covered. See, e.g., Bennett v. New York Life Ins. Co., 121 P.2d 551 (Idaho 1942) ("One cannot forfeit that which he never had. Forfeit means the loss of something one previously had a right to."). That an insurer may be estopped to deny coverage based upon forfeiture is undisputed. See Johnson v. Life Ins. Co. of Georgia, 52 So.2d 813 (Fla. 1951); see also Six L', supra.

This is altogether different from using estoppel to prevent an insurer from denying coverage which never existed

in the first place. Such use of estoppel effectively creates coverage where none existed before. It is this use of estoppel which this Court, and the great weight of authority, has recognized is not permissible. See Six L's, supra; see also, generally, 16B Appleman, Insurance Law and Practice § 9090 (1981). The Burns case, with a dissent by Judge Hubbart, lay more or less quietly uncited, apparently limited to the non-delivered policy situation. Uncited, that is, until the radical departure of Peninsular Life Insurance Co. v. Wade, supra.

In Wade, supra, the Second District Court of Appeal simply ignored the long line of Florida decisions which support the general rule that waiver and estoppel are not applicable to matters of insurance coverage as distinguished from grounds for forfeiture. It seized on the earlier statement in Burns that estoppel cannot be invoked to create coverage, but may be utilized -- again ignoring that the quoted language arose in the forfeiture context -- "when the insurer's conduct has been such as to induce action in reliance on it." Id. at 1184. There is no realistic way to reconcile Wade and the Six L's doctrine, notwithstanding the glossy dismissal of Six L's in Wade. One or the other, we suggest, has to go.

To the extent that Wade depends on authority other than Burns, the ice becomes very thin. Three of the four Florida cases cited by the Wade court do not reflect that the issue of estoppel and waiver was even considered. Judge

Grimes, who dissented, explained the court's error as follows:

> In three of the four Florida cases cited by the majority in support of its holding, the opinions do not reflect that the general rule concerning waiver and estoppel as its relates to coverage was even argued. Only in Burns v. Consolidated American Insurance Company, (Judge Hubbart dissenting) does the court mention the general rule. However, the court purports to distinguish the rule by concluding that the conversations between the insured and the agent may have created a parol contract contrary to the provisions of the written insurance policy. In the present case, the majority does not suggest that it based its position on a parol contract with an agent who was not shown to have the authority to amend the terms of the policy.
>
> I can see no basis for making a distinction between conversations with the agent which took place after issuance of the insurance policy and those which occurred beforehand. The agent's statements would still constitute waiver and estoppel if these doctrines could be raised. Even though the language of the policy is clear, given the facts of this case, I can understand why the majority wishes to affirm the award of the full coverage. Unfortunately, I believe the case represents a good example of the time worn adage that "hard cases make bad law."

Id at 1184-185 (J. Grimes dissenting) (emphasis added).

Other than Wade, the Fourth District affirmed upon the authority of its own decision in Kramer v. United Services Automobile Association, 436 So.2d 935 (Fla. 4th DCA

1983). That case may actually be distinguishable from this one, but the theory discussed is also far from that of Six L's.

In Kramer, the daughter of the named insured on an automobile policy, who was a listed driver on that policy, purchased a new car. She called the insurance company concerning coverage for her new car, and was allegedly told by the insurer that her car was covered for thirty days. Relying on these statements, she took no further action to obtain insurance. Fourteen days later the car was damaged in an accident, but the insurer denied coverage. The trial court dismissed her suit against the insurer, but the Fourth District reversed, relying principally on the contradictory language of Burns, quoted above, and Wade. Curiously, the Kramer Court did not point out the obvious -- that casualty agents commonly do have the contractual authority to bind coverage on the insurer.

Kramer acknowledged the general rule, but refused to apply it to facts characterized as "peculiar." The peculiarity was that the daughter dealt directly with the insurer, rather than through an agent. The court noted that had she been assured of coverage by an agent, she could have sued the agent, but still quoted from Wade language stating that if an agent misrepresents coverage, the insurer is estopped if the insured detrimentally relies. 436 So.2d at 937.

Kramer might be subject to some distinctions based on the probable absence of a non-waiver clause in that

policy, but it essentially extends the irrational doctrine of Burns and Wade to another factual situation that Six L's should control, further extending coverage by estoppel.

