

920-85-0181A WCM/jc

IN THE SUPREME COURT OF
OF FLORIDA

CASE NO: 72844

CONSOLIDATED AMERICAN INSURANCE
COMPANY, INC.,

Appellants/Petitioner

vs.

CHARLES BUCOLO,

Appellee/Respondent.

FILED

SID J. WHITE

AUG 12 1988

CLERK, SUPREME COURT

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Deputy Clerk

**APPELLANT/PETITIONER'S BRIEF ON PETITION
FOR DISCRETIONARY REVIEW TO SUPREME COURT FROM
DISTRICT COURT OF APPEAL OF FLORIDA, 3RD DISTRICT**
CASE NO. 87-1035

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STATEMENT OF CASE AND FACTS

Petitioner, CONSOLIDATED AMERICAN INSURANCE COMPANY, "CONSOLIDATED", filed a Declaratory Judgment action against CHARLES BUCOLO, its insured, after he was sued by KIMBERLY CADE HENDERSON. HENDERSON in her Complaint alleged BUCOLO sexually molested her when she was a minor and that his acts were intentional.

The gravamen of CONSOLIDATED's Declaratory Judgment action against BUCOLO was that intentional acts (child sexual molestation) were not covered under its policy.

BUCOLO filed a Motion for Summary Judgment stating that CONSOLIDATED had failed to comply with the time parameters prescribed by §627.426 (2) (a) F.S., to notify him of a particular coverage defense and, therefore, could not deny coverage.

The trial court granted BUCOLO's motion and entered Final Judgment for BUCOLO decreeing coverage under CONSOLIDATED's policy.

CONSOLIDATED appealed to the Third District Court of Appeal. The basis of its appeal being that §627.426 (2) (a) F.S., was immaterial to this case since CONSOLIDATED's policy never covered BUCOLO's intentional act of sexual molestation and to apply this statute created coverage where none existed by waiver and estoppel, which is contrary to the well established law of this court. Secondly, the application of this statute to the facts of this case is an unconstitutional impairment of contract under both the Florida and the United States Constitutions.

(Florida Constitution: Article 1, Section 10; USCA: Article 1, Section 10, Clause 1).

The Third District Court of Appeal per curiam affirmed the trial court on the authority of: AIU Insurance Company v. Block Marina Investments, Inc., 512 So.2d 1118 (Fla. 3d DCA 1987); §627.426 (2)(a), Florida Statutes, on May 17, 1988, and denied Petition for Rehearing on June 30, 1988.

Petition to this Court for Discretionary Review filed was July 29, 1988.

SUMMARY OF THE ARGUMENTS

AIU Insurance Company v. Block Marina Investments Company, 512 So.2d 1118 (Fla. 3d DCA 1987) interprets §627.426 (2) (a) to allow creation of insurance coverage by waiver and estoppel where the insurer fails to comply with the timely notice requirements of that statute to an insured of denial of coverage.

Block Marina conflicts with USF&G v. American Fire and Indemnity Co., 511 So.2d 624 (Fla. 5th DCA 1987), which holds that the legislature did not intend to abolish existing case law which holds that insurance coverage cannot be created by waiver and estoppel, to wit: Six L's Packing Co. v. Florida Farm Bureau Mutual Insurance Co., 276 So.2d 37 (Fla. 1973), and the progeny of that case.

The Third District Court of Appeal has acknowledged this direct conflict and pursuant to Article 5, Section 3(b)(4), Florida Constitution, has certified same to this Court. This Court has accepted jurisdiction of Block Marina (Supreme Court Case No. 71264).

Application of §627.426 (2) (a) to this case constitutes retroactive application of a statute to a pre-existing contract which unconstitutionally impairs that contract under both the Florida Constitution and the United States Constitution.

The events giving rise to HENDERSON's cause of action against BUCOLO had occurred and CONSOLIDATED's home owner's insurance policies under which BUCOLO was an insured had expired before §627.426 (2) (a) was enacted into law.

JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review a decision of the district court of appeal that expressly and directly conflicts with a decision of the Supreme Court or another district court of appeal upon the same point of law, and also upon the grounds that the decision below expressly construes a provision of the Florida Constitution. Article V, Section 3(b)(3), Florida Constitution, 1980; Florida Rules of Appellate Procedure, 9.030 (a)(2)(A)(iv).

ARGUMENT

I

In this case, the Third District Court of Appeal per curiam affirmed the trial court upon the authority of its decision in AIU Insurance Co. v. Block Marina Investments, Inc., 512 So.2d 1118 (Fla. 3d DCA 1987) and §627.426 (2) (a). (Appendix 1).

The Third District Court of Appeal when it rendered its decision in AIU Insurance Co. v. Block Marina Investments, Inc., certified to this court pursuant to Article 5, Section 3(b)(4), Florida Constitution, a direct conflict with USF&G v. American Fire and Indemntiy Co., 511 So.2d 624 (Fla. 5th DCA 1987). This court has accepted jurisdiction of Block Marina. (Supreme Court Case No. 71264). The points of law involved in this case are identical with those involved in the Block Marina and the USF&G v. American Fire and Indemnity Co. cases. In all three cases, the legal issues were the same:

1. Coverage was denied by the insured;
2. §627.426 (2) (a) was invoked by the insured to secure coverage predicated upon untimely notice of denial given by the insurer as required by that statute.

It follows, therefore, that the Third District Court of Appeal's decision in this case conflicts with the Fifth District Court of Appeal's decision in USF&G v. American Fire and Indemnity Co..

