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IN THE SUPREME COURT OF FLORIDA

STATE FARM FIRE AND CASUALTY COMPANY,

Petitioner,

v.

EXECUTIVE HEALTH SERVICES, INC., and WAYNE O. MONTGOMERY, M.D.,

CASE NO.: 69,897

Respondents.

On Notice To Invoke Discretionary Jurisdiction To Review A Decision Of The Second District Court Of Appeal

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PETITIONER'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

In this brief, the Petitioner, STATE FARM FIRE AND CASUALTY COMPANY, will be referred to as "State Farm". The Respondents, EXECUTIVE HEALTH SERVICES, INC., and WAYNE O. MONTGOMERY, M.D., will be referred to as "respondents" or by their respective names. The Appendix attached to this brief will be referred to as "App.", followed by the appropriate page number. The record on appeal will be referred to as "R", followed by the appropriate page number.

STATEMENT OF THE CASE AND OF THE FACTS

This case arises from a declaratory judgment action on an insurance coverage issue.

On January 25, 1982, Robert Ray went to Executive Health Services, Inc., a facility in the business of rendering medical services, for a medical examination (R 135). He had received a splinter in his thigh from an accident at work (R 83). Mr. Ray was seated in an examining room on a table used solely for medical examinations (R 94). Dr. Montgomery entered the examining room, asked Mr. Ray what his problem was, and reviewed the information available to him from the nurse's chart. After Mr. Ray had explained to Dr. Montgomery what had happened, the doctor instructed Mr. Ray to lie down on the table so he could get a better look at the injury. In the process of complying with the doctor's instructions, Mr. Ray fell back heavily on the examining table, the table up-ended and Mr. Ray fell on his right shoulder (R

82-84). Mr. Ray subsequently sued Executive Health Services, Inc., and Dr. Montgomery for damages arising out of their alleged negligence (R 32-34).

Executive Health Services was covered by a comprehensive insurance policy issued by State Farm, effective from June 19, 1981 to June 19, 1982 (R 5-31). The policy provided a number of coverages, including coverages for property damage, bodily injury, premises medical payments, and personal injury. The SMP Liability Insurance Form provided coverage for bodily injury liability:

> The Company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies, caused by an occurrence and arising out of the ownership, maintenance or use of the insured premises and all operations necessary or incidental to the business of the named insured conducted at or from the insured premises ... (App. 11).

The policy, however, contained a professional liability exclusion:

> PROFESSIONAL LIABILITY EXCLUSION ENDORSEMENT
>
> Form A
>
> This endorsement modifies such insurance as is afforded by the provisions of the policy relating to the following:
>
> SMP LIABILITY INSURANCE
>
> COMPREHENSIVE GENERAL LIABILITY INSURANCE
>
> Description of Operations:
>
> PARAMEDIC & PRE-EMPLOYMENT EXAMS
>
> It is agreed that with respect to any operations described above or designated in the policy as subject to this endorsement, the insurance

does not apply to bodily injury or property damage due to:

1. the rendering of or failure to render

(a) medical, surgical, dental, x-ray or nursing service or treatment, or the furnishing of food or beverages in connection therewith;

(b) any service or treatment conducive to health or of a professional nature;

* * *

(App. 16; emphasis added).

The introductory portion of the policy contains a waiver provision which states:

> No permission affecting this insurance shall exist, or waiver of any provision be valid, unless granted herein or expressed in writing added hereto. No provision, stipulation or forfeiture shall be held to be waived by any requirement or proceeding on the part of this Company relating to appraisal or to any examination provided for herein. (R 6).

It is undisputed that Executive Health Services knew when it contracted with State Farm that it was contracting for certain property and liability insurance, but not for professional malpractice insurance (R 131, 210, 233-34). The respondents stipulated that the State Farm policy was never intended to cover malpractice (R 224). Quince Cannon[1], the State Farm agent who obtained the insurance policy for Executive Health Services at issue, testified as follows:

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[1]Mr. Cannon is also an officer and a director of Executive Health Services, Inc. (R 202).

Q Okay. In general, what in general did they tell you? What kind of policy did they want to write? You had physicians who worked there. You had the property. What did they want you to write for them?

A They wanted me to cover their exposures. Now, I submitted this to the company and they came back, of course - we don't - State Farm did not write malpractice.

Q Okay. For physicians?

A For physicians. So they knew, and Executive Health Services and Properties both knew we were not covering professional liability.

* * *

Mr. Young: Okay. Just a minute. I didn't get a chance to make an objection to that question. But I think he's already stated that the intention was to provide coverage for everything except malpractice.

A Right.

Q Yeah. The one thing you had no intention of covering was the malpractice that might occur with regard to the professional people, doctors and nurses; correct?

A Right. (R 210-11; emphasis added).

Mr. Cannon also testified that the president of the corporation, the executive vice-president, and the board of directors all knew that there was no malpractice insurance in the State Farm policy (R 234). The clinic's doctors were required to have their own malpractice insurance (R 134). Dr. Montgomery himself knew that Executive Health Services' insurance policy with State Farm did not cover medical malpractice and that he had to obtain his own malpractice insurance, which he did (R 91, 96-97, 102). At no time did Mr. Cannon ever intend or represent to Executive

Health Services or Dr. Montgomery that professional malpractice was covered by the State Farm policy (R 211, 234).

