IN THE SUPREME COURT OF APPEAL
STATE OF FLORIDA

APPEAL NO.: 72,~~800~~ 080

PANTHER AIR BOAT CORPORATION, a Florida corporation,

Petitioner,

v.

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

Respondent.
_____/

BRIEF ON THE MERITS BY RESPONDENT, MacMILLAN-BUCHANAN & KELLY INSURANCE AGENCY, INC.,

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TABLE OF CONTENTS

CITATIONS OF AUTHORITY

MISCELLANEOUS:

STATEMENT OF THE CASE AND OF THE FACTS

Respondent, MacMillan-Buchanan & Kelly Insurance Agency, Inc. (MBK), would agree with the Statement of the Case and of the Facts as presented in limited fashion by Petitioner with several additions thereto.

In determining the legislative intent as to who is a "professional" within the meaning of the two year professional malpractice statute of limitation, the trial court looked to the legislative history of F.S. 95.11(4) and specifically determined that the 1974 amendment to the statute, which repealed specific categories of medical treatment in favor of a broad but undefined category of "professional malpractice", reflected an expanded interpretation of "professional" sufficient to include MBK, an insurance agency, within its confines (R-222). Such an approach here results in approval of the conclusion reached below, that an insurance agent is indeed a "professional" within the meaning of F.S. 95.11(4)(a).

One significant difference exists between this case and Pierce v. Aall Insurance, Inc.,[1] which is set for oral argument before this Court on April 27, 1988 on the same issues presented here. In Pierce, the insured specifically raised before the Fifth District an issue of whether F.S. 95.11(4)(a) was unconstitutional based on the contention that it was vague

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1. 513 So.2d 160 (Fla. 5th DCA 1987).

and ambiguous as to what occupations were included within the meaning of "professional".[2] However, that issue is not addressed in any way in either the majority opinion or the dissent of Judge Sharp. Nor was such issue certified to this Court in either Pierce or the case sub judice.

In contrast, Petitioner at no time raised any constitutional question, either by pleading or argument at the trial level, or, as it admits at page 17 of its brief, at the Fifth District level. In fact, by footnote, the Fifth District noted that fact in its opinion in Panther. That being so, Petitioner has waived any right to assert any constitutional issue here on appeal, albeit as indirectly done here.[3]

Two decisions of the Fifth District are currently before the Supreme Court on certified questions of great public importance as to whether an insurance agent is a "professional" within the meaning of the two year professional malpractice statute of limitation. In the first of the decisions, Pierce v. Aall Insurance, Inc.,[4] the majority refused to adopt an

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2. Aall Insurance, Inc. has pointed out in its brief in Case Number 71,381 that such an issue was verbally determined not to be preserved for appeal by the Fifth District (pg. 1).

3. One sentence on page 17 of Petitioner's brief concludes that the law is vague. See State ex. rel. Randall v. Miami Coin Club, Inc., 88 So.2d 293 (Fla. 1956) which holds that such a limited suggestion does not constitute proper briefing of an issue so as to be properly raised on appeal.

4. 513 So.2d 160 (Fla. 5th DCA 1987).

amorphous "traditional" limitation of "professional" to doctors and lawyers. Instead, the Court adopted an approach which analyzes the act involved to see if it involves the giving of advice through the application of superior knowledge, technical training or experience, or the imparting of recommendations in the learned arts. The majority concluded that an insurance agent is such a "professional" since he acts as an advisor and law-interpreter, a significant concept embodied in Florida statutory law which will be discussed later in the brief.

Though Judge Sharp dissented both in Pierce and in Panther, her dissent in Pierce ignored the requirement that an insurance agent have knowledge of other disciplines, specifically of Florida law pertinent to insurance matters. She also emphasized the possibility of limited academic preparation without acknowledging what other courts have long recognized, that the specific area of knowledge an insurance agent must possess to render proper advice is sufficient to bring him within the penumbra of "professional".

In the case sub judice, the Fifth District acknowledged Pierce and reiterated that an insurance agent is a "professional" within the professional malpractice statute of limitation because of his special skill, knowledge and training, even though such an occupation is not one "traditionally" thought of as a profession. As dicta, the Court enumerated other occupations for remuneration which are not traditionally thought of as professions, though the sole holding of the opinion was limited to the professional status of an insurance

agent. Both Judges Cobb and Judge Sharp concurred specially.

In sweeping language, Judge Sharp interpreted the majority holding in Panther to "repeal" the four year statute of limitation for negligence actions, a result never expressly or even impliedly reached by the majority. Though she admitted that the judicial role in interpreting the statute is to give effect to the legislature's intent, neither she nor the majority in Pierce or Panther looked to the statute's legislative history to determine same.