The law prohibiting extension of coverage by estoppel is not, however, a moldy and inflexible doctrine ripe for disposal. It is vital as a defense against fraud, is presently honored by the vast majority of courts, and is capable of responding to a variety of factual situations without the sort of wide-ranging non-theory applied by the "pro-estoppel" line of cases to achieve what they perceive to be justice in individual cases.

This Court should either extinguish the newly arisen "coverage by estoppel" doctrine followed in this case below, or it should define it in a way that will provide some useful guidance for the trial courts. Though it arrives in "exception" clothing, it operationally obliterates the Six L's rule, and effectively defines it out of existence. Nor have the courts authoring these opinions sought to provide any underlying legal principles to provide guidance as to when the "exception" should apply, and it is hardly surprising that confusion over these issues has arisen. This confusion, moreover, is hardly assisted by the stark opinion of the Fourth District in this case, which is devoid of facts and simply gives notice that the Six L's rule preventing the extension of coverage by waiver and estoppel is dead until further notice. It is that notice that this Court should provide.

Legal and Policy Implications

Adoption of coverage by estoppel would effectively shred every written contract of insurance now or hereafter in effect in Florida. Under the present rule in Six L's, trial courts have the authority to resolve on Summary Judgment those cases against insurers founded upon the extension of coverage by the doctrines of waiver and estoppel. The rule contended for by plaintiff would make this into a jury question in every case, open the door to a flood of fraudulent claims, extend coverage for which no premium was ever charged, and decimate written contracts on the basis of an agent's alleged statement even where the policy clearly provides that the agent shall not have such authority.

Like the parol evidence rule and the statute of frauds, the Six L's doctrine serves an important policy function in that it prevents consideration of unreliable oral evidence where the parties are litigating a disputed transaction embodied in a writing. It further furnishes to both parties to the insurance contract certainty with respect to the substance of the agreement and the extent of coverage. To dispose of the rule in such an unprincipled fashion would replace this certainty with a jury's best guess at what was agreed upon by the insured and the insurer with no effective upward limit. "They said I was covered in full" would be the cry in each case, and exclusions, deductible amounts and even policy limits would soon go the way of all flesh.

Abandonment of the rule in Six L's would also work a potentially stunning impact on other aspects of Florida insurance law.[6/] It is easily conceivable under plaintiff's interpretation, for example, that a statutory cause of action under § 624.155 Fla. Stat. (1983) would be available against an insurance company for claims expressly not covered in the policy, but which an insurer becomes "estopped to deny," or must pay under an "oral contract of insurance." Section 624.155 Fla. Stat. (1983) provides:

> (1) Any person may bring a civil action against an insurer when such a person is damaged:
>
> (a) . . .
>
> (b) By the commission of any of the following acts by the insurer:
>
> 1. Not attempting in good faith to settle claims when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward its insured and with due regard for his interests;
>
> 2. Making claims payments to insureds or beneficiaries not accompanied by a statement setting forth the coverage under which payments are being made; or
>
> 3. Except as to liability coverages, failing to promptly settle claims, when the obligation to settle a claim has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy.

6/ That the issues are best considered now, before the implications become unavoidable, is illustrated by the progression from Mercury Motors Express v. Smith, 393 So.2d 545 (Fla., 1981) to U.S. Concrete Pipe Co. v. Bould, 437 So.2d 1061 (Fla., 1983).

If coverage can be created or extended by the doctrines of waiver and estoppel, it is but a short step until insurers are being held liable under this statute for damages, costs, and attorneys' fees, even though the coverage sued upon did not exist in the written policy. Since the statute also requires that insurers deny a claim only after completing a reasonable investigation based upon "available information" (F.S. 626.9541(1)(i)(3d)), adoption of coverage by the oral contract/estoppel doctrine urged in this case would in short order see a rash of claims sounding in "bad faith" and extracontractual damages for the insurer's failure to discover, and, no doubt, approve, the agent's separate oral contract with the insured. The resulting impact upon the insurance industry, and ultimately upon those who purchase insurance, cannot be subject to much more speculation than its two certainties -- it would be massive, and its ultimate scope can only be guessed.7/

7/ Abrogation of the Six L's rule may also have an adverse effect on the present law in Florida regarding incontestability clauses. At present, incontestability clauses, like waiver and estoppel, cannot be used to create or extend coverage. See Massachusetts Casualty Ins. Co. v. Forman, 516 F.2d 425 (5th Cir. 1975).