When Dr. Montgomery was on duty on January 25, 1982, he was not a director of the corporation and had no supervisory authority on matters outside his immediate sphere of medical treatment (R 81, 118, 140, 230). Dr. Montgomery was operating as an independent contractor providing medical services to the clinic at the time of the accident (R 87-88, 119). It was only after Mr. Ray's accident that Dr. Montgomery became an officer in Executive Health Services, Inc. (R 82).

State Farm filed a declaratory judgment action to determine if the Ray accident was covered by its policy, and if it therefore had a duty to defend and indemnify the respondents. State Farm contended that the policy did not provide coverage because Mr. Ray's accident fell within the professional liability exclusion (R 39-70). State Farm also contended that the policy did not apply to Dr. Montgomery, arguing he was not an insured under the policy. Both sides moved for summary judgment, agreeing that there were no issues of material fact to be resolved (R 75-76, 144-47, 152-83). State Farm argued that, as a matter of law Mr. Ray's accident fell with the professional liability exclusion, while the respondents argued Mr. Ray's accident, as a matter of law, fell within the general liability provision and not the professional liability exclusion. The trial court[2] granted

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[2]Circuit Court, Tenth Judicial Circuit, Polk County, Florida.

summary judgment for State Farm, finding that the professional liability exclusion applied (R 187-88). The judgment was amended nunc pro tunc on August 22, 1986.

Executive Health Services and Dr. Montgomery appealed that judgment to the Second District Court of Appeal, arguing that Mr. Ray's accident did not fall within the provisions of the professional liability exclusion, and that State Farm was estopped from denying coverage.

The Second District affirmed on the policy exclusion issue, finding Mr. Ray's accident clearly fell within the professional liability exclusion (App. 4). However, the Second District reversed the summary judgment on an estoppel issue. It found the respondents' argument that before the accident a State Farm agent (Cannon) had stated to Executive Health Services that the policy provided full and complete liability to the insured, except coverage for medical malpractice, presented an issue of material fact. The court ruled that it could not conclude that the alleged statement about coverage could not have been a representation that there was more coverage than was actually provided by the policy. "The policy terms did not exclude from coverage only malpractice, as the agent is alleged to have said, but excluded, among other things, the 'rendering of ... any service ... conducive to health ....'" The court further stated that it could not conclude whether any such representation was made at a time after the policy was issued and before the accident (App. 4-5). The Second District denied State Farm's Motion for

Rehearing, Motion for Rehearing en banc, and Request for Certification to the Florida Supreme Court. The Second District's opinion is reported as Executive Health Services, Inc. v. State Farm Fire and Casualty Co., 498 So.2d 1268 (Fla. 2d DCA 1986) (App. 6-8).

State Farm filed a Notice To Invoke this Court's discretionary jurisdiction to review the decision of the Second District. By order dated May 11, 1987, this Court accepted this case for review. This Court has jurisdiction pursuant to Art. V, §3(b)(3), Fla. Const.

SUMMARY OF THE ARGUMENT

I.

SECOND DISTRICT'S DECISION APPLYING THE DOCTRINE OF ESTOPPEL TO CREATE COVERAGE SPECIFICALLY EXCLUDED FROM POLICY IS ERRONEOUS AND MUST BE REVERSED.

The Second District's decision misapplied the law of estoppel, and misconstrued the use of the term "malpractice" in this case, and therefore must be reversed.

It is fundamental insurance law that the doctrine of estoppel cannot be used to create coverage clearly excluded in a written contract of insurance. It is undisputed that Executive Health Services, Inc., contracted with State Farm for a policy of insurance which contained the exclusion for liability for bodily injuries arising out of the rendering of professional services at issue here. The policy exclusion is clear and unambiguous. At no time, before or after the policy was issued, before or after Mr. Ray's accident, did the respondents believe that the State Farm policy provided liability coverage for professional malpractice. Therefore, coverage did not exist and State Farm is entitled to summary judgment as a matter of law.

Proper application of this estoppel rule obviates the need to apply any of the recently formulated exceptions to that rule, as well as the need to determine whether State Farm's agent incorrectly told Executive Health Services it had more coverage than the State Farm policy actually provided. However, even applying the estoppel exceptions, as a matter of law none are applicable. Mr. Cannon provided uncontradicted testimony that

Executive Health Services knew it was not covered for professional liability, exactly what the policy delivered to Executive Health Services provides. Executive Health Services knew that and required its doctors to acquire their own malpractice insurance, something that Dr. Montgomery did. There was obviously no reliance by Executive Health Services or Dr. Montgomery on any alleged misrepresentation by Mr. Cannon.

Additionally, the Second District stretches logic in an attempt to establish coverage and override the express provisions of the insurance contract by creating a distinction between the "professional liability" exclusion and the term "malpractice". The use of the term "malpractice" in the law and by all parties in this case reflects the term is used synonymously with the term "professional liability". There is no material issue of fact as to the intent of the parties in the use of these terms, as to the representations of the parties, and as to reliance on the representations to the respondents' detriment. Therefore, State Farm was entitled to a summary judgment and this Court must reinstate that judgment.

Additionally, this Court's decision could have a wide ranging effect on the insurance industry in this state. To allow Florida courts to apply the doctrine of estoppel so as to allow an insured coverage which is expressly excluded from his insurance policy, and for which he paid absolutely no premium, will wreak havoc in the insurance industry. Proper application of the doctrine of estoppel so as to preclude coverage expressly excluded

in a policy of insurance will restore order and logic to the law.

II.

