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 REPLY BRIEF

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ARGUMENT

I. COVERAGE UNDER A POLICY OF INSURANCE MAY NOT BE CREATED OR EXTENDED BY ESTOPPEL, DESPITE AFFIRMATIVE REPRESENTATIONS BY AN AGENT OF THE INSURER.

In a handsome and disquieting illustration of the future should the Six L's doctrine be abandoned, plaintiff contends that Crown Life's restatement of the certified question broadens the scope of the Fourth District's original question. He supports this hypothesis by distinguishing between "estoppel to deny coverage" and "estoppel creating coverage," though the rationale seems to be nothing more than that the words "estoppel to deny coverage" look more restrictive. With perfect respect for the semantic flavor imparted by these phrases, however, that thought is more poetry than motion. In the non-forfeiture circumstance here at issue, estoppel to deny coverage not included in an insurance policy, and estoppel creating new coverages where none existed before, are identical in every respect except that the latter phrase is forthright. The Court in Grizzle v. Guarantee Insurance Company, 602 F.Supp. 465, 467 (N.D. Ga. 1984) saw to the heart of the issue:

> The plaintiff's argument that Guarantee should be estopped from denying coverage does not comport with the well established rule in Georgia that "neither waiver nor estoppel can be used to create a liability not created by the contract and never assumed by the insurer under the terms of the policy."

Crown Life's proposed restatement, we suggest, clarifies the fact that an insurer may be "estopped from denying coverage" when it seeks to enforce a forfeiture of a

policy, but not when it seeks to show that there was no coverage under the policy. Put another way, estoppel to deny coverage where none existed in the first place is simply creating coverage, but estoppel to deny coverage to enforce a forfeiture is not. The question was restated to clarify this important distinction stressed by this Court in Six L's Packing Company v. Florida Farm Bureau Mutual Insurance Company, 268 So.2d 560 (Fla. 4th DCA 1972), cert. discharged, 276 So.2d 37 (Fla. 1973), and the clarification serves to narrow, not broaden, the scope of this inquiry. That said, we turn to the main thrust of Respondent's Brief.

Crown Life acknowledges that some jurisdictions do not follow the rule that estoppel cannot create or extend coverage. Although some of the out-of-state cases cited by plaintiff can be explained because they involved forfeitures, involved insurance policies where an agent had authority to make binding representations, or did not contain non-waiver clauses, there is no doubt that some flatly contradict the Six L's view. For our part, we have not suggested that the stand taken by the Fourth District was unprecedented, only that it was wrong.

The cases cited in Respondent's Brief do share a refreshing characteristic -- at least they don't pretend to create an "exception" to the Six L's (no coverage by estoppel) rule. Rather, most openly acknowledge the split, and substitute for the Six L's rule an entirely contrary approach, as will effectively happen here if plaintiff prevails on the estoppel issue. See, e.g., Harr v. Allstate In-

surance Company, 255 A.2d 208, 218 (N.J. 1969) ("We agree ... that New Jersey should adopt the view that equitable estoppel is available, under appropriate circumstances, to bring within insurance coverage risks or perils which are not provided for in the policy or which are expressly excluded.")

Before adopting the airy confines of the "they promised" line of cases, however, a little perspective is needed. Not only do some of these cases far predate Six L's (they do not, in other words, represent a trend), they represent the minority view, and recent cases in other jurisdictions have held fast to the Six L's rule in cases similar to this one.

A good example is Pearce v. American Defender Life Insurance Company, 330 S.E.2d 9 (N.C. App. 1985), where plaintiff's decedent purchased a life policy paying $40,000.00 in the event of accidental death. The policy excluded such death, however, if the insured was the pilot or crew member of an airplane whose crash caused his death. The insured later joined the Air Force, ultimately becoming a pilot. Concerned about coverage, he apparently requested his financial advisor to ascertain what his coverage was as a pilot. The advisor wrote to the company, explaining the insured was now a pilot, and inquired about coverage. The insurance company, in a letter from one of its employees in policyowner service, unequivocally represented that accidental death benefits would be paid, even though the insured was now in the Air Force, as long as he did not die as a result of an act of war.

The insured died in a plane crash while serving as a crew member, but the insurer refused to pay the $40,000.00 accidental death benefits, citing the policy provision excluding airplane crew members who die in crashes. Plaintiff sued, claiming, inter alia, estoppel and waiver, and won a jury verdict, but the court granted the insurer's motion for judgment notwithstanding the verdict. The appeal raised virtually the identical questions now at issue.