The Fifth Circuit in Forman held that the incontestible clause only prevents the insurer from contesting claims covered under the policy terms. Since the diabetes had manifested itself prior to the effective date of the policy, it was never covered under the terms of the policy. The incontestability clause was thus irrelevant, since it only prevented the insurer from contesting covered claims. It could not be used to create
(Footnote continued on next page.)

The rule of Six L's is coherent, reflects sound public policy decisions, and is reflective of the vast majority of courts that have considered the issue. To the extent that this case presents this Court with the opportunity to issue a definitive statement, however, Six L's need not necessarily be embraced wholesale. Needless to say, if the Court were to recede from Six L's, it should carefully delineate the scope of any exceptions it creates, in order to provide meaningful guidance to trial courts facing efforts to secure coverage by estoppel.

An obvious and sensible distinction upon which an exception may be based is between policies having an express non-waiver provision, as in the instant case, and those that

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(Footnote continuation from previous page.) coverage for a condition which had first manifested itself before the effective date of the policy, which the policy specifically did not cover. Forman is a sound rule, followed virtually everywhere, that cannot operate to defeat innocent insureds.

Incontestability clauses and the doctrines of estoppel and waiver have similar purposes and effect in insurance contracts. Both limit the ability of an insurer to deny coverage under certain circumstances. The great majority of decisions, including Six L's and Forman, however, have drawn the line beyond which these clauses and doctrines can not operate. That is, they can not create or extend coverage beyond that specifically set forth in the terms of the policy. Since they are conceptually and operationally similar, if the court changes the law of Six L's which limits estoppel and waiver, it could have the further effect of sanctioning the sorts of fraud now barred from recovery by Forman. At the least, the very insureds who had already demonstrated their capacity for untruthfulness and deceit would, under the doctrine below, have only to assert that an agent "told them otherwise" to effectuate their fraud.

do not. Thus the contract itself would reflect whether an agent of the insurer has the authority to alter the terms of coverage by verbal representations. Since the courts have recognized the general validity of non-waiver provisions, see e.g., Bradley v. Western and Southern Life Insurance Company, 148 So.2d 559 (Fla. 1st DCA 1963), Bergh v. Canadian Universal Ins. Co., 216 So.2d 436 (Fla. 1968), and since such provisions are legislatively sanctioned, the presence or absence of a non-waiver clause would provide a workable controlling feature, especially where the policy was available for inspection by the insured prior to the loss.

The facts of the instant case fail both tests. The policy's restrictions on coverage were plain, and the non-waiver provision restricted their modification. Further, it was available for inspection by McBride.

Should the Court modify Six L's, it should also clearly define the temporal circumstances sufficient to establish an estoppel. For example, a loss which occurs after an affirmative representation by an authorized agent upon which the insured relies, but before the insured has an opportunity to obtain the written policy, might offer a reasonable grounds for estoppel. But where the insured can compare the representations made by the agent with the policy itself, as in Wade and the instant case, Six L's should govern. This should particularly apply in the even more attenuated context of so-called "estoppels" based on some-

thing other than direct and affirmative representations of coverage, though that issue is not present here.

Conclusion

The present state of the law has essentially dismembered this Court's decision in Six L's, or has at the least rendered it virtually impossible for a Florida trial court to rule coherently on the question of extending insurance coverage by estoppel or its "oral contract" cousin. Although we think the reasons for adhering to Six L's to be overwhelming, we do not urge this court to ignore the opportunity presented by this certified question to define the properties of the rule to include not only a sane rule of judicial construction consistent with statutory authority, but also to confirm the difference between forfeiture and coverage. Those exceptions, however, while indispensable to the practitioner, simply do not affect the result of the within case.

B. Plaintiff Failed To Carry His Burden Of Proving Equitable Estoppel By Clear And Convincing Evidence.

Assuming arguendo that Florida law permits the use of estoppel to create or extend insurance coverage, plaintiff's estoppel claim still should not have been presented to the jury because he failed to carry his burden of proving equitable estoppel by clear and convincing evidence.