In Block Marina, the Third District Court of Appeal held that when there is non-compliance with a statute's time

parameters, an insurer is not permitted to deny coverage based upon a particular coverage defense, thereby allowing coverage to be created by waiver and estoppel.

The Fifth District Court of Appeal ruled that the statute cannot create coverage by waiver and estoppel where none existed, since the legislature is deemed to know existing law which prohibits creation of insurance coverage by waiver and estoppel, and, therefore, the statute is irrelevant where coverage never existed under the policy.

II

§627.426 (2) F.S., APPLIED TO THE FACTS OF THIS CASE IS AN UNCONSTITUTIONAL IMPAIRMENT OF CONTRACT UNDER BOTH THE FLORIDA AND THE UNITED STATES CONSTITUTION (FLORIDA CONSTITUTION ART. 1, SEC. 10. USCA ART. 1, SEC. 10, CL.1).

Block Marina, the authority for the decision below in this case stated that the legislature, in unambiguous language has provided that where the statute's notice provisions are not followed by the insurer, that the insurer is not permitted to deny coverage based upon a particular coverage defense. Block Marina at 1119. The effect of the opinion is that it makes an insurer strictly liable for insurance coverage by virtue of this legislative enactment regardless of the terms of the insurance contract or the facts of a particular case. It, therefore, is not a procedure statute but affects the substantive rights of the parties to the insurance contracts.

The Third District Court of Appeal in Block Marina and in this case clearly holds that §627.426 (2) (a) can and does create coverage by waiver and estoppel. This becomes crystal clear upon a reading of that court's Landis¹ decision where it held that child sexual molestation is an intentional act as a matter of law and is not covered under a home owner's insurance policy. That is precisely the facts in this case. Therefore, if BUCOLO's acts of child sexual molestations are intentional as a

¹ Landis v. Allstate Insurance Company, 516 So.2d 305 (Fla. 3d DCA 1987). §627.426 (2) (a) and its notice provisions were not raised in this case.

matter of law and not covered under CONSOLIDATED's policies, coverage can only be created for him by waiver and estoppel, which the Third District Court of Appeal does by application of the statute.

But §627.426 (2) (a) did not become law until after BUCOLO's alleged acts of sexual molestation and the policies under which he was an insured had expired. The statute, therefore, must be applied retroactively.²

Existing laws, both statutory and decisional, form part of a contract at the time it is executed as if they were incorporated into it.³

At the time CONSOLIDATED's policies which insured BUCOLO were executed and during all the coverage periods, the unequivocal law of Florida was that insurance coverage could not be created by waiver and estoppel.⁴

It follows, therefore, that to apply the statute retroactively to create coverage for BUCOLO under CONSOLIDATED'S policies by a species of waiver and estoppel clearly unconstitutionally impairs its contract, because it obliterates a substantive right CONSOLIDATED had in these contracts.⁵

2 §627.426 (2) (a) became law in 1982. The policies in this case expired May 13, 1978. The alleged events of child sexual molestations occurred during the policies periods.

3 Columbia County v. King, 13 FLA 451 (1871); King v. Duval County, 174 So.2d 817 (1937)

4 Six L's Packing Co. v. Florida Farm Bureau Mutual Insurance Co., 276 So.2d 37 (Fla. 1973) and its progeny.

5 Statute as enacted is constitutional but an amendment cannot be applied retroactively since to do so would result in an

This constitutional issue has been raised in all courts below and has been ignored. But even if it had not this Court could still take cognizance of this issue.⁶

unconstitutional impairment of an existing contract. State Department of DOT v. Edward M. Chadborne, Inc., 382 So.2d 293 (Fla. 1980). See also: State Farm Mutual Auto Insurance Co. v. Gant, 478 So.2d 25 (Fla. 1985); Pomponi v. Claridge of Pompano Condominium, Inc., 378 So.2d 774 (Fla. 1979); Dewberry v. Auto Owners Insurance Company, 363 So.2d 1077 (Fla. 1978); State of Florida DOT v. Cone Brothers Contracting Co., 364 So.2d 482 (Fla. 2d DCA 1978); Fireman's Fund Insurance Co. v. Pohlman, 485 So.2d 418 (Fla. 1986).

6 Bigler v. Department of Banking and Finance, 394 So.2d 989 (Fla. 1981); People's Bank, etc. v. State Department of Banking and Finance, 395 So.2d 521 (Fla. 1981); 2829 Corporation v. Division of Alcohol Beverage, etc., 410 So.2d 539 (Fla. 4th DCA 1982). The basis for addressing the unconstitutionality of the statute for the first time on appeal is that the issue involves fundamental error. See also: Wollard v. Lloyds and Companies of Lloyds, 439 So.2d 217 (Fla. 1983).

CONCLUSION


The decision in this case being based solely on Block Marina and §627.426 (2)(a) and this court having accepted jurisdiction of that case as conflicting with USF&G v. American Fire and Indemnity Co., and since the three cases involve the identical points of law, clearly conflict exists between this case and USF&G v. American Fire and Indemnity Co..

The decision of this court in Block Marina would be dispositive of this case except for the unconstitutional impairment of contract issue raised by this petition.

It is, therefore, submitted that because of the foregoing reasons your petitioner be granted appellate review and be allowed to brief this court on the merits of its case.

Respectively submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to : Daniels and Hicks, P.A., Suite 2400, New World Tower, 100 N. Biscayne Boulevard, Miami, FL 33132; and Caron Balkany, Esq., 850 San Pedro, Coral Gables, FL 33156; on August 10, 1988.

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