IN THE SUPREME COURT OF FLORIDA

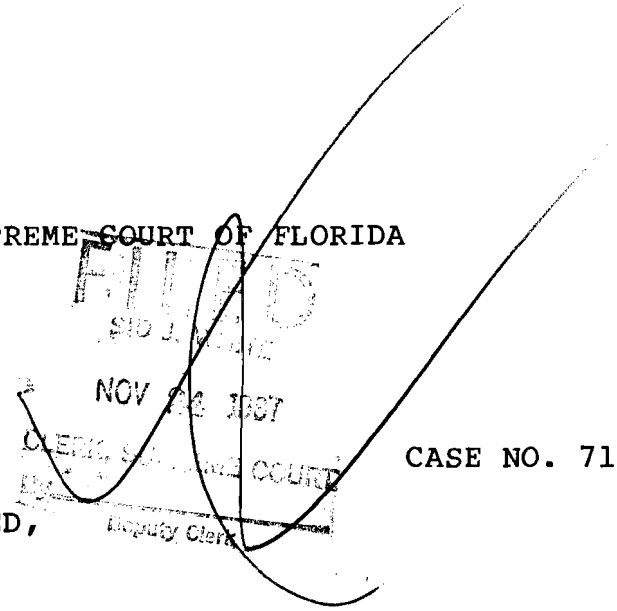
DONALD PIERCE and
MICHELE PIERCE, his wife,

Petitioners,

vs.

AALL INSURANCE INCORPORATED,
a Florida corporation,

Respondent.



CASE NO. 71,381

REVIEW OF THE FIFTH DISTRICT COURT OF APPEAL OF FLORIDA

PETITIONERS' INITIAL BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND OF THE FACTS

This is a review of a decision of the district court of appeal which affirmed a summary judgment by the trial court in favor of the defendant, AALL Insurance Incorporated ("AALL"). The court of appeal certified the following question as one of great public importance: "FOR THE PURPOSES OF THE PROFESSIONAL MALPRACTICE STATUTE IS AN INSURANCE AGENT A PROFESSIONAL?" Pierce v. AALL Insurance Inc., 12 Fla. L.W. 2001 (Fla. 5th DCA Aug. 13, 1987). This court has jurisdiction. Fla. R. App. P. 9.030(a)(2)(A)(v).

Donald Pierce was injured in a traffic accident with an uninsured motorist on November 1, 1982. Some time thereafter, Mr. Pierce's automobile liability insurance carrier denied him coverage for uninsured motorist limits of $100,000/$300,000. Mr. Pierce and his wife sued, among others, AALL, the insurance agency that sold Mr. Pierce his automobile liability insurance policy.

The action against AALL was begun in April of 1985.[1] Mr. and Mrs. Pierce alleged, among other things, that when Mr. Pierce applied for his automobile liability insurance policy through AALL, he

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[1]AALL was not joined as a defendant until the filing of the second amended complaint which, according to its certificate of service, was served on the original defendants on April 2, 1985. [Record at 54] During the course of the summary judgment proceeding, counsel for AALL stated that the action against AALL was filed April 5, 1985. [Record at 13, 78] The order granting Mr. and Mrs. Pierce's motion to amend their complaint states that the second amended complaint "is hereby deemed filed as of the date of the entry of this order." The order was entered April 10, 1985. [Record at 58]

specifically requested that he be provided full coverage to adequately protect him in the event of a casualty loss or injury; and the Plaintiff relied upon the purportedly superior knowledge of AaLL [sic] regarding automobile liability and uninsured motorist insurance matters and to give him complete and honest information about his insurance options.

30. The Defendant, AaLL [sic], negligently:

(a) Failed to fully advise and explain to the Plaintiff the uninsured/underinsured motorist coverages and options available to him, as required by law;[2]

(b) Processed and completed the application for insurance, and forwarded the same to PROGRESSIVE AMERICAN INSURANCE CO., in a manner and form unauthorized by the Plaintiff and without his knowledge and consent; and

(c) Caused the policy to be issued without uninsured/underinsured motorist coverage, without the Plaintiff ever having knowingly rejected said coverage, contrary to law.[3]

2

The limits of uninsured motorist coverage shall be not less than the limits of bodily injury liability insurance purchased by the named insured, or such lower limit complying with the company's rating plan as may be selected by the named insured, but in any event the insurer shall make available, at the written request of the insured, limits up to $100,000 each person, $300,000 each occurrence, irrespective of the limits of bodily injury liability purchased, in compliance with the company's rating plan.

