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THE SUPREME COURT OF FLORIDA
CASE NO. 72,~~080~~
72,080

PANTHER AIR BOAT CORPORATION,

Plaintiff/Appellant,

vs.

MacMILLAN-BUCHANAN & KELLY INSURANCE AGENCY, INC., a Florida corporation,

Defendant/Appellee.

FIFTH DISTRICT
COURT OF APPEAL
DOCKET NO. 86-724

PANTHER AIR BOAT CORPORATION,

Plaintiff/Appellant,

vs.

THE CHARTER OAK FIRE INSURANCE COMPANY, a Connecticut corporation,

Defendant/Appellee.

FIFTH DISTRICT
COURT OF APPEAL
DOCKET NO. 86-1315

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BRIEF ON THE MERITS

PANTHER AIR BOAT CORPORATION, PETITIONER

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LIST OF ABBREVIATIONS

The following abbreviations will be used:

4DCA - Fourth District Court of Appeal

5DCA - Fifth District Court of Appeal

STATEMENT OF THE CASE AND FACTS

Plaintiff Panther Air Boat Corporation (Petitioner here) sued the Defendant, MacMillan-Buchanan & Kelly Insurance Agency, Inc., an insurance agency, in the Brevard County Circuit Court on January 25, 1985, for negligently failing to furnish certain insurance coverage for air boats. The Circuit Court on January 23, 1986, entered Summary Judgment in favor of the Defendant based upon the two year statute of limitation for professional malpractice, Fla. Stat. 95.11(4)(a) (1983). Ultimately the Plaintiff, Panther Air Boat Corporation, appealed and the trial court was affirmed October 2, 1987, by the Fifth District Court of Appeal (hereafter 5DCA) Panther Air Boat Corporation v. MacMillan-Buchanan & Kelly Insurance Agency, 12 FLW 2312, (Fla. 5DCA, October, 1987), hereafter Panther (A-1). We are here on discretionary review of this application of the statute, as a question of great public importance.

There is a consolidation in the instant case as reflected in the style, because the defendant insurance agency was acting as agent for an insurance company, Defendant The Charter Oak Fire Insurance Company, which was similarly exonerated in a related case.

Pierce v. AALL Insurance, Inc., 1513 So.2d 160 (Fla. 5DCA 1987) (A-6), had been previously certified on the same question to this Court. The instant case was "co-certified" by the 5DCA with the previously certified case of Pierce (A-13).

The sole issue here, therefore, is the certified question, namely:

> "For the purposes of the professional malpractice statute, is an insurance agent a professional?"

These two decisions are a departure from the traditional idea of professional malpractice, and the historical purpose of statutes of limitation. The 5DCA states in Pierce "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 profession" (A-7). In Panther the 5DCA lists numerous trades and occupations not generally considered as professional (A-3).

We do not see the necessity of detailing the facts as to dates, events, and rulings of the trial court since the issue has been narrowed by certification. The briefs below, as well as apendices and other aspects of the record will of course be available to this Court.

When Panther's original action was filed, the Pierce case had not arrived on the scene. The plaintiffs in both certified cases alleged that the defendant insurance agency negligently failed to furnish certain insurance coverage, and both were held to be filed late under the two year statute.

There were other issues before the Fifth District Court of Appeal in the instant case, such as the time at which Plaintiff became aware of its claim, but these have been put to

rest, whether rightly or wrongly, and the only surviving issue is the certified question relating to the two year statute on professional malpractice.

Two of the three district judges sitting in the instant case, namely Judges Cobb and Sharp, while concurring, disagreed with the trial judge's decision and disagreed with the decision in Pierce, on which Judge Sharp had sat and dissented. Judge Sharp picked up Judge Cobb as another agreeing vote in the decision in the instant case. The division of judges in this case emphasizes the need for a ruling that will interpret the statute and set things straight.

Although in our Motion for Rehearing in the District Court of Appeal we made it clear that this case should also have been certified along with Pierce because of closeness in time and severity of effect, it was months before we received the ruling which brought us here to the Supreme Court. In our notice invoking discretionary jurisdiction, we pointed out that Pierce is already scheduled to be heard for oral argument on April 27, 1988. The Order of this Court scheduling our activity here does not state that the cases will be considered together or related to each other, but we assume they will.

SUMMARY OF ARGUMENT

Under the common law and historically, professionals include doctors, lawyers, and perhaps closely related activities. The statutes will not be held to have changed common law principles by implication unless the implication is clear. The Court below has overlooked this well-settled principle of statutory construction. It has also overlooked the public policy and rationale behind the professional malpractice statute of limitation.