Judge Cobb's special concurring opinion purports to apply the common law in determining the definition of "profession", though no Florida cases are cited. In fact, his opinion appears to be merely an expression of his ideological difference with the legislature. He does not believe that the statute of limitation for any act of malpractice, medical or otherwise, should be less than that for general negligence. In fact, Judge Cobb prefers that any malpractice statute of limitation be longer than the one for general negligence. Unfortunately, such a philosophical difference is entirely irrelevant since it is unquestionably within the legislature's prerogative to create different statutes of limitation applicable to different situations.

It is Respondent's contention that consideration of the legislative history of F.S. 95.11(4) as well as consideration of other statutes regulating insurance agents clearly shows the legislature's intent that insurance agents and agencies are one of the "professions" entitled to the protection of the two year professional malpractice statute of limitation.

SUMMARY OF ARGUMENT

The Fifth District was correct in holding that MBK, as an insurance agency sued for malpractice for its failure to procure adequate insurance, was a "professional" as a matter of law within the meaning of the 2 year professional malpractice statute of limitation. That conclusion finds well-reasoned support in the law. First of all, judicial recognition of an insurance agent as a "professional" exists both in Florida at the trial and appellate levels, and in other states, because of the level of expertise demanded by the current intricacy of the field of insurance.

Florida law recognizes no material difference between an attorney/client relationship and the relationship between an insurance agency and its client. In fact, through F.S. 626.041(2)(d), the legislature has specifically mandated that only a general lines agent or an attorney may legally render opinions or counsel the public as to insurance matters. Indeed, by a recent enactment, Ch. 86-160, Section 14, Laws of Florida, the legislature included insurance agents within a group of other enumerated professionals (certified public accountants, attorneys, engineers, architects, and land surveyors) entitled to be self insured.

A determination that an insurance agency falls within the ambit of the professional malpractice statute of limitation is supported by the expanded definition of "professional malpractice" contained in F.S. 95.11(4)(a) as well as the recent amendment to Fla. Std. Jury Instr. (Civ.) 4.2(c).

Lastly, the conclusion that an insurance agency is a professional is soundly premised upon the detailed, extensive statutory regulation of general lines insurance agents and agencies in terms of education, instruction, knowledge of other disciplines, and experience.

POINI I ON APPEAL

AN INSURANCE AGENT IS A "PROFESSIONAL" WITHIN THE MEANING OF THE PROFESSIONAL MALPRACTICE STATUTE OF LIMITATION, F.S. 95.11(4)(a).

The Fifth District was correct in holding that MBK, as an insurance agency sued for malpractice for its failure to procure requested insurance, was a "professional" as a matter of law within the meaning of the two year professional malpractice statute of limitation. That conclusion finds well-reasoned support in the law. First of all, contrary to Petitioner's contention, judicial recognition of an insurance agent as a "professional" exists both in Florida and in other states, though the issue of whether an insurance agent is a "professional" within the meaning of F.S. 95.11(4)(a) has never been addressed by this Court.

In Seascape of Hickory Point Condominium Association, Inc., Phase III v. Associated Insurance Services, Inc.,[5] the Second District defined the duty of reasonable care that an insurance agent owes his client to render professional insurance planning advice where the agent failed to correctly advise a client of the existence and availability of insurance for a particular risk. Significantly, the Second District noted no material difference between a client seeking advice from an attorney (an admittedly "professional" relationship),[6] and a client seeking

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5. 443 So.2d 488 (Fla. 2nd DCA 1984).

6. The analogy between an attorney and an insurance agent is
(Footnote continued on next page)

advice or services from an insurance agency on the subject of insurance.

In upholding the legal sufficiency of the complaint, the Second District noted that the insurance agency and its two employees held themselves out as "professional insurance planners" who had served the plaintiff's insurance needs for several years, just as MBK served the Petitioner's insurance needs for years (R-184, ques. 7a).[7] Thus, regardless of whether the word "professional" is alleged, it is the relationship between the client and the insurance agency that creates the professional duty, just as an attorney has a professional relationship with his client.[8]

Other states, too, have easily concluded that an insurance agent is a professional given the level of expertise demanded by the current intricacy of the field of insurance. In Todd v.

(Footnote continued from previous page)
strengthened by the fact that only an attorney or a licensed general lines agent may analyze insurance policies and counsel, advise or render opinions as to insurance under F.S. 626.041(2)(d). This will be discussed further.

7. Thus, one criticism leveled by dissenting Judge Sharp in Pierce, that the record there did not show a long term course of dealing between the parties, does not apply here.