Fla. Stat. § 627.727(2)(1981)

3

No automobile liability insurance covering liability arising out of the ownership, maintenance, or use of any motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental

Mr. and Mrs. Pierce further alleged that the signature on the insurance application rejecting uninsured motorist coverage, although purported to be, was not the signature of Mr. Pierce. [Record at 84-86, 89-90, 96-97]

The trial court granted summary judgment in favor of AALL upon a holding that (1) the two-year statute of limitations for professional malpractice[4] applied to Mr. and Mrs. Pierce's action against AALL and (2) Mr. and Mrs. Pierce discovered or should have discovered their cause of action against AALL more than two years prior to filing their action. In doing so, the trial court rejected Mr. and Mrs. Pierce's arguments, first,

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> thereto for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness, or disease, including death, resulting therefrom. However, the coverage required under this section shall not be applicable when, or to the extent that, any insured named in the policy shall reject the coverage.
>
> Fla. Stat. § 627.727(1)(1981)

4

> Actions other than for recovery of real property shall be commenced as follows:
>
> . . . .
>
> (4) WITHIN TWO YEARS.--
>
> (a) An action for professional malpractice, other than medical malpractice, whether founded on contract or tort; provided that the period of limitations shall run from the time the cause of action is discovered or should have been discovered with the exercise of due diligence. However, the limitation of actions herein for professional malpractice shall be limited to persons in privity with the professional.

Fla. Stat. § 95.11(4)(a)(1983)

that the professional malpractice statute of limitations does not apply to negligence suits against insurance agents and, second, that the professional malpractice statute of limitations, if applicable to negligence suits against insurance agents, is vague as to its application and, therefore, void, both on its face and as applied. [Record at 105-10]

Addressing only the former argument, the court of appeal affirmed the summary judgment. In doing so, the court of appeal stated,

> Rather than look to the title of the person being sued it is better now to look to the act done which injures. If the act is one which involves giving advice, using superior knowledge and training of a technical nature, or imparting instruction and recommendations in the learned arts then the act is one of a professional. . . .
>
> Here the act was failing to give proper advice by one of superior training, knowledge and experience. That is an act of one who is within Webster's definition of profession, "a calling requiring specialized knowledge and often long and intensive academic preparation." Webster's New Collegiate Dictionary (1979). The plaintiffs/appellants chose their cause of action and defined the tort as one of failing to give proper advice. That sounds just like professional malpractice. It is professional malpractice.

Pierce, 12 Fla. L.W. at 2001.

SUMMARY OF ARGUMENT

An insurance agent is not a professional for purposes of the professional malpractice statute of limitations. The courts below have ignored the well-settled rule of statutory construction that statutes will not be held to have changed common-law principles by implication, unless the implication is clear or is necessary to give full force to the express provisions of the statute and the public policy thus expressed. In extending the professional malpractice statute of limitations to encompass the negligence of insurance salesmen, the courts below have overlooked the common-law definition of "professional malpractice," the public policy behind professional malpractice statutes of limitations, and the history of Florida's professional malpractice statute of limitations. This is an action for negligence, and is, therefore, governed by the four-year statute of limitations for negligence actions. If the professional malpractice statute of limitations is extended to bar Mr. and Mrs. Pierce's cause of action against AALL, the professional malpractice statute of limitations would be unconstitutionally vague, because persons of common understanding and intelligence would not previously have been on notice that "professional malpractice" encompasses the negligence of an insurance salesman. The statute should not, therefore, be so applied.

ARGUMENT

I

AN INSURANCE AGENT IS NOT A PROFESSIONAL FOR PURPOSES OF THE PROFESSIONAL MALPRACTICE STATUTE OF LIMITATIONS

The trial court and the court of appeal have taken a simple lawsuit against an insurance agency, premised upon the negligence of one of its salesmen in failing to provide to a customer a statutorily-imposed opportunity to select or reject uninsured motorist coverage, and through a fantastic fiat of jurisprudential alchemy, have transformed the salesman's per se negligence into professional malpractice. By extending the professional malpractice statute of limitations, as they have, to the negligence of an insurance salesman, the courts below have overlooked the common-law meaning of "professional malpractice," the public policy behind professional malpractice statutes of limitations, and the history of Florida's professional malpractice statute of limitations.