This is an action for negligence and is therefore governed by the four year statute of limitations. Extension of the two year statute to bar Panther Air Boat Corporation's case forces the conclusion that the act itself is vague and incapable of sensible application, so that persons with claims cannot know what statute their claim falls within. In short, we contend that an insurance salesman's negligence cannot be translated into professional malpractice. The public policy and rationale for doctors and lawyers, as to likelihood of errors and impossibility of exact performance and results, simply does not exist for insurance agents. As a matter of fact, the subject

interpretation as to insurance agents by the Fifth District Court of Appeal, placing them under the two year statute, gives insurance agents unjustifiable short-term liability in tort and in contract.

POINT ONE

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

ARGUMENT

Since its first enactment in 1974, no appellate court has held that Section 95.11(4)(a), Fla. Stat. was intended by the Legislature to limit the time within which negligence or breach of contract actions could be brought against insurance agencies. For that matter, Plaintiff is unaware of any Florida appellate opinion even generally describing an insurance agent as a "professional", whether for purposes of a professional malpractice action or otherwise.

The 1974 Legislature enacted the Committee Substitute for House Bill 895 (R 237-267), effective January 1, 1975, and until then Ch. 95, Fla. Stat., did not specifically address general limitations of actions for professional malpractice. Instead, Section 95.11(6) Fla. Stat. (1973) provided a two year limitation for the filing of:

> "an action to recover damages for injuries to the person arising from any medical, dental, optometric, chiropodial or chiropractic treatment or surgical operation, the cause of action in such case is not to be deemed to have accrued until the Plaintiff discovers, or through use of reasonable care should have discovered, the injury."

Neither the Committee Substitute for House Bill 895, later codified as Ch. 74-382, Laws of Fla., nor the Legislative

Staff Summary (R227-236) discussing the changes, additions or deletions accomplished by the Committee Substitute for House Bill 895, reference any legislative intent to broaden the application of a two year limitation or to expand the advantage conferred by such a shorter limitation to occupations beyond those traditionally considered to be "professions."

As a result, we are left with little or no guidance as to what, if any, intent the Legislature had to change the status quo by enacting the Ch. 74-382, Laws of Fla. so as to provide, under Section 95.11(4)(a), Fla. Stat. (1975 and subsequent years) that:

> 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.

It appears that the purpose of the Legislature in segretating all the medical malpractice was to install for doctors a statute of repose also, which was not provided for other professions.

This left the situation in a position requiring interpretation, and the first significant case appears to have come up in the Fourth District Court of Appeal.

In Toledo Park Homes and HDV Construction Corp. v. Grant, 447 So.2d 343 (4 DCA 1984), the question arose whether a surveyor was a professional and therefore under the statute of limitations. The Fourth District Court stated, among other things that every activity subject to the jurisdiction of the Department of Professional Regulation did not constitute a "profession" within the scope of the malpractice statute of limitations. The Court stated that it was confident that the legislature did not intend to include such activities as embalming, cosmetics, etc., as professions when it enacted the professional malpractice statute.

The Fifth District Court of Appeal promptly disregarded the Fourth District's statement in Toledo Park when, in Cristich v. Allen Engineering, Inc., 458 So.2d 76 (Fla. 5th DCA 1984), the Fifth District Court noted that the Legislature has not provided a definition of "professional malpractice" in Chapter 95, nor has it listed what particular professions are encompassed within the term. Accordingly, the 5DCA in Cristich went to Webster's New Collegiate Dictionary (1979), which defines a "professional" as one who is "engaged

in one of the learned professions," and a "Profession" as "a calling requiring specialized knowledge and often long and intensive academic preparation." Id. at p. 78.

For comparison's sake, Black's Law Dictionary, Fifth Edition (1979), defines a "profession" as "a vocation or occupation requiring special, usually advanced, education and skill; e.g. law or medical professions," and "malpractice" as "professional misconduct or unreasonable lack of skill. This term is usually applied to such conduct by doctors, lawyers, and accountants."

In Cristich, the issue was whether a surveyor is a professional under Section 95.11(4)(a), Fla.Stat., and the opinion discusses the provisions of the Florida Statutes regulating surveyors and defining the practice of land surveying, which requires very substantial and long training.