The court upheld the rule prohibiting an extension of coverage beyond the policy terms by the doctrine of estoppel. To rule otherwise would essentially rewrite the policy, extending coverage to a risk expressly excluded therefrom, and obligating defendant to pay a loss for which it charged no premium. The court also considered whether the company's letter to the insured, assuring him of coverage for accidental death unless resulting from act of war, entitled him to rely on the (written) representations of coverage despite a policy provision to the contrary. The court said no, observing that the policy solely recognized the authority of the president, vice president, or secretary of the company to modify or waive the contract provisions, and it was unreasonable for the insured to assume the company's employee who wrote the letter had the authority to bind the company.

This case highlights many concerns raised by Crown Life but ignored by plaintiff. It recognizes the duty of the insured to read his policy, and it recognizes the fact that the policy provisions should control whether and by whom the policy can be modified. As in the present case (assuming at

face value McBride's view of the facts), there was an affirmative representation of coverage contrary to the provisions of the policy, relied upon by plaintiff in the face of a provision prohibiting modifications by such representations. The decisions relied upon in the instant case by plaintiff were available to justify departing from the rule and permitting recovery. The court, wisely, adhered to the majority view. See also, Western Insurance Co. v. Cimarron Pipe Line Construction, Inc., 748 F.2d 1397 (10th Cir. 1984).

Plaintiff, of course, continues to rely on the Burns, Wade, and Kramer cases in search of a definable "exception" to the rule that estoppel cannot extend coverage. Intriguingly, he continues to casually ignore the only case where this Court specifically addresses the capacity of an agent or employee's conduct, relied upon by an insured, to extend coverage by estoppel:

> The general rule is well established that the doctrine of waiver and estoppel, based upon the conduct or actions of the insurer (or his agent) is not applicable to matters of coverage as distinguished from grounds for forfeiture. (emphasis added)

Six L's Packing Co., Inc. v. Florida Farm Bureau Mutual Insurance Company, 268 So.2d 560, 563 (Fla. 4th DCA 1972), cert. discharged, 276 So.2d 37 (Fla. 1983).

While the Burns line of cases has been addressed at length in Crown Life's brief on the merits, the propositions in plaintiff's answer brief for which these cases are cited continue to demonstrate the chameleon-like characteristics of plaintiff's theory of recovery. While the

thrust of plaintiff's argument appears to be that the "exception" created by those cases is limited to affirmative misrepresentations of coverage upon which the plaintiff detrimentally relied, the language of those cases is so broad that the "exception" obliterates the rule.

Another effect of adopting the "exception" would be to extinguish forever any duty of the insured to read his policy, a duty the Florida legislature affirmed when it required that insurance policies be put in readable terms. Fla.Stat. § 627.4145 (1985). Indeed, a recurring factor in the cases from other jurisdictions cited by plaintiff which permit insureds to rely on representations of an agent contrary to the policy is the fact that the policies are not readable by the average layman. See Darner Motor Sales, Inc. v. Universal Underwriters Insurance Company, 682 P.2d 388 (Ariz. 1984); Harr v. Allstate Insurance Co., 255 A.2d 208 (N.J. 1969). As a result, insurers would be subject to any coverage a claimant is willing to say was promised by the agent, regardless of what the policy says, the extent of the agent's authority, or even whether the "promised" coverage exists anywhere at any price. The inconvenient restrictions of contract law could be brushed aside as surplus weight. Crown Life submits that such a result would have a serious, adverse effect on the insurance industry, the public it serves, and the system of laws under which we operate.

Plaintiff claims Crown Life ignores the distinguishing facts of this case, and further states that cases upon which Crown Life relies did not arise out of affirmative

representations of coverage upon which plaintiff detrimentally relied. This contention is flatly wrong, since State Liquor Stores #1 v. United States Fire Insurance Co., 243 So.2d 228 (Fla. 1st DCA 1971), was unquestionably such a case. Plaintiff's effort to distinguish it as not involving a misrepresentation of coverage upon which the insured relied is but a taste of the kind of ambitious rationale that will continue to plague decisions embracing plaintiff's urged "exception." In State Liquors, the insurer's general agent was told that plaintiff's method of delivering funds to the bank was by having its president first keep the funds overnight at home. The agent, after being made aware of plaintiff's methods, informed it that the policies which the insurer intended to furnish would cover any loss of money being handled in such a manner. The court specifically stated:

> From the record it clearly appears that any assurances which appellee's general agent, Waldorff, gave to appellants with respect to the insurance policies yet to be issued was a representation going to the scope or extent of coverage. There is no showing in the record that the agent had any authority to contract for insurance coverage protecting appellants from loss by robbery occurring off the premises ... Under the authorities hereinabove cited, appellants were neither authorized to nor justified in relying upon any verbal assurances given them by Waldorff 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.