The professional malpractice statute of limitations does not define "professional malpractice," nor is "professional malpractice" defined elsewhere in the Florida Statutes. One must look elsewhere for what the legislature contemplated when it first enacted Florida's professional malpractice statute of limitations in 1974. See ch. 74-382, § 7, 1974 Fla. Laws 1207, 1211. In doing so, a well-settled rule of statutory construction must be kept in mind: statutes will not be applied in derogation of the common law, nor held to have changed common-law

principles, by implication, unless the implication is clear or is necessary to give full force to the express provisions of the statute and the public policy thus expressed. E.g., Dudley v. Harrison, McCready & Co., 127 Fla. 687, 694, 173 So. 820, 823 (1937); In re Estate of Levy, 141 So. 2d 803 (Fla. 2d DCA 1962). An examination of the common-law meaning of "professional malpractice," and of the history and public policy of the professional malpractice statute of limitations, demonstrates that, contrary to the result in the courts below, the legislature did not intend the professional malpractice statute of limitations to encompass the negligence of insurance salesmen.

Historically, in Florida as in other jurisdictions, lawsuits characterized as "professional malpractice" actions have involved suits against persons engaged in the practice of law or medicine. See, e.g., Hine v. Fox, 89 So. 2d 13 (Fla. 1956); Foster v. Thornton, 125 Fla. 699, 170 So. 459 (1936); St. Paul Fire & Marine Insurance Co. v. Icard, Merrill, Cullis & Timm, P.A., 196 So. 2d 219 (Fla. 2d DCA), cert. denied mem., 201 So. 2d 897 (Fla. 1967); Couch v. Hutchison, 135 So. 2d 18 (Fla. 2d DCA 1961). Indeed, courts have held that the common meaning and common-law definition of "professional malpractice" is "limited to professional misconduct of members of the medical profession and attorneys." Richardson v. Doe, 176 Ohio St. 370, 372, 199 N.E.2d 878, 880 (1964); accord Cordial v. Grimm, 169 Ind. App. 58, 67-68, 346 N.E.2d 266, 272 (1976); Sam v. Balardo, 411 Mich. 405, 419, 424-25, 308 N.W. 2d 142, 147, 150 (1981). As stated by the court in Isenstein

v. Malcomson, 227 A.D. 66, 236 N.Y.S. 641 (1929),

> [M]alpractice is to be considered in its primary meaning, and as generally understood by the ordinarily intelligent and reasonably informed person, and, in this respect, according to such common usage and acceptance, it has continuously been intended to import an improper treatment or culpable neglect of a patient by a physician or surgeon. As an added significance it has been used to indicate a corrupt or culpably incompetent practitioner of either law or medicine.

Id. at 68, 236 N.Y.S. at 643. As explained by the court in Richardson,

> Today, the term, malpractice, is sometimes used loosely to refer to the negligence of a member of any professional group. However, legally and technically, it is still subject to the limited common-law definition. It is well established that where a statute uses a word which has a definite meaning at common law, it will be presumed to be used in that sense and not in the loose popular sense.

Richardson, 176 Ohio St. at 372-73, 199 N.E.2d at 880.

There is no indication that, in enacting the professional malpractice statute of limitations, the legislature intended to alter this common meaning and common-law definition of "professional malpractice." Much less is there any indication that the legislature intended to include the negligence of an insurance salesman within that definition. This conclusion is supported both by the public policy behind professional malpractice statutes of limitations and the history of Florida's professional malpractice statute of limitations.

In order to understand the public policy behind professional malpractice statutes of limitations, it is helpful to consider what is meant by "profession," as opposed to "vocation," "occupation," "business" or "trade." As explained by Roscoe Pound,