Estoppel is an equitable doctrine which precludes a party from asserting a particular fact because of previous conduct inconsistent with that fact. Quality Shell Homes &

Supply Co. v. Roley, 186 So.2d 837, 840-41 (Fla. 1st DCA 1966). The essential elements of an equitable estoppel are recited in Rinker Materials Corp. v. Palmer First National Bank & Trust Co., 361 So.2d 156, 157 (Fla. 1978), and, at the least, require knowledge of the misrepresentation which could not have been present here because Eileen Bishop did not understand the full nature of Plaintiff's condition.[8/]

A further element of a claim for equitable estoppel not proven by clear and convincing evidence is detrimental reliance. There was, however, no clear and convincing evidence of actual reliance by McBride on the question of the terms of the prior policy. He testified that he had a conversion option under his prior policy of insurance and that, in reliance on Burns' representations as to coverage, he allowed the option to lapse. Plaintiff did not, however, produce the actual insurance policy, did not know what kind of benefits were offered therein, and could not even say that coverage was provided for progeria thereunder. Although McBride testified that this prior policy was Blue Cross/Blue Shield, in fact, the only documentary evidence concerning the

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8/ The burden of proving estoppel is on the party invoking it, Erwin v. Dekle, 60 Fla. 56, 53 So. 441 (1910); State v. Hadden, 370 So.2d 849, 852 (Fla. 3d DCA 1979), and every fact essential to an estoppel must be proven by clear and convincing evidence. Barber v. Hatch, 380 So.2d 536, 537 (Fla. 5th DCA 1980); Phoenix Insurance Company v. McQueen, 286 So.2d 570, 572 (Fla. 1st DCA 1973); Escambia Properties, Inc. v. Largue, 260 So.2d 213, 214 (Fla. 1st DCA 1972); Ennis v. Warm Mineral Springs, Inc., 203 So.2d 514, 519 (Fla. 2d DCA 1967), cert. denied, 210 So.2d 870 (Fla. 1968).

existence of any insurance through Mel Webb Signs was a claim form submitted under a Life of Georgia policy (R. 257, 384-85).

The weaknesses of this proof are manifest. Did it contain a conversion option with a fixed dollar limit? Did it contain a major medical conversion option? Did it cover his sons once they reached 21? 23? No testimony or evidence at trial shed any light on these important and necessary questions. McBride did not know what the benefits were under this alleged conversion policy, and since that policy was never before the court, the critical requirement of proof of detrimental reliance was absent. In the absence of that policy, it was improper for the trial court to assume its terms protected plaintiff. See Adams v. Commercial Union Insurance Companies, 10 F.L.W. 1377 (Fla. 1st DCA June 6, 1985). This is particularly true, we suggest, when the reason these facts were not developed was the combined effect of the amendment at trial seeking affirmative relief and the denial of our motion for continuance. See Sections IV and V, infra.

Under the totality of the circumstances and taking the evidence adduced at trial in a light most favorable to plaintiff, plaintiff completely failed to prove the necessary elements of estoppel by clear and convincing evidence. The trial court's denial of Crown Life's motions for directed verdict on this issue was in error.

II. THE TRIAL COURT ERRED IN DENYING CROWN LIFE'S MOTION FOR DIRECTED VERDICT ON PLAINTIFF'S ORAL CONTRACT CLAIM.

The very consideration of this issue presupposes that this sort of "oral contract" creature can affirmatively create coverage in the face of a insurance contract excluding it. If it cannot, this issue hopelessly begs the question, because you cannot have an enforceable oral contract to create insurance coverage for much the same reason you cannot have one to assassinate a member of Congress or engage in a bookmaking operation -- the goal of the contract is not one sanctioned by the law. If it can, then we may as well fold the tents of the other questions raised in this appeal, because from this point forward all an insured need do to get to a jury is what happened here: say that the insurer promised "coverage" for "Always."[9/]

A. Plaintiff Failed to Carry His Burden of Proving the Existence of an Oral Contract to Insure.

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 Co., 103 Fla. 848, 138 So. 369 (1931). The rule is generally recognized that

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9/ We reach this issue only because of confusion in the appellate court's opinion concerning the oral contract. While Judge Hersey's concurring opinion objects because the majority did not find an oral agreement to waive coverage defenses, the majority opinion gives no color to that conclusion. It states, in fact, that they "affirm the judgment of the trial court in its entirety," which would apparently include the oral agreement count submitted to the jury.

for the parties to have a contract, there must be reciprocal assent to certain and definite propositions. Webster Lumber Co. v. Lincoln, 94 Fla. 1097, 115 So. 498 (1927); Truly Nolen, Inc. v. Atlas Moving & Storage Warehouses, Inc., 125 So.2d 903, 905 (Fla. 3d DCA 1961), cert. dismissed, 137 So.2d 568 (Fla. 1962). This is true because the courts cannot make a contract for the parties. Truly Nolen, supra, at 905.