8. Seascape was cited as authority in Hotel Properties, Ltd. v. Savage-Manfre & Associates, Inc., 493 So.2d 544 (Fla. 3rd DCA 1986) which recognized that a cause of action exists against an insurance agency for "professional" negligence in failing to obtain desired coverage.

Malafronte,[9] the defendant insurance agent contended that a suit against him for negligence raised a question of professional competence under which his conduct must conform to a professional standard because he received extensive training and licensing. The Connecticut Appellate Court held that insofar as the sale of insurance required specialized knowledge, it agreed that a suit against the agent for failure to obtain insurance differed from a case of ordinary negligence.

Bell v. O'Leary[10] involved suit against an insurance agent for his failure to discover the insured's ineligibility for flood insurance. Just as Florida has equated a general lines agent with an attorney insofar as the rendering of advice or opinions as to insurance coverage is concerned, the Eighth Circuit held:

> "...O'Leary held himself out to the public as one who had superior knowledge of a specific area of business, insurance. As a professional, O'Leary is charged with the ability to do more than simply fill out application forms. He is charged with the knowledge of his business, which includes an awareness of what facts render his clients ineligible for insurance coverage..." (page 1373; emphasis supplied).

In an action against an insurance agent for failure to provide insurance for an off-premises accident, the Pennsylvania District Court in Fiorentino v. Travelers Insurance Company[11] held:

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9. 3 Conn.App. 16, 484 A.2d 463 (App. 1984).

10. 744 F.2d 1370 (8th Cir. 1984).

11. 448 F.Supp. 1364 (E.D. Penn. 1978).

> "The duty owed by an insurance agent to an insured is to obtain the coverage that a reasonable and prudent professional insurance agent would have obtained under the circumstances." (page 1369, 1370; emphasis supplied).

In like manner, the Tenth Circuit held in Butler v. Scott[12]:

> "...An agent employed to effect insurance must exercise the skill and diligence fairly to be expected from one in his profession...." (page 473; e.s.).[13]

Professional malpractice also has a judicially defined meaning not necessarily limited to a medical or legal context. The term "professional" is commonly used to distinguish those highly proficient in many endeavors from mere amateurs.[14] To undertake a professional assignment implies that the defendant possesses the degree of professional learning, skill and ability which others of that profession ordinarily possess.[15] "Malpractice" means the negligence of a member of a profession in his relation to a client, and describes the negligence of a professional toward the person for whom he has rendered a

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12. 417 F.2d 471 (10th Cir. 1969).

13. See also Oppenheim, Professional Malpractice: Welcome Insurance Agents and Brokers, Insurance Law Journal (December 1979); Ohm, Insurance Agents' and Brokers' Liabilities: An Overview of the Duties of the Insurance Professional to Their Principal, Defense Research Institute, Volume #2 (1986); Meechem, Outlines of Agency, Section 525 (4th Ed. 1952), which includes as one required to display specialized skills, attorneys, physicians and brokers.

14. Perfecting Service Company v. Product Development and Sales Company, 261 N.C. 660, 136 S.E.2d 56 (1964).

15. Id.

service.[16]

It cannot be denied that an insurance agent possesses a high level of expertise in intricate insurance matters simply not available to a layman, which squarely distinguishes him as highly proficient in endeavors beyond the grasp of one not so learned by education or experience. Clearly an insurance agent has been adjudicated and treated as a "professional" by both the Florida appellate courts and by numerous out-of-state decisions, all of which acknowledge the professional relationship between an insurance agent and his client akin to the attorney/client relationship.

The Fifth District in Pierce held that the 2 year professional malpractice statute of limitations applies to an insurance agency because an agent acts as "advisor and law-interpreter" who gives advice, using superior knowledge, technical training, and experience. Thus, according to Pierce, an insurance agent falls within the common understanding of the word "professional" using the analysis developed in Cristich v. Allen Engineering, Inc.[17] which held a land surveyor to be a "professional" within the malpractice statute.

It should be noted that Panther's illustration of the verbal advice by a riding instructor as being "professional" in contrast to the instructor's actions as non-professional imposes a far too literal and constrained analysis which is not

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16. Cubito v. Kreisberg, 419 N.Y.S.2d 578 (N.Y. S.Ct. 1979).

17. 458 So.2d 76 (Fla. 5th DCA 1984).

supported by any reading of Pierce. In vivid contrast to a horse riding instructor, there is no Florida law that equates him with an attorney as to the act of giving advice, nor is the riding instructor required to know and apply Florida law on insurance matters in doing his job.