> A profession is a group of men pursuing a learned art as a common calling in the spirit of public service--no less a public service because incidentally it may be a means of livelihood. The exigencies of the economic order require most persons to gain a livelihood and the gaining of a livelihood is a purpose to which they are constrained to devote their activities. But while in all walks of life men must bear this in mind, in business and trade it is the primary purpose. In a profession, on the other hand, it is an incidental purpose, pursuit of which is held down by traditions of a chief purpose to which the organized activities of those pursuing the calling are to be directed primarily and by which the individual activities of the practitioner are to be restrained and guided. A profession, such as the ministry, medicine, law, teaching, is much more than a calling which has a certain traditional dignity. Certain other callings in recent times have achieved or claim a like dignity, but lack the essential primary purpose. For example, if an engineer discovers a new process or invents a new mechanical device he may obtain a patent and retain for himself a profitable monopoly. If, on the other hand, a physician discovers a new specific for a disease or a surgeon invents a new surgical procedure, they each publish their discovery or invention to the profession and so to the world. If a lawyer has learned through research or experience something useful to the profession and so to the administration of justice he publishes it in a legal periodical or expounds it before a bar association or in a lecture to law students. It is not his property. He may publish it in a copyrighted book and so have rights to the literary form in which he put it. But the process or method or developed principle he has worked out belongs to the world.
>
> . . . .
>
> . . . in its idea and in its history a profession is a body of learned men pursuing a learned art. Learning is one of the qualities which sets off a profession from a vocation or occupation. Professions are learned from the nature of the art professed. But they have also a cultural ideal side which furthers the exercise of the art. Problems of human relations in society, problems of disease, problems of the upright life guided by religion are to be dealt with by the resources of cultivated intelligence by lawyer, physician and clergyman.

5 R. Pound, Jurisprudence § 151, at 676-79 (1959)(footnote omitted);

accord R. Pound, The Lawyer from Antiquity to Modern Times 4-6, 8-10 (1953).

The idea of a "professional," then, is inharmonious with the business, occupation, vocation or trade of selling policies of insurance. Moreover, it is particularly incongruous to apply the professional malpractice statute of limitations to the negligence of an insurance salesman when the public policy behind professional malpractice statutes of limitations is considered. As explained by the court in Richardson,

> It is the misfortune of both physicians and lawyers that, in a very considerable proportion of their cases, they are unable to accomplish the purpose desired. The general public often fails to realize that circumstances over which these persons have no control may make it impossible for them to accomplish what they set out to do. Since physicians must often fail to fulfill expectations, they, along with lawyers, are peculiarly susceptible to the charge of failure in the performance of their professional duties.
>
> With the passage of time it becomes more and more difficult for a physician to establish that he exercised due care in performing his services. If sufficient time elapses, it may be impossible to determine whether the present physical condition of a person is the result of a lack of care and skill in prior treatment or the result of factors unrelated to treatment.

Richardson, 170 Ohio St. at 372, 199 N.E.2d at 879-80; accord 2 T. Cooley, A Treatise on the Law of Torts 1387 (3d ed. 1906); see also M. Bigelow, The Law of Torts 125 (8th ed. 1907) ("[A] person who enters a learned profession . . . does not undertake, if an attorney, that he will gain a cause at all events, or, if a physician, that he will effect a cure.")(footnote omitted).

In Richardson, as here, the court was confronted with a professional malpractice statute of limitations which did not

define "professional malpractice." The court in Richardson concluded that, in enacting a professional malpractice statute of limitations, the state legislature contemplated only members of the legal and medical professions because of their particular susceptibility to "unwarranted and fraudulent claims which would be difficult to disprove." Richardson, 170 Ohio St. at 372, 199 N.E.2d at 880. There is nothing to indicate that the motives of the Florida Legislature were any different.

Prior to its 1974 enactment, there was no statute of limitations in Florida for "professional malpractice." Actions for professional malpractice were encompassed, if stated in terms of negligence, within the general four-year statute of limitations for non-specified causes of action, and if stated in terms of an oral promise to perform, within the three-year statute of limitations for oral contracts. See Manning v. Serrano, 97 So. 2d 688 (Fla. 1957); see, e.g., Fla. Rev. Stat. § 1294 (1892); Fla. Gen. Stat. § 1725 (1906); Fla. Rev. Gen. Stat. § 2939 (1920); Fla. Stat. § 95.11 (1941); Fla. Stat. § 95.11 (1973). In 1967, the legislature enacted a four-year statute of limitations encompassing "any action brought against a professional engineer or registered architect for bodily injury, wrongful death or injury to property" for or arising out of any deficiency in design or planning of an improvement to real property. Coupled with this four-year statute of limitations, which was of the same length as the statute applicable to negligence, was a statute of repose imposing an absolute bar twelve years from the date of substantial completion

of construction or termination of the contract. Ch. 67-284, 1967 Fla. Laws 811. This statute of repose, which was later extended to encompass "licensed contractors," ch. 74-382, § 7, 1974 Fla. Laws 1207, 1210, was apparently enacted in response to a perceived threat of perpetual and unfair liability, see ch. 80-322, 1980 Fla. Laws 1389, 1390, but cannot be read to have altered the common-law definition of "professional malpractice," a term that is nowhere mentioned in the legislation, nor relevant to its scope and goals.