243 So.2d 234-35. Pearce, supra, was also an affirmative representation/detrimental reliance case where the court adhered to the general rule, and the point is clear: the rationale for not extending coverage by estoppel applies equally with or without affirmative (but unauthorized) representations of coverage. Thus, even when confronted by facts as compelling as those in the instant case, other courts have maintained a conservative course and decided such cases according to the principles of law Crown Life has shown should control here.

It is nothing new for claimants to urge affirmance of a jury verdict based upon the perceived "justice" of their case. If that's all that there were to the policy and legal questions that our appellate courts must consider, they could be turned solely into arbiters of trial evidence and the taxpayers could save a bundle of money. The workings of justice operate in both directions, however, and we are dismayed that Respondent's only public policy discussion is just a reprise of his argument to the jury. The decision in this case will dramatically affect thousands of people and millions of dollars, and it does nothing for the adversary process if one side won't discuss the very real impact that adoption of "coverage by estoppel" would have on the individual and corporate citizens contracting in Florida.

II. ANY ORAL CONTRACT ASSERTED BY PLAINTIFF WAS AN ORAL CONTRACT OF INSURANCE, NOT A MODIFICATION OF AN EXISTING GROUP POLICY.

Plaintiff argues that the oral contract which it asserted at trial was merely a modification of the existing group policy. Thus, he says, the terms of the oral contract were definite and a modification of it is not barred by the statute of frauds.

In support of this appellate-level hope that his theory at trial will be construed to be an oral modification of an existing contract, plaintiff cites one record reference of a dissertation before the trial court by counsel for Crown Life. Plaintiff, however, fails to take notice not only of the actual amendment to the complaint by his own counsel, but also the very terms of the special interrogatory submitted to the jury. Plaintiff did not move ore tenus to amend the pleading to assert an oral modification of an existing contract. To the contrary, plaintiff's eleventh hour amendment was to assert "an oral contract of insurance." (R. 157). Furthermore, the jury found in its special interrogatory that "the defendant Crown Life Insurance Company, through its agent, orally agreed to provide coverage for medical expenses of Steven Patrick McBride so long as Joseph Valerie McBride continues to be employed by Signcraft, Inc."

There is, in short, nothing in plaintiff's amendment to the complaint or in the jury verdict which would suggest that plaintiff's theory at trial was an oral modification to an existing contract, even if that wonderfully

circuitous phrase meant something in the open-ended context of this particular case. Based on this premise, Crown Life relies on its argument in its brief on the merits that plaintiff failed to carry his burden of proving the existence of an oral contract to insure, and that any purported oral contract of insurance is barred by the statute of frauds.

Plaintiff nevertheless asserts the existence of an oral modification of the written contract, and that such an oral modification is not barred by the statute of frauds. An oral modification of a written contract must, however, be supported by new consideration. Newkirk Construction Corp. v. Gulf County, 368 So.2d 813 (Fla. 1st DCA 1979). In addition, the party alleging the oral modification has the burden of proving it. Id. The record is devoid of evidence sufficient to prove the existence of an oral modification, especially with respect to the issue of any new consideration received by Crown Life for any such modification.

Plaintiff's claim that the statute of frauds does not apply to an oral modification of a written contract is simply wrong. His authority for that proposition is an action in equity for reformation of a lease. In that case, Orange State Oil Co. v. Crosby, 36 So.2d 272 (Fla. 1948), there was no action to enforce an oral contract. The case does not apply to an oral modification of a written contract of insurance, or stand for the stated proposition.

Next, plaintiff argues that the oral contract was rendered enforceable by the execution of the certificate of insurance and enrollment cards, which, in a truly imaginative

leap, supposedly constituted "sufficient subsequent memoranda" to take the agreement out of the statute of frauds. But wait a minute. First, the certificate and enrollment cards do not acknowledge the existence of any modification to the policy. Indeed, they say exactly what they would have said had the question of coverage for plaintiff never been raised, since dependent coverage was requested for all the McBride children, not just Stephen. (R. 198.)

More importantly, the case cited for the assertion that oral agreements subject to the statute are rendered enforceable by a "sufficient subsequent memorandum" involved circumstances where the subsequent memorandum contained all the terms of the oral agreement. See Flagship National Bank of Miami v. King, 418 So.2d 275 (Fla. 3d DCA 1982). Here, the "memorandum" contained no terms of the agreement and the effort to construe it as such a memorandum speaks more to plaintiff's need to buttress his position than anything else.