SECOND DISTRICT CORRECTLY RULED THAT PROFESSIONAL LIABILITY EXCLUSION PRECLUDED COVERAGE.

The undisputed evidence shows that Executive Health Services, Inc., a facility in the business of rendering medical services, had an insurance policy with State Farm which provided liability for bodily injuries except for those bodily injuries which occurred during the rendering of professional services, i.e., malpractice insurance. The undisputed evidence further reveals that Dr. Montgomery, while serving as an independent contractor for Executive Health Services, was on duty as a physician on January 25, 1982. In that capacity, he began professional treatment in an examination of a patient, Robert Ray. In the course of treatment, on order of Dr. Montgomery, Mr. Ray performed an act to resulting in the collapse of the examining table. Dr. Montgomery was thus clearly rendering medical service or treatment, or service or treatment conducive to health or of a professional nature. The great weight of legal authority in both Florida and other states demonstrates that Mr. Ray's injury falls within the professional liability exclusion of the State Farm policy. Therefore, the Second District's decision that the State Farm policy would not provide coverage to Executive Health Services and Dr. Montgomery for Mr. Ray's accident is correct and must be affirmed.

ARGUMENT

I.

SECOND DISTRICT'S DECISION APPLYING THE DOCTRINE OF ESTOPPEL TO CREATE COVERAGE SPECIFICALLY EXCLUDED FROM POLICY IS ERRONEOUS AND MUST BE REVERSED.

The decision of the Second District applying the doctrine of estoppel in this case is erroneous on legal, factual, and policy grounds, and therefore must be reversed.

The Second District ruled that the respondents' argument that before the accident Quince Cannon had stated to Executive Health Services that the State Farm policy provided full and complete liability coverage to Executive Health Services, except coverage for medical malpractice, warranted reversal of the summary judgment. The court stated that while representations by an agent as to coverage under an insurance policy made before the policy is issued did not estop the insurer from denying coverage, such representations made after the issuance of the policy and before the incident giving rise to the claim can estop the insurer from denying coverage. 498 So.2d at 1269. The court stated that it could not conclude whether the alleged statement about coverage could not have been a representation that there was more coverage than was actually provided by the State Farm policy, and could not conclude whether any such representation was made at a time after the policy was issued and before Mr. Ray's accident. Id. at 1270.

A. Second District Misapplied Law of Estoppel

The Second District's decision is erroneous because it applies the doctrine of estoppel to a matter of coverage, something this Court ruled was impermissible in Six L's Packing Co., Inc. v. Florida Farm Bureau Mutual Insurance Co., 276 So.2d 37 (Fla. 1973). The Second District did not discuss Six L's. In Six L's, this Court specifically adopted the decision of the Fourth District in Six L's Packing Co., Inc. v. Florida Farm Bureau Mutual Insurance Co., 268 So.2d 560 (Fla. 4th DCA 1972), where the Fourth District stated:

> The general rule is well established that the doctrine of waiver and estoppel based upon the conduct or action of the insurer (or his agent) is **not** applicable to matters of **coverage** as distinguished from the grounds for **forfeiture** ... In other words, while an insurer may be estopped by its conduct from seeking a **forfeiture** of a policy, the insurer's **coverage** or restrictions on the **coverage** cannot be extended by the doctrine of waiver and estoppel.

268 So.2d at 563 (emphasis in original). Six L's involved a value reporting form policy for fire insurance. The value of the property at issue was reported only after the loss. The insured consistently filed late reports and claimed that the insured waived the contractural requirement that the insured filed monthly value reports. The insurance policy at issue in Six L's contained a waiver provision identical to the waiver provision present in the State Farm policy. Id. at 562; see p. 3 supra. The Fourth District affirmed a summary judgment

for the insurer on the ground that the filing of the monthly value reports went to coverage for which the doctrines of waiver and estoppel were not applicable. The Fourth District stated:

> ... under Florida Law and the overwhelming weight of the majority the doctrine of waiver and estoppel is not available to bring within the coverage of the policy risks not covered by its terms. There are therefore no issues of fact to be determined which would affect the applicability of the doctrine of waiver and estoppel. The doctrine is simply not applicable.

Id. at 564 (footnote omitted). It is beyond dispute that the professional liability exclusion in the State Farm policy goes to coverage, not forfeiture. In accord with the Six L's ruling, there are therefore no issues of fact to be determined which would or could affect the applicability of the doctrine of the estoppel, and therefore the Second District's ruling to the contrary is erroneous and cannot stand.

This Court has never receded from the Six L's rule. Other District Courts of Appeal have applied the Six L's rule and held that the doctrines of waiver and estoppel cannot be used to create or to extend coverage which is not provided in the written contract of insurance. Starlite Services, Inc. v. Prudential Insurance Co., 418 So.2d 305, 306-07 (Fla. 5th DCA), rev. dismissed, 421 So.2d 518 (Fla. 1982); Manacare Corp. v. First State Insurance Co., 374 So.2d 1100, 1102 (Fla. 2d DCA 1979); Radoff v. North American Co., 358 So.2d 1138, 1139 (Fla. 3d DCA 1978); Unijax, Inc. v. Factory Insurance Association, 328 So.2d 448, 455 (Fla. 1st DCA), cert. denied, 341 So.2d 1086

(Fla. 1976); Hayston v. Allstate Insurance Co., 290 So.2d 67, 69 (Fla. 3d DCA 1974); Hydraulic Equipment Systems and Fabrications, Inc. v. Pennsylvania Millers Mutual Insurance Co., 277 So.2d 53, 56-57 (Fla. 3d DCA 1973); Johnson v. Dawson, 257 So.2d 282, 284 (Fla. 3d DCA), cert. denied, 266 So.2d 673 (Fla. 1972); State Liquor Stores #1 v. United States Fire Insurance Co., 243 So.2d 228, 233-35 (Fla. 1st DCA 1971). See also Kaminer v. Franklin Life Insurance Co., 472 F.2d 1073, 1077 (5th Cir.), cert. denied, 414 U.S. 80 (1973); 16B Appleman, Insurance Law and Practice §9090 (1981); 18 Couch on Insurance 2d §71:40 (rev. ed. 1983).