In the instant case, plaintiff failed to introduce any competent substantial evidence or prove the elements of a written or oral contract. It is, rather, Plaintiff's contention that Burns' representation that McBride and his defendants were "covered," apparently as long as he worked there, is definite enough. The problem with this analysis is that the trial court completely rejected the possibility of any recovery under the written contract. It was (quite properly) simply not available to borrow from in order to achieve a definition of the virtually limitless subjects not covered by the "oral contract."

Assuming arguendo the existence of an agreement directly between McBride and Crown Life (the definitive nature of such a contract cannot, we suggest, be satisfied by the Burns/McBride "oral contract"), it is apparent that it was so vague and uncertain as to be unenforceable as a matter of law. The elements necessary to establish an oral contract of insurance in Florida are the following:

> The subject matter, the risk insured against, the amount of insurance, the

> rate of premium, the duration of the risk, and the identity of the parties.

South Carolina Insurance Co. v. Wolf, 331 So.2d 337, 339 (Fla. 1st DCA 1976), quoting Collins v. Aetna Insurance Company, 103 Fla. 848, 138 So. 369 (1931). Yet, there was absolutely no evidence adduced at trial that McBride discussed any terms or conditions with Crown Life. This was particularly apparent in Burns' testimony about the "forever" coverage for McBride's children:

> Q. Did Eileen Bishop or anyone from Crown Life ever tell you that the McBride children or Stephen McBride would be covered after he graduated from high school?
>
> A. They did not -- we did not address that question.

(R. 317). See also (R. 333).

The facts in the instant case are very similar to those in South Carolina Insurance Company, 331 So.2d 337 (Fla. 1st DCA 1976), where the First District Court of Appeal reversed a final judgment in favor of an insured under an alleged oral contract of insurance.

As in South Carolina Insurance Company, supra, the facts in the instant case do not establish by competent substantial evidence the existence of an oral contract of insurance between McBride, allegedly on behalf of plaintiff, and Crown Life, and to affirm on this basis would weaken the evidentiary rules required to establish an oral contract to the point that the vaguest of generalizations would be adequate. Construing the gossamer thread of this "agreement" as

steel cable would not, however, change the result, since even a specific contract would be barred by Statute of Frauds.

B. Any Purported Oral Contract of Insurance Herein Is Barred by the Statute of Frauds.

The Florida Statute of Frauds provides that no action may be brought on any oral contract "not to be performed within the space of one year from the making thereof." Fla. Stat. §725.01. The primary factor to be utilized in determining whether or not an oral contract is to be performed within the one year limitation of the statute is, of course, the intent of the parties. Markowitz Bros., Inc. v. John A. Volpe Construction Co., 209 F.Supp. 339 (S.D. Fla. 1962); First Realty Investment Corp. v. Gallaher, 345 So.2d 1088, 1089 (Fla. 3d DCA 1977), cert. denied, 359 So.2d 1214 (Fla. 1978). Under this "intent" rule, a showing of the possibility of completion of performance within a year is not enough and the possibility of performance is of only minimal importance as bearing on the parties' intent. Markowitz Bros., supra, at 341.

Although Crown Life denies that any oral contract of insurance ever existed between it and plaintiff or plaintiff's father that would have extended coverage for plaintiff some four years after McBride began his employment at Sign Craft, Inc., it is clear that McBride's intent in December 1977 was to obtain insurance for himself and his dependents

for longer than one year.[10/] This intent is evidenced by McBride's affidavit filed in opposition to Crown Life's Motion for Summary Judgment and by his testimony at trial.

McBride testified at trial that Walter Burns told him that he and his dependents would be covered as long as he was employed by Sign Craft and Sign Craft was insured by Crown Life. (R. 264). (See also paragraph 11 of his affidavit at R.673) Joyce Prader testified that not only was McBride concerned about all coverage, immediate and future, but he also wanted coverage then and "coverage for always." (R. 333).

Were plaintiff able to prove an oral contract of insurance by competent substantial evidence, McBride's intent as to the duration of this purported oral contract was obviously that it would last in excess of one year. A fortiori, an oral contract "for always" is barred by the Florida Statute of Frauds.

III. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT NEGLIGENT CONDUCT IS SUFFICIENT TO FIND CROWN LIFE LIABLE UNDER AN EQUITABLE ESTOPPEL CAUSE OF ACTION.

In instructing the jury on plaintiff's equitable estoppel cause of action, the trial court stated as follows:

10/ There was no testimony at trial that plaintiff had any discussions whatsoever with Crown Life. Further, because of plaintiff's last minute amendment during trial, there are no pleadings upon which the substance of plaintiff's oral contract cause of action can be determined.

> An equitable estoppel consists of words, conduct, or both combined, causing another person to believe in a certain state of things in which the person so speaking or acting did so willfully, culpably or negligently, and by which such other person may be induced to act so as to change his own previous position injuriously.
>
> An equitable estoppel may arise when one willfully or negligently 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 or to the injury of one for whom he is acting.

(R. 538-39) (emphasis added).

The trial court's negligence standard was clearly erroneous. This Court has held that "a party may successfully maintain a suit under the theory of equitable estoppel only when there is proof of fraud, misrepresentation, or other affirmative deception." Rinker Materials, supra at 159. See also In Re Estate of Peterson, 433 So.2d 1358, 1359 (Fla. 4th DCA 1983). Because there is no hint in the record of fraud, misrepresentation, or other affirmative deception on the part of Crown Life, the trial court's negligence standard was again harmful error.

IV. THE TRIAL COURT'S GRANTING OF PLAINTIFF'S MOTION TO AMEND THE COMPLAINT DURING TRIAL CONSTITUTED AN ABUSE OF DISCRETION.

Upon commencement of trial, the sole issue to be litigated, as set forth in the amended complaint, was whether plaintiff was entitled to recovery of benefits allegedly owing under a written policy of insurance. Following jury

selection, and over Crown Life's objection, the trial court granted plaintiff's ore tenus motion to amend the complaint to assert two new claims for equitable estoppel and oral contract of insurance.

Florida courts have generally favored liberality with respect to granting of motions to amend. This liberality gradually diminishes, however, as the case progresses to trial. See e.g., Lasar Manufacturing Co. v. Bachanov, 436 So.2d 236 (Fla. 3d DCA 1983) See also, e.g. Martinez v. Clark Equipment Co., 382 So.2d 878 (Fla. 3d DCA 1980);

Most important, such amendments are not allowable if they would change the issues, introduce new issues, or materially vary the grounds for relief. See e.g., International Patrol & Detective Agency, Inc. v. Aetna Casualty & Surety Co., 396 So.2d 774 (Fla. 1st DCA 1981). Although a trial judge's decision to permit or refuse amendment of pleadings is a matter of discretion, reversal of an order allowing amendment is warranted where the court has abused its discretion to the prejudice of the opposing party. Versen v. Versen, 347 So.2d 1047 (Fla. 4th DCA 1977). See also, Allett v. Hill, 422 So.2d 1047, 1050 (Fla. 4th DCA 1982).

In the instant case, the lower court's granting of plaintiff's motion to amend the complaint during trial to assert claims of equitable estoppel and oral contract clearly constituted an abuse of discretion, since it suddenly entitled Plaintiff to a theory of relief where the Court itself

ruled that none existed under the contract.[11/] The result was both predictable and ironic. As a result of plaintiff's tardy amendment, Crown Life had no opportunity to prepare a defense to the numerous new issues and materially different grounds for relief raised, notably any discovery into the nature of the alleged Blue Cross coverage. Plaintiff now, of course, says that the failure to present evidence on the former policy is Crown Life's responsibility, and seeks to lay the fault at implied neglect on our part for not having guessed that there would be a new cause of action based on the fact that "waiver" was already in the case as an affirmative defense. The "waiver" is "waiver" argument, however, ignores the vastly different scope of relief to which Plaintiff gained access by amendment.

As in Allett, the initial error of permitting plaintiff's last-minute amendment had a compounding and harmful effect, creating a chain of reversible error as the trial proceeded, and allowing plaintiff to accomplish a trial by ambush. This is particularly true, of course, when the remedy was as simple as granting defendant's motion for continuance, and we turn now to that issue.

11/ This is particularly true where the Court also refused all efforts to prevent oral tetimony about the prior "Blue Cross" contract based on best-evidence objections (R. 195-97). See Action Fire Safety Equipment, Inc. v. Biscayne Fire Eqpt. Co., 383 So.2d 969, 971 (Fla. 3d DCA 1980).