Though admitting that "professional malpractice" is not defined in F.S. 95.11(4)(a), Judge Sharp's dissent in Pierce ignores the fact that the legislative history of the statute supports the inclusion of acts other than the traditionally accepted acts of a physician within the ambit of "professional". The legislative history of F.S. 95.11 shows the statute's progression to a more expansive definition of "professional", which is indicative of an intent to include professional relationships not previously enumerated therein. The trial court below specifically found that such a change reflected an expanded definition of "professional" sufficient to include MBK, an insurange agency (R-222). Looking at the statute's legislative history in the context of other laws enacted on similar subjects dispels any contention that the statute is vague in its application.

Chapter 71-254, Section 1, Laws of Florida first placed within the two year statute for personal injuries actions involving specified kinds of treatment or surgery: any medical, dental, optometric, podiatric or chiropractic act. Contrary to Petitioner's argument, this version of the statute in no way limited its applicatin to professions, traditional or otherwise, and did not use the term "malpractice".

The change pertinent here occurred in 1974 when Chapter 74-382, Section 7, Laws of Florida[18] placed "professional malpractice" actions in a separate section, F.S. 95.11(4)(a). Significantly, the legislature deleted the enumerated categories of actions in a medical context and replaced them by allowing any action for "professional malpractice", (a new phrase coined by the legislature), whether such malpractice was founded in contract or tort. It was not until the Medical Malpractice Reform Act in 1975 that the legislature created F.S. 95.11(4)(b) for medical malpractice only,[19] leaving intact F.S. 95.11(4)(a) as to acts of other professional malpractice. However, the movement of medical malpractice to a separate section did not have the effect of limiting (4)(a) to attorneys only, as Petitioner suggests.

It seems obvious that the legislature's elimination of specified categories of medical treatment in favor of broadened language of inclusion of all acts of "professional malpractice" indicates its intent to expand the application of the statute to professions other than the medical field. The Supreme Court of Michigan is in accord with such an expansive interpretation.

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18. MBK's objection to the legislative history (R-39) should have been sustained since it was required to be introduced through the mechanism of judicial notice. Department of Health and Rehabilitative Services v. Shatto, 487 So.2d 1152 (Fla. 1st DCA 1986). However, even if it is considered, it provides no guidance of the issue here. However it in no way construes the statute to be limited to "traditional" profession.

19. Ch. 75-9, Section 7, Laws of Florida.

In Sam v. Balardo,[20] it determined that attorneys now fell within Michigan's two year professional malpractice statute of limitation. In pertinent part, the Court held:

> "We find that the deletion of the words "physicians, surgeons or dentists" [from the initial form of the statute as first enacted] was the purposeful removal from the statute of language of limitation and is a clear and specific indication of legislative intent to change substantively the meaning of [the professional malpractice statute]" (emphasis supplied; at pages 152, 153 of the opinion).

It should be noted that Petitioner has cited no caselaw rejecting such an interpretation, and in fact ignores rules of statutory construction that require an analysis of a statute's legislative history to glean and thereby effectuate the legislature's intent. The Michigan Supreme Court in Sam chose not to follow the definition of malpractice enunciated in its previous decision 7 years earlier of Kambas v. St. Joseph's Mercy Hospital of Detroit[21] which was relied on by Petitioner below. Kambas was based in part on Richardson v. Doe[22] which is cited briefly by Petitioner here and by Judge Cobb in his concurring opinion in Panther.

Doe provides no assistance on the issue raised here for a number of reasons. First, Ohio's statute of limitation addresses "malpractice", not "professional malpractice". More

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20. 411 Mich. 405, 308 N.W.2d 142 (1981).

21. 389 Mich. 249, 205 N.W.2d 431 (1973).

22. 176 Ohio St. 370, 199 N.E.2d 878 (1964).

importantly, the Ohio statute's legislative history reflects no change by eliminating enumerated medical categories in favor of a broad, encompassing term of "professional malpractice" as was evident in Florida. Nor were there other statutes enacted by the Ohio legislature that clearly indicated its desire that an insurance agent be considered "professional" as is evidenced here. In addition, though Ohio's common law may have limited "malpractice" to a medical and legal context, no such showing is made here as to the Florida common law. In fact, historically "malpractice" would not appear to be so limited in this state.[23]

The Michigan Supreme Court in Sam provided an explanation for a broadened interpretation of "malpractice" beyond the medical field. It noted that when Michigan's first malpractice statute of limitation was enacted in the 1900's, very few malpractice actions existed against attorneys. Thus, the Court reasoned that medical malpractice actions were far more prevalent, which explained the early protection given to the medical profession by the legislature. However, given the passage of time, the Michigan Court noted the increased number of malpractice actions against attorneys "and other groups" as the explanation for the Michigan legislature's expansion of those entitled to the protection of the malpractice statute of limitation (page 154 of the opinion).