In Starlight Services, supra, the Fifth District applied this body of case law in affirming summary judgment for the 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 rule 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. Consequently there was no dispute of a **material** fact and the trial court's summary judgment is AFFIRMED." 418 So.2d at 307 (emphasis in original). Similarly, the alleged

oral representations by State Farm's agent are of no moment. The statements are not material facts in this dispute because the language of the policy exclusion is clear and unambiguous, and is binding on both the insurer and the insured.

In Unijax, supra, 328 So.2d at 454-55, the First District 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 from 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 Pack. 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.3rd 1972, 257 So.2d 282; and see cases collected in 1 A.L.R.3d 1139 and Supplement.

Similarly, in E. J. Evans Co. v. Ohio State Life Insurance Co., 144 So.2d 833 (Fla. 2d DCA 1962), the Second District itself refused to apply the estoppel argument to a case analogous to the case at issue. In E. J. Evans it was alleged that an agent made oral misrepresentations as to the insured's rights under a life insurance policy. In denying the insured's estoppel argument, the court stated:

> ... where the terms [of the insurance policy] are unambiguous, an interpretation thereof by a general agent does not bind the insurer. ... The terms of the policy in this case are plain and unambiguous, and appellee

> is not estopped by its general agent's alleged interpretation of the insurance policy.

Id. at 835. In Executive Health the policy exclusion is not ambiguous.

In addition to these cases, Old Colony Insurance Co. v. Trapani, 118 So.2d 850 (Fla. 2d DCA 1960), rev'd on other grounds, Allstate Insurance Co. v. Vanater, 297 So.2d 293, 295 (Fla. 1974), is also instructive. In Old Colony, the Second District reversed a judgment allowing reformation of an insurance contract where it was manifest at the time the policy was issued that neither party contemplated that professional services were covered. Id. at 853-54. The Second District ruled that the statements of the insurer's agent to the effect that an accident for professional services would be covered under the policy, made both before and after the accident at issue, did not allow for reformation of the insurance contract. 118 So.2d at 853-54. Although Old Colony was not an estoppel case, the logic of that decision is applicable. In effect, the Second District's decision reforms the insurance contract between State Farm and Executive Health Services to provide malpractice insurance without any charge to Executive Health Services or notice to State Farm.

Recently, there has been a trend towards ignoring or restricting the Six L's rule by district courts of appeal. In Burns v. Consolidated American Insurance Co., 359 So.2d 1203 (Fla. 3d DCA 1978), the court noted there was no entitlement to recover where the insured admittedly knew that policy did not cover the risk encountered, id. at 1206, and recognized

the general statement of law that an agent's representations as to coverage cannot operate by way of estoppel to create coverage where the terms of the policy was unambiguous. Id. at 1207. However, the Third District, over a dissent, reversed a summary judgment because of unresolved questions of fact concerning a possible oral contract of insurance. The court stated:

> 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 Co. v. Eakins, 337 So.2d 418 (Fla.2d DCA 1976)[3].
>
> ...
>
> 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.

Id. (footnote added). Burns involved a complaint which included an allegation against an insurance agent based on misrepresentations as to coverage.

The Second District Court of Appeal seized upon the Burns language in Peninsular Life Insurance Co. v. Wade, 425 So.2d 1181 (Fla. 2d DCA 1983), one of the cases that it relied on in its Executive Health Services decision. In Wade the insurer's agent affirmatively misled the insured as to the amount of coverage under the policy. Despite the fact that the policy was read by the insured, and clearly limited recovery, the Second District

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[3]Eakins offers absolutely no basis for the proposition for which is cited in Burns. It is a forfeiture, not a coverage case.

ruled that the insurer was estopped from denying full coverage where the insurer's agent held himself out as an expert on policies such as the insured's and misinformed the insured as to the meaning of that provision, which would be expected to and did induce the insured's reliance. Judge Grimes dissented due to the court's failure to follow the Six L's rule, stating:

> 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 it relates to coverage was even argued. Only in Burns v. Consolidated American Insurance Co. (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 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 timeworn adage that "hard cases make bad law."

Id. at 1184-85.

Another case relied upon by the Second District was Kramer v. United Services Automobile Association, 436 So.2d 935 (Fla. 4th DCA 1983). In Kramer, Victoria Kramer was allegedly told by

the insurer that her father's existing automobile insurance policy covered her new car for 30 days or until the vehicle could be added to the policy, or until another policy was issued. Following the Burns and Wade rationale, the court ruled that the insureds' complaint stated a cause of action.

The third case cited by the Second District was Crown Life Insurance Co. v. McBride, 472 So.2d 870 (Fla. 4th DCA 1985), rev. granted, Case Number 67,476.[4] In Crown Life, the court did not set forth the factual basis underlying its opinion. However, it did rely on Kramer and Wade and ruled that the insurer was estopped from denying coverage. Asserting confusion over this issue, the Fourth District certified the issue to this Court.

