IN THE SUPREME COURT OF FLORIDA

FILED
JAN 28 1987
CLERK, SUPREME COURT
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STATE FARM FIRE AND CASUALTY COMPANY,

Petitioner,

v.

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

Respondents.

CASE NO.: 69,897

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

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PETITIONER'S BRIEF ON JURISDICTION

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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 entered Executive Health Services, Inc., a facility in the business of rendering medical services, for a medical examination. Mr. Ray was seated in an examining room on a table used solely for medical examinations (R 94). Dr. Montgomery entered the 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 and Dr. Montgomery.

Executive Health Services was covered by a comprehensive insurance policy issued by State Farm. The policy, however, contained a professional liability exclusion which stated that the insurance did not apply to bodily injury due to the rendering or failure to render medical service or treatment or any service or treatment of a professional nature (R 18; App. 8-13). State Farm filed a declaratory judgment action to determine if the Ray accident was covered by this policy. State Farm contended that the policy did not apply because Mr. Ray's accident fell within the professional liability exclusion. Both sides moved for summary judgment. The trial court granted summary judgment for State Farm, finding that the professional liability exclusion applied.

The Second District affirmed on the coverage 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 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).

SUMMARY OF THE ARGUMENT

THIS COURT SHOULD ACCEPT JURISDICTION AS THE DECISION OF THE SECOND DISTRICT APPLYING THE DOCTRINE OF ESTOPPEL TO A COVERAGE ISSUE EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER DISTRICT COURTS OF APPEAL.

This Court must accept jurisdiction pursuant to Art. V, §3(b)(3), Fla. Const., because the decision of the Second District Court of Appeal expressly and directly conflicts with a decision of this Court and decisions of other District Courts of Appeal on the same question of law. Specifically, this Court has previously ruled that the doctrine of estoppel is not applicable to a matter of coverage. The Second District's opinion expressly applies the doctrine of estoppel to an issue of coverge and is therefore in direct conflict with the Court's explicit ruling. The Court has the same issues before it in Crown Life Insurance Company v. McBride, Case No. 67,476.

ARGUMENT

THIS COURT SHOULD ACCEPT JURISDICTION AS THE DECISION OF THE SECOND DISTRICT APPLYING THE DOCTRINE OF ESTOPPEL TO A COVERAGE ISSUE EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER DISTRICT COURTS OF APPEAL.

This Court has jurisdiction pursuant to Art. V, §3(b)(3), Fla. Const., to review decisions which expressly and directly conflict with decisions of this Court or decisions of other District Courts of Appeal. Reaves v. State, 485 So.2d 829, 830 (Fla. 1986). In the instant case, conflict exists because

the Second District's decision applies the doctrine of estoppel to a matter of coverage, something this Court ruled was impermissible in Six L's Packing Co., Inc. v. The Florida Farm Bureau Mutual Insurance Co., 276 So.2d 37 (Fla. 1973). 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). This Court has never receded from this 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. Starlite Services, Inc. v. Prudential Insurance Co., 418 So.2d 305 (Fla. 5th DCA), rev. dismissed, 421 So.2d 518 (Fla. 1982); Radoff v. North American Co., 358 So.2d 1138 (Fla. 3d DCA 1978); Unijax, Inc. v. Factory Insurance Ass'n, 328 So.2d 448 (Fla. 1st DCA), cert. denied, 341 So.2d 1086 (Fla. 1976).

In Starlight Services, supra, the Fifth District applied this body of case law in affirming summary judgment for defendant

In Starlight Services, supra, the Fifth District applied this 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 coverge. 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." 418 So.2d at 307.

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.3rd 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.

Co., 144 So.2d 833 (Fla. 2d DCA 1962), the Second District refused to apply the 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 Burns v. Consolidated American Insurance Co., 359 So.2d 1203, 1206 (Fla. 3d DCA 1978), the court ruled that there was no entitlement to recovery where the insured admittedly knew the policy did not cover the risk encountered. Yet that is exactly what the Second District has sanctioned in this case.

As stated in §768.57(1)(a), a claim for medical malpractice means a claim arising out of the rendering of, or failure to render, medical care or services. See also §§624.605(1)(k)(malpractice defined as injury as the result of negligence in rendering professional services); 627.351(4)(b),(d); 627.357(1), Fla. Stat. (1983). The testimony of the State Farm agent who obtained Executive Health Services policy at issue, was that "... So they knew, and Executive Health Services and Properties both knew we were not covering professional liability...." (R 210).

In spite of the agent's clear testimony that Executive Health Services knew of the professional liability exclusion, and despite the fact that the exclusion provided in the State Farm policy meets the definitions of malpractice set forth in

Florida Statutes cited above, the Second District ignored the clear language of the policy exclusion, ignored this Court's Six L's opinion, and applied the doctrine of estoppel to extend coverage in this case. Such a result cannot be countenanced by this Court. This Court must accept jurisdiction in this case as being in conflict with Six L's and the cases cited above, and reverse the decision of the Second District Court of Appeal.

* * *

This Court presently has before it Crown Life Insurance Co. v. McBride, Case No. 67,476, in which the Court is reviewing a Fourth District opinion, 472 So.2d 870 (Fla. 4th DCA 1985), which certified the question of whether equitable estoppel may be utilized to prevent an insurer from denying coverage. At issue in that case is the exact issue presented in this petition - the application of estoppel to provide coverage beyond the explicit terms of the insured's policy. This Court should accept review of this case in order to ensure that it is resolved in the same manner as Crown Life is.

CONCLUSION

Based on the arguments and authorities set forth in this brief, this Court must grant State Farm's Petition For Review.

Respectfully submitted,

HAAS, BOEHM, BROWN, RIGDON,
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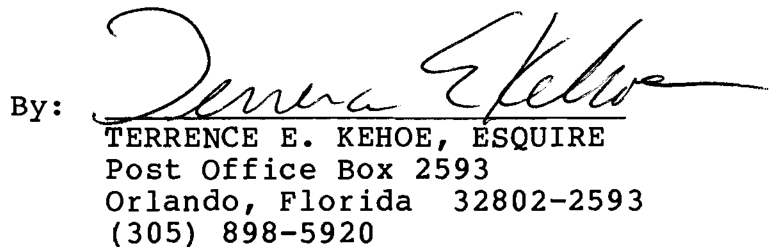

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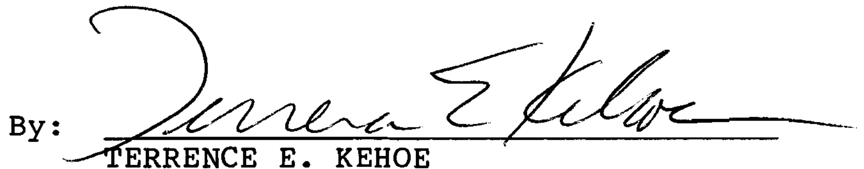
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of this brief and the attached appendix have been furnished by U.S. Mail this 26th day of January, 1987, to CLIFFORD J. SCHOTT, ESQUIRE, Post Office Box 1808, Lakeland, Florida 33802.



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