That same analysis can be made here. It is probable

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23. Cf. Ex Parte Amos, 112 So. 289 (Fla. 1927); Everett v. Gillespie, 63 So.2d 903 (Fla. 1953).

that no actions against insurance agents were in existence at the turn of the century, as vividly contrasted to recent decades which have seen a proliferation of suits against insurance agents when a particular policy did not cover a particular risk after the policy was interpreted legally by the courts. Thus, the Florida legislature's substantive change to the professional malpractice statute of limitation must have taken into account the barrage of malpractice suits against those other than doctors when they revised the statute in 1974 and retained the expanded version after the Medical Malpractice Reform Act in 1975.

Certainly the Michigan Supreme Court's analysis in Sam as to the similarity between attorneys and doctors as justification for including attorneys within the protection of a shortened malpractice statute of limitation has equal application here to insurance agents. The Court in Sam notes repeatedly that an attorney must make decisions involving independent professional judgment of the same serious quality as those made by a doctor, though involving a different expertise. "Like physicians, attorneys are required to exercise independent judgment as to what course of action will best serve their clients' interests" (page 151, footnote 24).

That is precisely the context within which an insurance agent finds himself today. He, too, must give advice as to what insurance protection is available in the market or is best able to serve a particular insured's needs. Moreover, the agent must know what coverage is available and what specific form will cover a risk (despite the fact that he is not a lawyer) or

subject himself to a malpractice suit if there is a later ultimate determination by the courts that the policy he procured did not in fact cover the insured for that particular risk.

It is significant to note that had the legislature intended to circumscribe the activities it deemed "professional" in making the 1974 change, it could have done so by category, definition, or by expressing a level of education beyond high school.[24] However, it did neither, and that omission is significant.[25] This is because the legislature may enact a statute as restrictive or as all-inclusive as it sees fit and the courts must give effect to its intent.[26] To hold, as the concurring judges in Panther would prefer, that F.S. 95.11(4)(a) is limited to certain enumerated occupations which were not so specified by the legislature would invoke or judicially engraft limitations on or add words to the statute

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24. Petitioner suggests that it is the level of education beyond high school that delineates a profession, citing as examples physicians, accountants, engineers, architects or attorneys. The legislature made no such distinction, but instead opened the application of F.S. 95.11(4)(a) to the general category of "professional malpractice". Interestingly enough, such an argument ignores the fact that at one time, even applicants for the bar examination need only have had a high school education, or its equivalent. See Petition of Florida State Bar Assoc., 134 Fla. 851, 186 So.280 at 286, 288 (1938).

25. Aall Insurance, Inc. in Case Number 71,381 has specifically cited from tapes of the 1974 hearings on the proposed statutory change which disclose the legislature's specific decision not to enumerate categories of "professions".

26. Leatherman v. State ex. rel. Somerset Company, 133 Fla. 630, 182 So. 831 (1938).

which were not placed there by the legislature. Courts are specifically proscribed from taking such liberty in interpreting and applying statutory law.[27]

Stated another way, for this Court to ignore the legislative history of the statute which reflects the broadening in 1974 of "professional malpractice" would be to assume the legislature acted pointlessly. Such a conclusion would violate accepted rules of statutory construction.[28] To the contrary, when the legislature amends a statute, the courts are to presume that the legislature intended the new statute to have a different meaning from the repealed version and to give effect to the legislative intent.[29] That cannot be accomplished if Petitioner's position is adopted here.

Since 1974 when the legislature first coined the phrase "professional malpractice" within a statute of limitation context, two cases involving judicial discussion of significant terms have been rendered, which the legislature is presumed cognizant of in its determination not to change the statute in response to these decisions. The Second District in Seascape of

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27. Hialeah, Inc. v. B & G Horse Transportation, Inc., 368 So.2d 930 (Fla. 3rd DCA 1979); Chaffee v. Miami Transfer Company, Inc., 288 So.2d 209 (Fla. 1974); Kelly v. Retail Liquor Dealers Association of Dade County, 126 So.2d 299 (Fla. 3rd DCA 1961).

28. Neu v. Miami Herald Publishing Company, 462 So.2d 821 (Fla. 1985).

29. Causeway Lumber Company, Inc. v. Lewis, 410 So.2d 511 (Fla. 4th DCA 1982), rev.den., 419 So.2d 1196 (Fla. 1982); Kelly v. Retail Liquor Dealers of Association of Dade County, 126 So.2d 299 (Fla. 3rd DCA 1961).