Wade, Kramer, and Crown Life cannot be reconciled with Six L's and were therefore wrongly decided. However, even applying the new exceptions created and announced in those cases, Executive Health Services and Dr. Montgomery would not be entitled to coverage. For one thing, the State Farm policy expressly stated that its terms could not be waived unless done so in writing. Also, these cases all require an express representation that coverage exists before an accident occurs. See Wade, 425 So.2d at 1183. Here, contrary to the Second District's opinion, respondents can point to no representation from any State Farm agent that the State Farm policy covered malpractice or professional

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[4]This Court heard oral argument in Crown Life on June 2, 1986.

liability, and to no representation before the Ray accident that such an incident would be covered under the general liability policy. These cases also required that an insured expect to receive certain coverage and act in reliance upon the representation of the insurer to the insured's detriment. Here, Executive Health Services did not expect to receive professional malpractice coverage. It was not induced to act in reliance on any representations of coverage by State Farm. Executive Health Services and Dr. Montgomery knew they did not have malpractice coverage under the State Farm policy. Executive Health Services received exactly what it contracted and paid for - a liability policy with a professional liability exclusion. It is evident that Executive Health Services proceeded to conduct its business with that knowledge, specifically requiring its physicians to obtain their own malpractice insurance. Dr. Montgomery did obtain his own malpractice coverage.

Because the policy issued by State Farm to Executive Health Services contained the professional liability exclusion which was contracted for, and because the exclusion is clear and unambiguous on its face, the doctrine of estoppel set forth by this Court in Six L's requires this Court to reinstate the summary judgment for State Farm previously entered by the trial court.

B. Second District Misconstrued Term "Malpractice"

Due to the arguments set forth in the preceeding section of this brief, it is clear that doctrine of estoppel cannot

be applied to create coverage in this case. However, even if the doctrine was applied, the Second District's decision is still erroneous as a matter of law.

The Second District stated that it could not conclude that there had been a representation that there was more coverage and actually provided by the policy, because:

> The policy terms did not exclude from coverage only malpractice, as the agent is alleged to have said, but excludes among other things, the "rendering of ... any service ... conducive to health ... ."

498 So.2d at 1270.

First, Mr. Cannon's testimony is unrefuted that Executive Health Services knew that the State Farm policy did not cover professional liability (R 210). Second, the Second District could reach this conclusion only if it considered a "malpractice" exclusion to be narrower than the professional liability exclusion. However, the professional liability exclusion is not broader than the terms "professional malpractice", "medical malpractice", or "malpractice" permit, but rather these terms are used interchangeably in the law of Florida and this case to mean the exact thing.

The Second District's opinion overlooks Florida Statutes defining malpractice and medical malpractice[5]. In the Florida

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[5]A statute applicable to the insurance policy, which was in force at the time the policy of insurance was consummated, is considered a basic ingredient of the contract, because the law in existence at the time of the making of the contract of insurance forms a part of that contract, as if it were expressly referred to in its terms. Williams v. New England Mutual Life Insurance Co., 419 So.2d 766, 769 (Fla. 1st DCA 1982).

Insurance Code, malpractice is defined as:

> (k) **Malpractice.** - Insurance against legal liability of the insured, and against loss, damage or expense incidental to a claim of such liability, arising out of the death, injury, or disablement of any person, or arising out of damage to the economic interest of any person, as the result of negligence in rendering expert, fiduciary, or professional service.

Section 624.605(1)(k), Fla. Stat. (1981)(emphasis added)[6].

The current medical malpractice statute itself treats the term "medical malpractice" as interchangeable with and identical to the term "rendering medical services". Section 768.57(1)(a), Fla. Stat. (1985), states:

> (1) As used in this section:
> (a) "Claim for medical malpractice" means a claim arising out of the rendering of, or the failure to render, medical care or services.

In the medical malpractice risk apportionment section of the Florida Insurance Code, §627.351(7) Fla. Stat. (1981)[7], reads in pertinent part:

> (b) Entities licensed to issue casualty insurance as defined in s. 624.605(1)(b),

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[6]Additionally, Black's Law Dictionary defines, in part, the term malpractice as:

> Failure of one rendering professional services to exercise that degree of skill and learning commonly applied under all the circumstances in the community by the average prudent reputable member of the profession with the result of injury, loss or damage to the recipient of those services or to those entitled to rely upon them.

Black's Law Dictionary 864 (5th ed. 1979)(emphasis added).

[7]This section is now §627.351(4), Fla. Stat. (1985).

> (k), and (q) and self-insurers authorized to issue medical malpractice insurance under s. 627.357 shall participate in the plan and shall be members of the joint underwriting association.
>
> * * *
>
> (d) The plan shall provide coverage for claims arising out of the rendering of, or failure to render, medical care or services and, in the case of health care facilities, coverage for bodily injury or property damage to the person or property of any patient arising out of the insured's activities... . (Emphasis added).

The language of §627.357(1), Fla. Stat. (1981), which allows certain health care providers to self-insure, is nearly identical to that in §627.351(7)(d). See also §458.305(3), Fla. Stat. (1981).