Moreover, the original policy contains a provision prohibiting modifications except when agreed in writing, verified by the seal of the company and signed by two officers. (Plaintiff's exhibit #7 at p.26.) Respondent's argument that there was a valid oral modification of the policy is simply meritless.

III. THE TRIAL COURT ERRED IN GRANTING PLAINTIFF'S MOTION TO AMEND AND IN DENYING CROWN LIFE'S MOTION FOR CONTINUANCE.

Plaintiff asserts that no new issues were created by the amendments which added affirmative claims for equitable estoppel and oral contract of insurance, since these issues were said to have been in the case by virtue of plaintiff's reply to Crown Life's affirmative defenses. But plaintiff has characterized the oral modification of written contract theory as an entirely separate vehicle of recovery, and it is clear that the issues pertaining to an oral contract (or an oral modification of a written contract) were not already in the case by the mere assertion of estoppel in plaintiff's reply to Crown Life's affirmative defenses. For example, the issue of the new consideration required for any oral modification, see Newkirk, supra, had not been explored in discovery, since it was not part of the case until trial.

IV. THE TRIAL COURT'S AWARD OF ATTORNEY'S FEES WAS ERROR.

In claiming that Crown Life misperceives plaintiff's theory of recovery, plaintiff merely highlights the fact that his theory of recovery is so poorly defined and elusive as to nearly defy description. The "theory" has also shown a tendency to emphasize whatever portion of its being is not under close analysis at the moment, and has traveled in various guises, both in this lawsuit and in the cases cited by plaintiff. In this lawsuit, it has been

characterized as 1) an estoppel to deny coverage (plaintiff's reply to Crown Life's affirmative defenses (R. 645-46)); 2) an oral contract of insurance (R. 157, R. 538); 3) an estoppel to deny the existence of oral agreement (Brief of appellee in the Fourth District, p. 2, see also Burns v. Consolidated American Insurance Co., 359 So.2d 1203 (Fla. 3d DCA 1978)); 4) an oral modification of written contract (Brief of respondent on certified question, p. 29); and 5) an oral agreement to waive policy exclusions (concurring opinion of J. Hersey in Fourth District opinion, 427 So.2d at 871). In cases cited by plaintiff, this theory of recovery also appears as 6) promissory estoppel as in Restatement, Contracts, § 90 (Travelers Indemnity Company v. Holman, 330 F.2d 142 (5th Cir. 1964)); and 7) the doctrine of reasonable expectations (Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co., 682 P.2d 388 (Ariz. 1984)).

Since plaintiff is attempting to obtain attorney's fees, it is hardly surprising he attempts here to characterize his theory as a claim on a written policy (with an oral modification to provide "coverage" forever, unless he quits his job), since the statute grants attorney's fees only to suits on policies executed by the insurer. See § 627.428(1) Fla. Stat. (1985). The trial court stated that the policy here executed did not cover the plaintiff (R. 536). Thus any recovery must be obtained in spite of, not under, the policy which here was executed by the insurer. But the law is clear that the statute must be strictly construed. Lumberman's Mutual Insurance Co. v. American Arbitration

Association, 398 So.2d 469 (Fla. 4th DCA 1981); Sheridan v. Greenberg, 391 So.2d 234, 236 (Fla. 3d DCA 1981).

For the Court to award attorney's fees under the statute to this plaintiff would further open the door to false claims based solely on assertions of coverage. Certainly this goes beyond what the legislature intended in enacting the statute; to grant attorney's fees based on coverage not included in a written policy offers the insurance industry virtually no way to control its risks. The Court should deny the award, and reject the concept that claimants can circumvent the necessity for strict construction by the semantic expedient of calling an oral extension of coverage by different names depending on the goal at the moment. This coverage walks, talks, and quacks like something completely outside the contract executed by the insurer, and it is just that hallmark that has gotten plaintiff this far. To allow attorney's fees based on the contract whose provisions they must circumvent to prevail would mock the concept of strict construction.

CONCLUSION

For the foregoing reasons, Crown Life respectfully requests that the decision of the Fourth District be reversed and the case remanded to the trial court with directions to enter a judgment for Crown Life.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 16th day of January, 1986, to: WALLACE B. McCALL, ESQUIRE, Frates & McCall, Attorneys for Respondent, 234 Royal Palm Way, Palm Beach, Florida 33480 and EDNA CARUSO, P.A., Attorney for Respondent, Suite 4B - Barristers Building, 1615 Forum Place, West Palm Beach, Florida 33401.

Of Counsel

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