Hickory Point v. Associated Insurance Services, Inc.[30] acknowledged an insurance agent to be a "professional" akin to a lawyer. Cristich v. Allen Engineering, Inc.[31] developed the judicial approach to determining who may be a "professional" within the meaning of the statute in question here. In addition to these decisions, the legislature had already placed insurance agents on a par with attorneys as to giving advice on insurance matters through the enactment of F.S. 626.041(2)(d).

Far from restricting the ambit of F.S. 95.11(4)(a) in response to Seascape and Cristich, the legislature has in fact continued its expansion of the term "professional" in other areas of the law as well. Subsequent to the action filed here, as part of the sweeping Tort Reform and Insurance Act of 1986, the legislature expanded authorized professional liability self-insurers beyond the legal profession, to which such an option had previously been limited under F.S. 627.356, to include certified public accountants, architects, engineers, land surveyors and insurance agents. Chapter 86-160, Section 14, Laws of Florida. This statute emphasizes the legislature's latest expression of its clear expansive interpretation of "professional" beyond the "traditional" understanding of same to include insurance agents.[32]

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30. 443 So.2d 488 (Fla. 2nd DCA 1984).

31. 458 So.2d 76 (Fla. 5th DCA 1984).

32. Courts may consider subsequent legislation on a subject to aid in determining legislative intent in enacting other statutes. Cf. Parker v. State, 406 So.2d 1089 (Fla. 1982).

Other indicia confirm that "professional" may include the activities of an insurance agency. Judicial implementation of the legislature's recognition that actions for professional malpractice exist beyond the medical, legal, and architectural fields occurred through the creation of Fla. Std. Jury Instr. (Civ.) 4.2(c), which was developed after both the Seascape and Cristich decisions, and after the enactment of F.S. 626.041(2)(d).[33] The Comment to the instruction recognizes that others may be determined as a matter of substantive law to be a professional liable for negligence, citing in support thereof First American Title Company v. First Title Service Company[34] which involved the liability of a title abstractor as a professional.

Before the Pierce and Panther cases were decided, only two cases analyzed the specific question of what other activities are a "profession" so as to come within the ambit of the professional malpractice statute of limitation. In Cristich v. Allen Engineering, Inc.,[35] the Fifth District developed an analysis for deciding if an act is a "professional" one, noting

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33. See The Florida Bar re: Standard Jury Instructions, 459 So.2d 1023 (Fla. 1984).

34. 457 So.2d 467 (Fla. 1984). See also Don Mar, Inc. v. Gillis, 483 So.2d 870 (Fla. 5th DCA 1986), where it was held, without discussion, that an action against a certified public accountant falls within the professional malpractice statute. It is interesting to note that a CPA must have a working knowledge of tax law in order to appropriately advise his clients, just as an insurance agent must have a working knowledge of insurance law to do the same.

35. 458 So.2d 76 (Fla. 5th DCA 1984).

that the legislature has neither defined the term nor enumerated professions. The Court looked to the statutes governing the act of land surveying to see if they disclosed such specialized knowledge so as to be considered a "profession".

It should be noted that in Cristich, as here, there is no factual evidence as to the licensing and credentials of the professional involved.[36] In fact, as here, the "professional" involved was a corporate entity just like MBK, not the individual surveyor. Instead, the Fifth District in Cristich and the trial court here looked to the applicable statutes to determine whether MBK qualified as a professional as a matter of law.[37]

It is hard to imagine a more highly regulated industry than insurance because of its immediate impact on the public. The intricacies of insurance in general, and the concomitant strict statutory regulation of insurance agencies and agents have long been acknowledged by the courts. As noted by the Supreme Court of South Carolina in Riddle-Duckworth, Inc. v. Sullivan,[38]:

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36. Other than the admission by answer that MBK is authorized to do business as an insurance agency in Florida [R-167, 202].

37. Cristich specifically refused to follow the contrary decision of the Fourth District in Toledo Park Homes v. Grant, 447 So.2d 343 (Fla. 4th DCA 1984), which held, without analysis, that land surveying was not a profession simply because it was regulated by the Department of Professional Regulations. The opinion did not analyze the extent of statutory regulation of that activity.

38. 253 S.C. 411, 171 S.E.2d 486 (1969), at page 490; emphasis supplied.

> "Insurance has long been recognized as a business affected with public interest. It is a complicated business and its intricacies often confuse the average layman. The Legislature has accordingly provided for the licensing of insurance agents by the State so as to place the business of insurance in competent and trustworthy hands. This court in La Tourette v. McMaster, 104 S.C. 501, 89 S.E. 398, in recognizing the specialized nature of the insurance business, stated: 'It is one of many complications, requiring, for its safe conduct, not only expert knowledge, but such knowledge as can be acquired only by experience in the business.'
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> Therefore, the respective duties and obligations arising from the relationship of a principal and his agent in the procurement of insurance must be determined in the light of the fact the agent was an expert dealing in a highly specialized business, with knowledge and means of knowledge not possessed by the average applicant for insurance."