Nor can the enactment in 1971 of the short-lived two-year statute of limitations for actions "to recover damages for injuries to the person arising from any medical, dental, optometric, podiatric or chiropractic treatment or surgical operation," ch. 71-254, 1971 Fla. Laws 1372, be read to have altered the common-law meaning of "professional malpractice." That statute, which was repealed in 1974 with the enactment of the professional malpractice statute of limitations, see ch. 74-382, § 7, 1974 Fla. Laws 1207, 1209, signifies nothing other than the fact that the public policy behind professional malpractice statutes of limitations was, in Florida, extended to members of the medical profession several years prior to being extended to lawyers.

In 1974, the two-year professional malpractice statute of limitations was enacted, as follows:

> Section 7: Section 95.11, Florida Statutes, is amended to read: (substantial rewording of section; See Florida Statutes 95.11 for present text.)
>
> 95.11 Limitations other than for the recovery of real property.--Actions other than for recovery of real property shall be commenced as follows:

. . . .

(4) WITHIN TWO YEARS.--

(a) An action for professional malpractice, whether founded on contract or tort; provided that the period of limitations shall run from the time the cause of action is discovered or should have been discovered with the exercise of due diligence; provided, however, that the limitation of actions herein for professional malpractice shall be limited to persons in privity with the professional;

Ch. 74-382, § 7, 1974 Fla. Laws 1207, 1209, 1211. As stated, there is nothing to indicate that at the time of the 1974 enactment, "professional malpractice" meant anything other than its common-law definition: professional negligence or misconduct of a member of the medical or legal professions.

The question remains whether the legislature has subsequently acted to redefine "professional malpractice." In 1975, the professional malpractice statute of limitations was amended to exclude medical malpractice, and a separate medical malpractice statute of limitations and new medical malpractice statutes of repose were enacted, as follows:

Section 7. Subsection (4) of section 95.11, Florida Statutes, 1974 Supplement, is amended to read:

95.11 Limitations other than for the recovery of real property.--Actions other than for recovery of real property shall be commenced as follows:

(4) WITHIN TWO YEARS.--

(a) An action for professional malpractice, <u>other than medical malpractice</u>, whether founded on contract or tort; provided that the period of limitations shall run from the time the cause of action is discovered or should have been discovered with the exercise of due diligence; provided, however, that the limitation of actions herein for professional malpractice shall be limited to persons in privity with the professional.

> (b) An action for medical malpractice shall be commenced within two years from the time the incident occurred giving rise to the action, or within two years from the time the incident is discovered, or should have been discovered with the exercise of due diligence, provided, however, that in no event shall the action be commenced later than four years from the date of the incident or occurrence out of which the cause of action accrued. An action for medical malpractice is defined as a claim in tort or in contract for damages because of the death, injury, or monetary loss to any person arising out of any medical, dental, or surgical diagnosis, treatment, or care by any provider of health care. The limitation of actions within this subsection shall be limited to the health care provider and persons in privity with the provider of health care. In those actions covered by this paragraph where it can be shown that fraud, concealment, or intentional misrepresentation of fact prevented the discovery of the injury within the four-year period, the period of limitations is extended forward two years from the time that the injury is discovered or should have been discovered with the exercise of due diligence, but in no event to exceed seven years from the date the incident giving rise to the injury occurred.

Ch. 75-9, § 7, 1975 Fla. Laws 13, 20-21 (emphasis in original).

These amendments did not change the definition of "professional malpractice," they merely afforded to members of the medical profession the additional protection, not available to lawyers, of a dual statute of repose, precipitated by a perceived medical professional liability insurance crisis. See ch. 75-9, 1975 Fla. Laws 13, 14-15. The professional malpractice statute of limitations and the medical malpractice statutes of limitations and repose remained unchanged at the time Mr. and Mrs. Pierce were injured and began their action against AALL, see Fla. Stat. § 95.11(4)(a), (b)(1983), and remain unchanged today, see Fla. Stat. § 95.11(4)(a), (b)(1985).