From a reading of these Florida statutes, one can see that the statutes which govern malpractice and medical malpractice insurance define medical malpractice in the almost the exact terms as those used in the State Farm professional liability exclusion present in this case (App. 16). Under these Florida statutes, "rendering professional services" is interchangeable with and identical to "malpractice", and "rendering professional medical services" is interchangeable with and identical to "medical malpractice".

Additionally, as the record on appeal in this case demonstrates, the terms "medical malpractice" and "rendering medical services" or "rendering professional services" were used interchangeably to mean the identical thing by the parties involved. Mr. Cannon's testimony demonstrates that he used both the terms "professional liability" and "malpractice". He testified that the policy would not cover professional liability (R 210). Immediately

thereafter he testified:

> Q Yeah. The one thing you had no intention of covering was the malpractice that might occur with regard to the professional people, doctors and nurses; correct?
>
> A Right. (R 211).

Mr. French, Executive Health Services' general manager at the time, clearly understood when told the policy excluded "malpractice" that it excluded coverage for professional services of the medical staff, because he required these professionals to obtain their own such insurance.

The sections of the Florida statutes cited above show that the term "medical malpractice" is not narrower than the term "rendering medical services" and is not narrower than the professional liability exclusion in this case. Rather, "medical malpractice" is simply a short hand, lay person's term for the failure to render professional medical services. The terms "malpractice" and "professional liability" must be given reasonable and sensible interpretations, Hess v. Liberty Mutual Insurance Co., 458 So.2d 71, 72 (Fla. 3d DCA 1984), not the strained, illogical interpretation that the Second District's opinion allows. The Second District's decision to remand for further proceedings on this issue therefore is erroneous because it overlooks the statutes cited above and ignores the clear testimony in the record.

C. Policy Considerations

The law in this state has long been that where a particular type of coverage is not included in a contract of insurance,

or is specifically excluded in a contract of insurance, that particular type of coverage does not exist. The doctrine of estoppel must not be allowed to be used to vitiate written contracts of insurance. That is what will happen if the doctrine is allowed to extend coverage to matters specifically excluded within the unambiguous language of the policy. The insured must be limited to coverage for those subjects that he has contracted and paid for. Where, as here, an insured is seeking coverage for an incident which is specifically and clearly excluded from the insured's policy of insurance - a coverage for which the insured paid no premium - it would be inimical to our system of justice to hold the insurer liable for a loss for which it received no consideration.

This Court's decision could have wide ranging effects on the insurance industry in Florida. To permit Florida courts to apply estoppel to allow an insured coverage for matters expressly excluded from his policy would create chaos in the insurance industry. This is particularly true of the coverage involved in this case, that of professional malpractice insurance, for which premiums are extremely costly to the insured and for which exposure for liability can run into the millions of dollars. Uncertainty as to coverage on the part of both the insured and the insurer, despite a written policy, will be the rule if the Second District's decision is allowed to stand.

This Court must reassert the vitality of the Six L's rule. The law prohibiting extension of coverage by estoppel 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-theories applied by "pro-estoppel" line of cases relied on by the Second Distrct to achieve what the lower courts perceive justice to be in individual cases. The "pro-estoppel" line of cases effectively obliterates the Six L's rule and renders it nonexistent.

II.

SECOND DISTRICT CORRECTLY RULED THAT PROFESSIONAL LIABILITY EXCLUSION PRECLUDED COVERAGE.

The Second District correctly ruled that the State Farm policy did not provide coverage for Mr. Ray's injuries. The Second District, as did the trial court, found that the "[t]here could be no question that the accident came within ..." the provisions of the policy excluding bodily injury due to the rendering of medical services and any services conducive to health.[8] 498 So.2d at 1269.

The Second District's decision ruling that Mr. Ray's accident clearly came within the professional liability exclusion is in line with the decisions in Florida and other states which have considered this issue. A review of those decisions demonstrates that Second District's decision on this issue must be affirmed.

The undisputed evidence shows that on January 25, 1982, Ronald Ray came to the clinic operated by Executive Health Services for treatment of a work related injury (R 82). At that time, Dr. Montgomery was the physician on duty at the clinic. The clinic's business is to render professional medical services (R 97, 135). Dr. Montgomery had an independent contractor relationship with Executive Health Services, wherein he performed

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[8]Although the respondents did not seek review of the Second District's decision concerning the application of the professional liability exclusion, State Farm recognizes that once this Court has accepted jurisdiction, it is free to consider any issue raised by the decision under review. Jacobson v. State, 476 So.2d 1282, 1285 (Fla. 1985). Therefore, State Farm will address this issue.

medical services at the clinic on an hourly basis in exchange for an hourly fee (R 199). He was paid half of his medical malpractice insurance premium by Executive Health Services as an additional benefit (R 119). Dr. Montgomery had authority to make medical decisions and to direct other employees of the clinic in the performance of his medical duties while he was on duty (R 121).

The incident in issue occurred in an examining room at the clinic. This room was used for professional purposes. It was not a general waiting room or an area primarily open to the public. When Dr. Montgomery entered the room, Mr. Ray was seated on an examining table. The table was used solely for medical examinations (R 94). The doctor began rendering professional services by asking Mr. Ray what his problem was, and by reviewing the information available to him from the nurse's chart. After Mr. Ray had explained to Dr. Montgomery what had happened, the doctor instructed Mr. Ray to lie down on the table so that he would take a better look at the injury (R 83). This instruction clearly is a rendering of medical service or treatment or a service of a professional nature. In the process of complying with the doctor's instructions, Mr. Ray fell back heavily on the examining table, the table up-ended, and Mr. Ray fell on his right shoulder (R 83). After the fall Dr. Montgomery examined Mr. Ray for any injuries which occurred from the fall and also examined the splinter (R 84).