Sullivan's view of the insurance industry and the highly specialized role of the insurance agent has equal application to Florida, where insurance agents must be conversant not only with every conceivable type of insurance policy and risk, but also with such statutory creatures as personal injury protection and uninsured motorist insurance. To render professional advice or opinions on insurance matters, the agent must also be aware of the judicial construction and interpretation of policies, thereby requiring knowledge of another discipline, law. Not even a wise layman can conceivably discern his insurance needs today without the assistance of an insurance expert.

Both Florida statutes and the Florida Administrative Code establish the detailed education and experience required to

become licensed as a general lines insurance agent, or an agency such as MBK. Under the analysis provided in Cristich, these regulations and the judicial constructs of an agency as a professional are sufficient to sustain both the trial court's and the Fifth District's finding MBK to be a professional within the professional malpractice statute of limitation as a matter of law.

The Department of Insurance regulates every aspect of the insurance industry, from accounting requirements to insurance rates, as well as the requirements for numerous types of insurance (F.S., Chapter 624 - Chapter 651). It regulates every individual who transacts or advises the public as to insurance (F.S., Chapter 626). Chapter 626 regulates insurance agents of all kinds, insurance adjusters, and insurance agencies as to all types of insurance.[39] Since the policy involved here was a casualty insurance policy, it was transacted by MBK through its employees as a general lines agency, which is authorized to transact property, casualty and surety insurance.[40]

It is significant to note that according to F.S. 626.041(2)(d), only a licensed general agent may engage in the business of analyzing insurance policies or counseling, advising or rendering opinions as to insurance other than an attorney. This establishes a legislatively created parity between the two

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39. F.S. 626.022(1).

40. F.S. 626.04(1).

professions insofar as insurance expertise is concerned.[41] It is simply inconceivable that the legislature could hold an agent to the standard of knowledge of a lawyer as to insurance matters on the one hand but on the other hand eliminate the agent from the protection of the shortened statute of limitation which protects a lawyer. This would mean that improper advice on insurance matters by an attorney would be subject to a two year statute, whereas the same improper advice by an insurance agent would be subject to a four year statute, a result which has no rational basis. Such a result is clearly not intended by the legislature, given the history of F.S. 95.11 and the other statutes discussed herein.

As applicable here, F.S. 626.041(2)(d) can only be interpreted as implied recognition by the legislature that being an insurance agent requires knowledge of and application of other disciplines, that of law as it applies to insurance matters, in interpreting what coverage is available and applicable for an insured's particular needs.[42] This recognition of knowledge of cross-disciplines provides another analogy to Cristich which was ignored by Judge Sharp's dissent in Pierce.

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41. See also Seascape of Hickory Point Condominium Association, Inc., Phase III v. Associated Insurance Services, Inc., 443 So.2d 488 (Fla. 2d DCA 1984), which found no material difference between the attorney/client professional relationship and the insurance agency/client professional relationship.

42. An insurance agent is specifically tested on all pertinent Florida law. F.S. 626.221 and F.S. 626.241.

The statutory scheme of regulation of insurance agencies and agents supports their inclusion as "professionals". An insurance agency is defined to be a business location at which an individual or entity engages in activities which by law may be performed only by a licensed insurance agent.[43] Agents and insurance agencies are required to be licensed[44] which issues only after investigation into their experience and fitness, and upon approval of the application.[45] Upon approval, the applicant must take an examination which tests his ability, competence and knowledge in all kinds of insurance, the transactions to be handled, his duties and responsibilities, and all pertinent Florida law.[46] Examination questions must be in essay and problem solving form.[47]

The extent of knowledge, experience or instruction for a general lines agent is addressed in F.S. 626.732. The applicant must have either (1) taught or successfully completed an approved classroom course in insurance at an approved school or college; or (2) completed an approved correspondence course in insurance regularly offered by an accredited college or university, in addition to six months experience in responsible

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43. F.S. 626.094.