Parenthetically, it should be noted that the Florida Department of Professional Regulation does not regulate insurance agents or agencies. As we have already stated, not all activities subject to the jurisdiction of the Department of Professional Regulation constitute "professions" within the scope of Section 95.11(4), Fla. Stat. See, Toledo Park, supra. In addition, the mere fact that the insurance industry in general, and insurance agents in particular, are regulated under Chapter 626, Fla. Stat. cannot be taken as indicative of

legislative intent to bring insurance agents within the scope of the two year professional malpractice limitation of actions. If state regulation were seen to confer professional status, then, for example, operators of moving picture machines (Ch. 468, Fla. Stat.), plumbers (Ch. 469, Fla. Stat.) and pest control operators (Ch. 482, Fla. Stat.) would all be deemed to be professionals.

It can and should be argued that when the limitations act for professional malpractice first was enacted, for example in 1974, there was nothing to indicate that the Legislature meant anything other than the common law definition of professional malpractice, as statedin a leading case, Richardson v. Doe, 176 Ohio St. 370, 199 N.E.(2d) 878 (1964), which limited the Ohio statute to law and medicine.

In 1975 medical malpractice was removed by the Florida Legislature to install a statute of repose, but there was no further limitation or definition of professional malpractice. This situation still, essentially speaking, obtains, and so it can and should be argued that the common law definition of professional malpractice is still with us. Courts have held that the common law meaning of professional malpractice is limited to professional misconduct of members of the medical and legal profession. Richardson, supra. It appears therefore that the Fifth District Court of Appeal was venturing far into

a void to reach its holding in Cristich, supra; but we do have Cristich with us; but we also have Toledo Park, which appears to conflict, as we have indicated, in holding that the four year statute applies to surveyors.

But even under the holding in Cristich, to be deemed a profession a calling must require specialized knowledge and often long and intensive academic preparation.

So we must face the problem here of whether the ruling of the Fifth District Court of Appeal in the instant case goes counter to Cristich as it interprets the statute; also, whether Toledo Park is any help, since there appears to be a conflict. See Koko Head, Florida Bar Journal, May 1987, "Florida Professional Malpractice Statute of Limitations, To Whom Does it Apply?" P. 63. Mr. Head writes at p. 64:

> The analysis and holding of the courts in both Toledo Park and Cristich indicate the continued dilemma of the Florida courts in determining which groups are to be afforded the protection of Sec. 95.11(4)(a). In Toledo Park the court confidently assumes that the legislature intended to restrict the scope of Sec. 95.11(4)(a) by its failure to enumerate the groups which constitute a "profession" within the scope of the statute; while in Cristich the court ignores the legislature's silence as to the statute's scope and creates its own "professional act" standard against which groups are to be examined to see whether they fall within the scope of Sec. 95.11(4)(a).

Mr. Head proceeds to point out (also on p. 64) that Ohio and Michigan courts have refused to broaden the common law definitions, and have asked their legislatures to name the groups intended by "professional".

Getting back to qualifications of insurance agents: while there is nothing in the Record to indicate that the Defendant was engaged in business as either a general lines agent, a life agent or a health agent, the minimum qualifications for licensure as a general lines agent are stricter than those for a life or health agent. Therefore, if any of the three types of agents are to be considered a "professional", it would arguably be the general lines agent.

To qualify for a general lines agent's license, the individual must not be untrustworthy or incompetent, must be 18 years of age and, unless the requirement is waived, must have been a bona fide resident of the state for at least one (1) year (Section 626.731, Fla. Stat.). Additionally, an applicant for a general lines agent's license must, within the four (4) years immediately preceding application, have:

> (a) Taught or successfully completed classroom courses in insurance satisfactory to the Department (of Insurance) at a school, college, or extension division thereof, approved by the Department;
>
> (b) Completed a correspondence course in insurance satisfactory to the Department and regularly offered by accredited institutions of higher learning in the state and, ..., has had at least six

months of responsible insurance duties as a substantially full time bona fide employee of an agent or an insuror, its managers, general agents or representatives, ...; or

(c) Completed at least one year in responsible insurance duties as a substantially full time bona fide employee of an agent or an insurer, its managers, managing general agents, or representatives, in all lines of insurance, exclusive of aviation and wet marine and transportation insurances, ... without the education requirement mentioned in paragraph (a) or paragraph (b). (Section 626.732, Fla. Stat.) (Emphasis added.)

Finally, an individual applying for a license must qualify for, take and pass to the satisfaction of the Department of Insurance a written examination, unless the individual is exempted, as set forth in Section 626.221, Fla. Stat. In fairness we should add here that only a general lines agent (and lawyers) can give opinions on insurance policies. 626.041(2)(d) Fla. Stat. 1981.