In light of the foregoing, there is simply nothing to indicate

that the legislature has ever intended the professional malpractice statute of limitations to apply to insurance salesmen or, for that matter, to anyone other than members of the legal and medical professions. Nor is this changed by the fact that members of numerous occupations hold themselves out as "professionals," or are popularly thought of as "professionals," nor by the fact that the Department of Professional Regulation, Division of Professions, regulates many businesses and occupations loosely defined as "professions." See e.g., Fla. Stat. § 20.30(4)(b)(1983)(acupuncture); Fla. Stat. § 20.30(4)(d)(1983)(barbers); Fla. Stat. § 20.30(4)(g)(1983)(cosmetology). As stated by the court of appeal in Toledo Park Homes v. Grant, 447 So. 2d 343 (Fla. 4th DCA 1984), in rejecting an argument that the professional malpractice statute of limitations applied to a registered land surveyor,

> We . . . reject appellee's hypothesis that every activity subject to the jurisdiction of the Department of Professional Regulation constitutes a "profession" within the scope of the malpractice statute of limitations . . . . To hold otherwise would bring activities such as embalming and cosmetology within the professional malpractice statute of limitations. We are confident the legislature had no such intention.

Id. at 344. If the legislature had intended to extend the meaning of "professional malpractice" beyond its common-law definition, or, for that matter, to state-regulated "professions," it could have listed the "professions" to be covered, see Richardson, 176 Ohio St. at 373, 199 N.E.2d at 880, or expressly stated that state-regulated "professions" are covered, see Adkins v. Annapolis Hospital, 420 Mich. 87, 95, 360 N.W.2d 150, 154 (1984).

When the legislature enacted the professional malpractice statute of limitations in 1974, the legislature, in effect, incorporated into the statute the common-law definition of "professional malpractice." Until the court of appeal below in Cristich v. Allen Engineering, Inc., 458 So. 2d 76 (Fla. 5th DCA 1984), extended the professional malpractice statute of limitations to encompass land surveyors, no Florida court had attempted to depart from the common-law definition of "professional malpractice" contemplated by the statute. In Cristich, however, the court of appeal looked to Webster's New Collegiate Dictionary, and the state's regulation of land surveying, rather than to the common law, to support the court of appeal's conclusion that land surveying is encompassed by the professional malpractice statute of limitations. Cristich, 458 So. 2d at 78-79. But see Lund v. Cook, 354 So. 2d 940 (Fla. 1st DCA), cert. denied mem., 360 So. 2d 1247 (Fla. 1978).

In the present case, the court of appeal has extended the professional malpractice statute of limitations to insurance salesmen, and beyond, to any act which involves "giving advice" or "using superior knowledge and training of a technical nature," as well as "imparting instruction and recommendations in the learned arts." Pierce, 12 Fla. L.W. at 2001. In a more recent case, Panther Air Boat Corp. v. MacMillan-Buchanan & Kelly Insurance Agency, 12 Fla. L.W. 2312 (Fla. 5th DCA Sept. 24, 1987), the court of appeal below has now looked to Webster's New International Dictionary and decided that "professional"

includes, as well, actors, boxers, golfers, tennis players and football players, in short, anyone seeking financial remuneration rather than sport or pleasure, as well as mechanics, electricians, plumbers, real estate agents, bankers, investment counselors, appaisers and yacht surveyors, that is, "anyone whose skill, counsel and judgment is actively sought and relied upon by lay members of the community." Id. at 2312-13.

As pointed out by Judge Sharp, the court of appeal in Pierce ignored the fact that one can be licensed to sell insurance with little or no academic preparation, Pierce, 12 Fla. L.W. at 2002 (Sharp, J., dissenting), and in Panther Air Boat Corp. has now limited the application of the four-year statute of limitations for negligence, Fla. Stat. § 95.11(3)(a)(1985), to amateurs or volunteers upon whose skills or abilities an injured plaintiff did not rely, Panther Air Boat Corp., 12 Fla. L.W. at 2313 (Sharp, J., concurring specially).

The court of appeal apparently has been spurred toward this result by an understandable disillusionment with the fact that many "professionals" today seem bent on lowering their practice to the basest form of trade:

> But "tradition" has been overcome in modern times, with lawyers hawking their wares in public advertisements, doctors forming vertical corporations offering all sorts of health-related services and supplies, and architects and engineers becoming builders and landlords, too. The image of these "professionals" has changed, as well as their practices. Others have come under the umbrella of professional, one of whom, in our opinion, is the insurance agent who acts as advisor, law-interpreter, and provider of the "best package" for his clients. The good hands of Allstate and the Travelers' umbrella, along with others, tout their

> expertise exactly like those doctors, lawyers and dentists who assault us on television about their worth.