Although the primary issue in the trial court was whether

Dr. Montgomery was rendering professional services at the time of the injury to Mr. Ray, so as to bring this incident within the professional liability exclusion of the State Farm policy, respondents provided the trial court with no legal authority for their proposition that the exclusion did not apply.

A. Florida Cases

There are a number of Florida cases which demonstrate that the Second District's, and the trial court's, decision was legally correct. In Neilinger v. Baptist Hospital of Miami, Inc., 460 So.2d 564 (Fla. 3d DCA 1984), the Third District affirmed a summary judgment in favor of the defendant, Florida Patients' Compensation Fund, because the plaintiff's cause of action was time-barred by the two year statute of limitations for medical malpractice. In affirming the summary judgment, the court stated:

> The claim filed by the plaintiffs herein arises out of Baptist Hospital's allegedly negligent medical care of the plaintiff Sandra Neilinger while she was a maternity patient at the hospital. Mrs. Neilinger slipped and fell on a pool of amniotic fluid while she was descending from an examination table under the direction and care of hospital employees at the said hospital.

Id. at 566. The court ruled that the health care provider in Neilinger was performing medical services for the plaintiff at the time of the alleged injury. Id.

In support of its decision, the Third District cited Mount Sinai Hospital v. Wolfson, 327 So.2d 883 (Fla. 3d DCA 1976). In Mount Sinai, the plaintiff alleged that the hospital had failed to maintain a properly operated warning system whereby

a patient in distress could get attention from hospital employees, and further failed to provide adequate bed rails to insure the protection of its patients. The hospital moved to dismiss the complaint on the ground that the plaintiff had not complied with the medical mediation statute which was then in effect. The trial court denied the motion, finding that the complaint did not establish an action for malpractice. The Third District reversed, holding that the suit first had to be submitted to a medical mediation panel before it could be maintained in a trial court, thereby implying it was a malpractice action. Id. at 884-85.

In Riccobono v. Cordis Corp., 341 So.2d 805 (Fla. 3d DCA 1977), a patient was admitted for a coronary catheterization procedure. While the procedure was being performed, the tip of the catheter broke off, causing injury to the plaintiff. The Third District affirmed an order granting a motion to dismiss for failure to submit the claim first to a medical mediation panel.

In Norton v. South Miami Hospital Foundation, Inc., 375 So.2d 42 (Fla. 3d DCA 1979), the Third District affirmed a dismissal of a complaint on the basis of Riccobono. In Norton, the plaintiff was allegedly injured because of the mechanical failure of a special table to which he was strapped during the taking of a myelogram at the hospital. Id.; (Schwartz, J., specially concurring). The Norton facts are therefore closely analogous to the Ray incident and demonstrate the applicability of the

malpractice exclusion to equipment used during a medical examination. See also Zobac v. Southeastern Hospital District, 382 So.2d 829 (Fla. 4th DCA 1980)(dicta; defective medical equipment more nearly covered by malpractice act than defective chairs in public waiting room).

In contrast to these cases finding the injury complained of fell within the purview of medical malpractice, other cases under different situations have found no malpractice. In Durden v. American Hospital Supply Corp., 375 So.2d 1096 (Fla. 3d DCA 1979), cert. denied, 386 So.2d 633 (Fla. 1980), the plaintiff alleged that the hospital was negligent in the use of a dirty needle, failure to use a clean or sterilized needle, and failure to properly inspect the needle for cleanliness prior to its use. Id. at 1097. The trial court dismissed the claimant's complaint as being time-barred by the two year statute of limitations for medical malpractice. The Third District reversed, stating:

> Durden sold his blood to American. There was no medical, dental or surgical diagnosis, treatment or care rendered by American to Durden. The relationship contemplated by the subject statute of limitation is in the nature of a doctor (dentist) - patient or hospital - patient in contrast to the vendor - vendee relationship in the case at bar.

Id. at 1099. Finding the plaintiff's complaint granted in ordinary negligence, not professional malpractice, and the four year statute of limitations therefore applicable, the Third District reinstated the complaint. Id. at 1099.

In New Amsterdam Casualty Co. v. Knowles, 95 So.2d 413

(Fla. 1957), a convalescent home had an insurance liability policy which excluded claims resulting from the rendition of professional services. The complaint essentially alleged that an attendant was negligent in failing to insure that the bed rails were up. The Knowleses sought a declaratory decree establishing the right to have New Amsterdam provide a defense in the underlying action. The chancellor found New Amsterdam was obligated to defend. In affirming, this Court found that the title "convalescent home" did not connote an institution where only professional services were rendered, and the term "attendant" did not describe a person who rendered professional services. Id. at 414-15. The Court found no basis to presume that the injury arose only from services of a professional character. Id. at 415. In the Ray accident, a professional physician was clearly rendering a professional service at a medical services center at the time of the accident.