V. THE LOWER COURT'S DENIAL OF CROWN LIFE'S MOTION FOR CONTINUANCE CONSTITUTED REVERSIBLE ERROR.

In view of the trial court's granting of plaintiff's motion to amend the complaint during trial, the denial of Crown Life's motion for continuance constituted a compounded abuse of discretion requiring reversal of the judgment rendered.

The test on this issue is summarized in Carpenter v. Carpenter, 451 So.2d 914 (Fla. 1st DCA 1984), where the Court held:

> ... the granting of a continuance is within the sound discretion of the trial court and its decision should not be interfered with on appeal absent an abuse of discretion. Special circumstances, however, may require a continuance where there has not been sufficient time to complete discovery and properly prepare for trial and where the continuance causes no substantial prejudice or injustice to the opposing party. [citations omitted]

Id. at 916 (emphasis added). See also Stanley v. Bellis, 311 So.2d 393 (Fla. 4th DCA 1975), and Howell F. Davis & Associates, Inc. v. Laabs, 389 So.2d 1249 (Fla. 2d DCA 1980) (if amendment of complaint would prejudice defendants, court should have granted a continuance to enable them to prepare case regarding new claim).

The prejudicial effect of plaintiff's eleventh hour amendment on Crown Life's ability to prepare an adequate defense is apparent. The detrimental reliance question and the content of the alleged Blue Cross policy -- neither of

which were material to or admissible in an action under the Crown Life policy -- were suddenly crucial issues requiring discovery. We know of no judicial standard that would hold us accountable for a lack of prescience, though that is effectively what plaintiff urges and the decision below allows.

The failure to allow a continuance in this case is not a makeweight argument. The Court's denial of the motion was a serious and prejudicial decision that may well have allowed the jury to reach the result it did. We urge this Court to hold that the search for truth should be made of sterner stuff.

VI. THE TRIAL COURT ERRED IN DENYING CROWN LIFE'S MOTION TO STRIKE PLAINTIFF'S PRAYER FOR ATTORNEYS' FEES.

Absent a specific contractual provision, the sole authority for recovery of attorneys' fees in suits on insurance policies is Fla. Stat. § 627.428(1) (1983). See Lumbermens Mutual Insurance Co. v. American Arbitration Association, 398 So.2d 469 (Fla. 4th DCA 1981).

Fla. Stat.§ 627.428(1) entitles an insured to recover his reasonable attorneys' fees only when the action is pursuant to a policy executed by the insurer, and this provision must be strictly construed. Lumbermens Mutual, supra at 471; Sheridan v. Greenberg, 391 So.2d 234, 236 (Fla. 3d DCA 1981); Travelers Indemnity Company v. Chisholm, 384

So.2d 1360, 1361 (Fla. 2d DCA 1980), pet. denied, 392 So.2d 1372 (Fla. 1980);

At the trial of the instant case, the court ruled that plaintiff was not entitled, as a matter of law, to coverage under the terms of the written insurance policy. This, of course, was the only policy executed by Crown Life in this case. With this finding, there can be no basis for penalizing Crown Life pursuant to Fla. Stat. § 627.428(1) for its failure to pay under the written policy, and any holding to the contrary would have ominous import for the treatment accordable under § 624.155 to such "estoppels to deny coverage." The jury returned a verdict in favor of plaintiff on theories of oral contract and equitable estoppel. Pursuant to the strict construction of Fla. Stat. § 627.428, there was no judgment in favor of any insured "under a policy or contract executed by the insurer", nor is there any contractual or statutory authority allowing the award of attorneys' fees to the prevailing party in an action on an oral contract of insurance or under an equitable estoppel theory.

CONCLUSION

For the foregoing reasons, Crown Life respectfully requests that the amended final judgment be reversed and

vacated and the case remanded to the trial court with directions to enter a judgment in favor of Crown Life.

Respectfully submittted,

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_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 23rd day of October, 1985 to Wallace B. McCall, Esq., Frates & McCall, Attorneys for Appellee, 234 Royal Palm Way, Palm Beach, Florida 33480 and Edna L. Caruso, P.A., Attorney for Appellee, Suite 4B - Barristers Building, 1615 Forum Place, West Palm Beach, Florida 33401.

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Of Counsel

RPM7/sw(13)