Pierce, 12 Fla. L.W. at 2001. It is almost as though the admonition of Roscoe Pound, some thirty years ago, has been turned on its head:

> Today the idea of a profession is again seriously threatened. One threat may be seen in the increasing bigness of everything, in which individual responsibility as members of a profession is diminished or even lost and economic pressure may make the money-making aspect of the calling the primary or even the whole interest. . . . Moreover the endeavor of many callings today to be classed as professions although primarily money-making in purpose and spirit must be taken into account. The movement to elevate the standards of business and of all callings is a worthy one. But in elevating these vigilance is needed that the purpose is not achieved by pulling down the standards of the old recognized professions to a common level with the newer ones.

5 R. Pound, supra, at 680.

The court of appeal is perhaps correct in its criticism of the less than elevating recent practices of certain professionals. It is, however, incorrect in its expansive application of the professional malpractice statute of limitations. In applying the professional malpractice statute of limitations to the negligence of an insurance salesman, the courts below have overlooked the common-law meaning of "professional malpractice," the public policy behind professional malpractice statutes of limitations, and the history of Florida's professional malpractice statute of limitations. This is an action for negligence. It is governed by the four-year statute of limitations for negligence actions contained in section 95.11(3)(a), Florida Statutes (1983). An insurance agent is not a professional for purposes of the professional malpractice statute of limitations.

II

IF THE PROFESSIONAL MALPRACTICE STATUTE OF LIMITATIONS IS HELD TO BE APPLICABLE IN THIS CASE, THEN THE STATUTE IS VOID FOR VAGUENESS, BOTH ON ITS FACE AND AS APPLIED

The effect of the professional malpractice statute of limitations, if extended to Mr. and Mrs. Pierce's cause of action against AALL, is to take from them their right to redress for their injuries. The question then arises whether this forfeit has been imposed by a statute that would place a person of common understanding and intelligence on notice that he has two years from the accrual of his cause of action to bring a lawsuit premised upon the negligence of an insurance salesman. If not, the statute is unconstitutionally vague, because persons of common understanding and intelligence must guess at its meaning. D'Alemberte v. Anderson, 349 So. 2d 164, 166 (Fla. 1977); Zerweck v. State Commission on Ethics, 409 So. 2d 57, 60 (Fla. 4th DCA 1982).

In Department of Legal Affairs v. Rogers, 329 So. 2d 257 (Fla. 1976), a statute was held not to be unconstitutionally vague because its language had a well-established meaning in trade usage, federal law and the common law. D'Alemberte, 349 So. 2d at 166-67. Such reasoning cannot save the statute involved here. As can be seen from the authorities cited in the initial argument, the meaning of "professional malpractice," both as commonly understood and as defined by the common law, does not encompass the application of the statute to bar a cause of action premised upon the negligence of an insurance salesman.

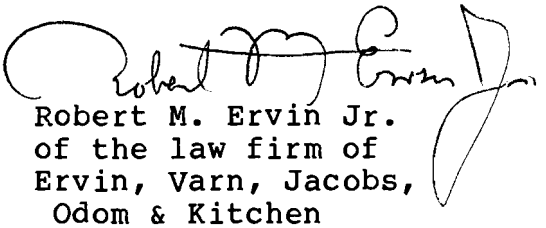
The professional malpractice statute of limitations does not place persons of common understanding and intelligence on notice that the statute encompasses lawsuits premised upon the negligence of an insurance salesman. Therefore, if applied to bar Mr. and Mrs. Pierce's cause of action against AALL, the professional malpractice statute of limitations would be unconstitutionally vague. It should not, therefore, be so applied. See Board of Public Instruction of Broward County v. Doran, 224 So. 693, 697-98 (Fla. 1969).

CONCLUSION

For the foregoing reasons, the decision of the court of appeal should be quashed, and the summary judgment of the trial court should be reversed and remanded for further proceedings consistent with the authorities cited herein.

Thomas M. Ervin Jr.

and



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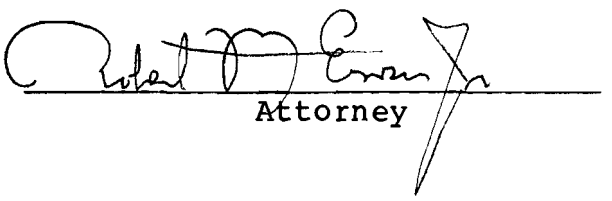

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