B. Out of State Cases

A number of states besides Florida have considered this, or similar situations, and have concluded that each of the causes of action fell within a professional malpractice exclusion. One of the cases most similar to this one is Harris v. Fireman's Fund Indemnity Co., 42 Wash.2d 655, 257 P.2d 221 (1953). In Harris, a Mrs. Shaw went to Dr. Harris, an osteopathic physician, for osteopathic treatment. While Dr. Harris was administering treatment to Mrs. Shaw on an osteopathic table, the table collapsed. Mrs. Shaw then filed a complaint for injuries against Dr. Harris,

his wife, and the firm which sold the table. Dr. Harris and his wife maintained a declaratory decree action against Fireman's Fund. Fireman's Fund provided a policy of insurance which provided coverage for bodily injury liability, but which excluded malpractice. The appellate court reasoned that the issue to be determined was whether the use of the defective osteopathic table under the circumstances constituted malpractice in the performance or omission of professional services. 257 P.2d at 224. The Washington Supreme Court stated that the table was especially designed to enable an osteopathic physician to give his patients the type of treatment which he was licensed to give. Id. Harris concluded that the claim was one of malpractice, and came within the exclusionary provisions of the insurance policy. Id. at 225.

Harris relied heavily on American Policyholders Insurance Co. v. Michota, 156 Ohio 578, 103 N.E.2d 817 (1952). In Michota, the insurance company sought a declaratory decree as to its obligation to defend a certain action brought against a chiropodist by one of his patients. The policy under consideration was a professional liability policy which required the insurer to defend cases involving an injury arising out of the practice of the insured's profession. 103 N.E.2d at 818. The facts reveal that the patient was told by her doctor to sit in a certain treatment chair which rotated in a manner similar to a barber's chair. As she was getting into the chair, it rotated and the patient lost her balance and fell to the floor, sustaining injuries.

The Ohio Supreme Court upheld a conclusion that the insurer was required to defend the doctor against the patient's complaint. In so concluding, the court stated:

> Prior to November 9, 1949, Mrs. Hirssig had been a patient of Michota. When on that date she entered the doctor's office and in a treatment room thereof began to follow his precise instructions in preparing herself for his professional ministrations, the relationship of patient and doctor was clearly established. Her claimed injuries, according to the allegations of her petition, were due to the negligence of the doctor in failing to maintain apparatus employed by him in his practice of chiropody in a safe condition for her use as a patient.
>
> The injury described was one "arising out of the practice of the insured's profession" and also constituted "an injury resulting from professional services rendered or which should have been rendered". Maintaining the treatment chair in a proper and safe condition for the accomodation of patients was a service or duty directly connected with the practice by Michota of his profession as a chirpodist, chiropody being a limited branch of medicine or surgery.

103 N.E.2d at 819.

In Antles v. Aetna Casualty and Surety Co., 221 Cal.App.2d 438, 34 Cal.Rep. 508 (1963), Aetna insured Dr. Antles under a policy which excluded coverage for malpractice or professional service. In Antles, the patient was laying on a table receiving heat lamp treatments. The doctor had placed the patient under the lamp, and adjusted the lamp. After several minutes, the lamp fell and burned the patient's back. The court found that the injury did occur during the performance of professional services. It reasoned that the lamp was the principal instrument

used in giving the treatment; the doctor had, in the exercise of his professional skill and judgment, placed the lamp at the proper place and height, and was observing the treatment. 34 Cal.Rep. at 511. See also Northern Insurance Co. v. Superior Court, 91 Cal.App.3d 541, 154 Cal.Rep. 198 (1979)(no duty to defend and/or indemnify where policy contained professional services exclusion and injury resulting from misidentification of patient occurred as a direct result of performance of professional services); Brockbank v. Travelers Insurance Co., 12 A.D.2d 691, 207 N.Y.S.2d 723 (1960), appeal denied, 9 N.Y.2d 609, 210 N.Y.S.2d 1025 (1961)(alleged negligence in connection with the placing, raising or adjustment of sideboards on a bed of a patient in a nursing home constituted nursing service and was expressly excluded from coverage under a policy which excluded insurance for rendering or failure to render professional services).

Although it arises outside the medical field, Knorr v. Commercial Casualty Insurance Co., 171 Pa.Super. 488, 90 A.2d 387 (1952), is also instructive. In Knorr, a beauty shop had an insurance policy which excluded coverage for rendering of professional services. The injury occurred when a customer who was seated beneath a mechanical hairdryer was struck on the head when the hairdryer unexplainedly fell. The court found that the accident fell within the professional services exclusion because an integral part of the services the patron had contracted for was to dry the hair. 90 A.2d at 388.

* * *

These Florida and foreign state authorities require this Court to affirm the Second District's decision on the coverage issue. As was stated in Coleman v. Valley Forge Insurance Co., 432 So.2d 1368, 1371 (Fla. 2d DCA 1983), where an exclusion is clearly stated it should be upheld. In this case, Mr. Ray was allegedly injured while on a professional examining table in a professional medical center under the care and instruction of a treating medical doctor. When Dr. Montgomery entered the room and began reviewing Mr. Ray's charts and questioning with Mr. Ray about his injury, a professional relationship had been instigated and professional medical services had begun. It is patently fallacious to contend that the rendering of professional medical services did not begin until Dr. Montgomery actually looked at Mr. Ray's splinter. The trial court and the Second District correctly applied the above cited authorities to the facts of this case, and determined that the professional liability exclusion applied.

CONCLUSION

This Court must reverse the Second District's decision on the estoppel issue, affirm the Second District's decision on the policy exclusion issue, and remand with directions that judgment for State Farm be reinstated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of this brief and the attached appendix has been furnished by U.S. Mail this 5th day of June, 1987, to CLIFFORD J. SCHOTT, ESQUIRE, Post Office Box 1808, Lakeland, Florida 33802.

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