44. F.S. 626.112(1) and (5)(a); F.S. 626.171, F.S. 626.172.

45. F.S. 626.201; F.S. 626.211.

46. F.S. 626.221, F.S. 626.241.

47. Fla. Admin. Code Rule 4-52.04.

insurance duties as a full-time employee of an agent or insurance agency in all lines of insurance; or (3) completed at least one year of responsible insurance duties as a full-time employee of an agency or insurance company.[48]

Florida's Administrative Code prescribes further detail for the education and experience requirements. Fla. Admin. Code Rule 4-52.01 dictates that a general lines qualification course consist of either 240 hours of classroom instruction in all lines of insurance, or a correspondence course equivalent to six semester hours of classroom instruction in all lines of insurance offered by an accredited institution of higher learning. The courses, the outlines used, and the school must be approved by the Department of Insurance.[49] Significantly, an individual satisfying the education requirements by completing courses in insurance offered by an accredited school for college credit must have either a four-year college degree with major course work in insurance, or 15 semester hours of college credit in property and casualty insurance, or have completed a correspondence course equivalent to six semester hours of classroom instruction in all lines of insurance.[50]

To briefly dispose of Petitioner's belated attempt to suggest a constitutional issue, it should be noted that in

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48. The student must also be familiar with current insurance policies and related forms which are required to be made available to him as part of his instruction. Fla. Admin. Code Rule 4-52.05.

49. Fla. Admin. Code Rule 4-52.02; 4-52.03.

50. Fla. Admin. Code Rule 4-52.10.

contrast to Pierce, no such contention was made at either the trial or Fifth District levels, nor is it certified as an issue here. The Fifth District's opinion in Panther expressly notes that no constitutional issue was raised by Petitioner which Petitioner admits here (page 17).

It is axiomatic that by failing to raise the issue at the trial level, appellate courts will not consider the issue on appeal.[51] Even had Petitioner timely raised such an issue, constitutional issues will not be reached by the courts if the case can be decided on other grounds.[52] Stated in other terms, if a law can be fairly construed to make it lawful, in deference to the legislature's lawmaking power, the courts should give it that effect rather than adjudge the statute to be illegal or vague.[53] Certainly, a statute is not unconstitutional simply because it is subject to different interpretations.[54] Thus, the spectre of constitutional infirmity lacks merit.

In sum, Florida has exacted a high price from aspiring insurance agents in the form of a demonstration of specialized

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51. Smith v. Brantley, 400 So.2d 443 (Fla. 1981); Granados v. Miller, 369 So.2d 358 (Fla. 4th DCA 1979), dismd., 394 So.2d 1152 (Fla. 1981); Picchione v. Asti, 354 So.2d 954 (Fla. 3rd DCA 1978).

52. Granados v. Miller, 369 So.2d 358 (Fla. 4th DCA 1979), dismd., 394 So.2d 1152 (Fla. 1981).

53. Board of Public Instruction of Broward County v. Doran, 224 So.2d 693 (Fla. 1969).

54. Department of Insurance v. Southeast Volusia Hospital District, 438 So.2d 815 (Fla. 1983).

knowledge of insurance matters, including Florida law applicable thereto, which is obtained after intensive academic preparation or its equivalent by experience. Knowledge available to a licensed insurance agent having met all of Florida's requirements simply has no parallel to the layperson. His education and experience in the complicated and specialized business of insurance, and his knowledge of Florida law pertinent thereto, qualifies him, and an insurance agency which acts only by and through its agents, to be treated judicially as a "professional". Where judicial opinion in both Florida and other states has recognized the insurance agent's calling as a professional because of the specialized knowledge required of the business of insurance, where the degree of preparation to become a licensed agent is detailed and extensive, and where Florida law has specifically recognized the parity between an insurance agent and a lawyer as to insurance matters, the Fifth District's conclusion that MBK is a professional within the meaning of the professional malpractice statute of limitation should be affirmed.

CONCLUSION

In conclusion, Florida has exacted a high price from aspiring insurance agents in the form of a demonstration of specialized knowledge of insurance matters, including Florida law applicable thereto, which is obtained after intensive academic preparation or its equivalent by experience. Knowledge available to a licensed insurance agent having met all of Florida's requirements simply has no parallel to the layperson. His education and experience in the complicated and specialized business of insurance, and his knowledge of Florida law pertinent thereto, qualifies him, and an insurance agency which acts only by and through its agents, to be treated judicially as a "professional". Where judicial opinion in both Florida and other states has recognized the insurance agent's calling as a professional because of the specialized knowledge required of the business of insurance, where the degree of preparation to become a licensed agent is detailed and extensive, and where Florida law has specifically recognized the parity between an insurance agent and a lawyer as to insurance matters, the Fifth District's conclusion that MBK is a professional within the meaning of the professional malpractice statute of limitation should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief on the Merits by Respondent has been furnished by mail this 21st day of April, 1988, to Lindsey Holland, Esquire, Post Office Box 459, Melbourne, Florida 32902-0459.

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