Therefore, an individual can qualify for and become a general lines agent, without even a high school diploma, upon completion of one year's responsible insurance duties as a full time employee of an agent or insuror, and upon passing a Department of Insurance examination. While one is obviously required to have some intelligence and knowledge to be licensed as a general lines agent, the level of specialized knowledge and the extent of academic preparation required fall far short

of what is required of physicians, accountants, engineers, architects or attorneys, all of which require four or more years of college education. Even surveyors, held to be professionals in Cristich, are required to have graduated from a university surveying program and to have at least two years experience under a professional land surveyor or at least eight years experience under a land surveyor, before being eligible to sit for the surveyor's licensing exam. See, Section 472.013, Fla. Stat.

We do not know whether it is truly available to us here, but we point out that the record in the instant case contains no evidence of the defendant insurance agent's educational and experiential background prior to licensing. But even assuming compliance with the statute for insurance agents, the instant case falls far short of the standard of Cristich, which case is itself subject to criticism in legal writings, as we have shown.

The reasoning of the Fifth District Court of Appeal in Pierce and the instant case reaches the realm of total uncertainty by stating that we should look not to the occupation of the person being sued, but to the act done which injures, and if the act involves "giving advice" using superior knowledge and training, imparting instruction and recommendations then it is professional. In the instant case

the 5DCA even uses, if not adopts, the totally irrelevant standard of "professional" and "amateur" as applied to sports and uses financial remuneration as a significant distinguishing feature; then the 5DCA proceeds to say, by way of example, that mechanics, electricians, plumbers, real estate agents, bankers, investment counsellors, appraisers, yacht surveyors, etc., all are or may be "professionals", and then, almost in passing, states that doctors and lawyers are professionals, too (A-3). The court sees no distinction between Cristich and the instant case.

The Fifth District Court of Appeal totally misses the rationale of this statute, which is explained in various sources, including Richardson, supra, and that rationale is, that doctors and lawyers are often unable to accomplish their desired purposes because of circumstances over which they have no control, and they are therefore peculiarly susceptible to unjustified charges of failure. Therefore the two year limitation would apply to them more than to others (meaning, of course, two years after knowledge). In the case of doctors, there is even the statute of repose. The reasoning of the Fifth District Court of Appeal misses this rationale, and also subverts and perverts it, to the great loss of the public, by qualifying all but amateurs and rank beginners as professionals.

The apparet reasoning in Pierce and Panther is that the 5DCA says to look at the act itself to see if it is one of counselling, and to look to the activity to see if it is the rendering of service for monetary gain. This generates a vagueness and overbroadness that makes the present statute incapable of application in a sensible way. People simply will not know what statute they are under, and so they will have to use the two year statute. Pierce and Panther have therefore effectively repealed the four year statute of limitations for a vast number of cases, and it is clear that this is not what the Legislature intended.

The Legislature either intended that professional malpractice was to be taken in its traditional meaning, that is to say, its common law definition of medical and legal practitioners, or the Legislature intended an interpretation of professional malpractice that includes something learned and of special experience and background, such as, perhaps, architects and engineers, but certainly not every skilled or semi skilled activity. We see the inevitable impasse of vagueness, a dark abyss of unknown and treacherous obstacles, when we think of examples. For one example, a horse riding trainer: when he advises his pupil how to sit and how to hold the reins a certain way, he is professional. But when he himself grabs the pupil's reins he is not. When he is speaking, he is under the

two year statute. When he is using his hands, he is under the four year statute. Of course he can use his hands to teach also. What kind of law is this? Surely this has generated a vagueness under which the statute is incapable of execution and enforcement under Florida Public Instruction of Broward County v. Doran, 224 So.2d 693, 697. It may not have been challenged as unconstitutional below, but if the act cannot be applied and administered because of its uncertainties, then the court should decline to permit it to go further down its present treacherous path, hopefully with a gentle suggestion to the Legislature, something like, "Help!".

The above analysis, and the statutes regulating the licensing of insurance agents and agencies demonstrate

1. even viewing the requirements for education and experience in a light most favorable to insurance agents and agencies, these requirements fall far short of even the test set forth in Cristich; and
2. it will be impossible for the courts of this State to interpret and apply this statute sensibly, reasonably, and predictably unless
   a) the common law definition of "professional is followed, or

b) the statute is declared vague and amendment is sought to define professional.

Any of the above will require quashal of Panther and remand.

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.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by delivery this 5th day of April, 1988, to Janet Delaura Harrison, Esquire, SMALBEIN, EUBANK, JOHNSON, ROSIER & BUSSEY, P. A., P. O. Box 695, Rockledge, Florida 32955.

By Lindsey Holland
Lindsey Holland