IN THE SUPREME COURT OF FLORIDA

CASE NO. 72,844

CONSOLIDATED AMERICAN
INSURANCE COMPANY, INC.,

Petitioner,

vs.

CHARLES BUCOLO,

Respondent.
_____/

ON PETITION FOR REVIEW
FROM THE DISTRICT COURT OF
APPEAL, THIRD DISTRICT

_____

PETITIONER'S BRIEF ON THE MERITS

WALTON LANTAFF SCHROEDER & CARSON
By G. BART BILLBROUGH
Attorneys for Petitioner
One Biscayne Tower, Suite 2500
2 South Biscayne Boulevard
Miami, Florida 33131
(305) 379-6411

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WALTON LANTAFF SCHROEDER & CARSON
SUITE 2500, ONE BISCAYNE TOWER, 2 SOUTH BISCAYNE BOULEVARD, MIAMI, FL 33131 • TEL. (305) 379-6411

INTRODUCTION

The Petitioner, Consolidated American Insurance Company, Inc., seeks review and reversal of the final summary judgment entered in favor of the Respondent, Charles Bucolo, on the issue of insurance coverage, by the Honorable Fredricka G. Smith, Circuit Court Judge of the Eleventh Judicial Circuit in and for Dade County, Florida, as affirmed by the Third District Court of Appeal on May 17, 1988.

This court has jurisdiction pursuant to Article V, Section 3(b)(3), Florida Constitution (1980); Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv); and Jollie v. State, 405 So.2d 418 (Fla. 1981). This court, on November 7, 1988, entered an order accepting jurisdiction.

The Petitioner, Consolidated American Insurance Company, Inc. was the Appellant in the Third District Court of Appeal and the Cross-Claimant on the issue of insurance coverage in the trial court. Consolidated American Insurance Company, Inc. will be referred to in this brief as the Petitioner, the Cross-Claimant, or by name.

The Respondent, Charles Bucolo, was the Appellee in the Third District Court of Appeal and the Cross-Defendant in the trial court on the insurance coverage issue giving rise to this appeal. Charles Bucolo will be referred to as the Respondent, the Cross-Defendant, or by name.

WALTON LANTAFF SCHROEDER & CARSON
SUITE 2500, ONE BISCAYNE TOWER, 2 SOUTH BISCAYNE BOULEVARD, MIAMI, FL 33131 • TEL. (305) 379-6411

References to the record on appeal will be designated by a letter "R".

All emphasis is supplied unless otherwise indicated.

WALTON LANTAFF SCHROEDER & CARSON
SUITE 2500, ONE BISCAYNE TOWER, 2 SOUTH BISCAYNE BOULEVARD, MIAMI, FL 33131 • TEL. (305) 379-6411

STATEMENT OF THE CASE AND FACTS

On July 17, 1985, Plaintiff [redacted] filed her original complaint against Defendants Elizabeth De Silva Bucolo and Charles Bucolo, her son. (R. 1-5). The complaint alleged that Charles Bucolo had sexually assaulted the Plaintiff from her earliest memory as a young child through her early teens. Count I of the Complaint sought to maintain a negligence action against both Defendants. Count II was directed exclusively to Charles Bucolo and sought recovery for intentional assault. (R. 3-4).

On July 23, 1985, Elizabeth De Silva Bucolo was served with the Summons and Complaint. (R. 83). She subsequently contacted Consolidated American Insurance Company, Inc. ("Consolidated"), her homeowner's insurance carrier, and requested that she be provided a defense. Consolidated carried Mrs. Bucolo's homeowner's policy for periods from May, 1972 to May, 1975, and from May, 1975 to May, 1978. (R. 246).

Under the terms of the Consolidated homeowner's policy, Elizabeth De Silva Bucolo, as the homeowner, was the primary insured. The policy also provided insurance for resident relatives. To the extent that Charles Bucolo was a resident of his mother's home during the subject acts, he would have been a relative insured under the definition section of the policy. The policy's terms specifically excluded, however,

coverage for incidents arising from intentional acts by any insured. (See R. 31-49).

On August 8, 1985, a copy of the Complaint was served on Charles Bucolo in Cobb County, Georgia. (R. 251). The record is devoid of any evidence that the Complaint was forwarded by Charles Bucolo to Consolidated with a demand for a defense.

On August 19, 1985, Michael Jenks, Esquire, an attorney hired by Consolidated to represent Elizabeth Bucolo in the lawsuit, entered an appearance solely on behalf of Mrs. Bucolo. (R. 247).

On August 21, 1985, counsel for the Plaintiff filed the Summons and Affidavit of Service prepared by the Cobb County, Georgia, sheriff's department, which reflected that Charles Bucolo had been served. The pleading indicated a copy had been mailed to Michael Jenks, Esquire, as an attorney of record for Mrs. Bucolo. (R. 249).

On August 30, 1985, Charles Kessler, Esquire, retained by Consolidated to enter an appearance on behalf of Charles Bucolo, filed a motion to dismiss. (R. 10). The date of his employment, however, is not shown in the record.

On September 23, 1985, Charles Bucolo was informed by Consolidated that Consolidated reserved all rights it may have under the homeowner's policy issued to his mother. (R. 141-142).

Consolidated was thereafter included as a Defendant in the Plaintiff's amended complaint and filed a cross-claim

against Charles Bucolo for a declaratory judgment determination of coverage responsibility, if any. (R. 31-49).

Charles Bucolo, through personal counsel, moved for a summary judgment on the cross-claim for declaratory relief. (R. 136-142).

After hearing argument on the motion, the Honorable Fredricka G. Smith, Circuit Court Judge of the Eleventh Judicial Circuit in and for Dade County, Florida, granted Charles Bucolo's motion for summary judgment. The basis of the Court's ruling was that Consolidated had failed to comply with the time requirements for providing a reservation of rights notice as set forth in Section 627.426(2)(a), Florida Statutes. In particular, the court stated:

> 1. The Cross-Defendant, CHARLES BUCOLO, is an insured under policies of insurance issued by CONSOLIDATED AMERICAN INSURANCE COMPANY, INC., more particularly Homeowners Policy No. H269739 (Effective dates: May 12, 1972 to May 12, 1975) and Homeowners Policy No. H8132945 (Effective dates: May 12, 1975 to May 12, 1978) at all times that CHARLES BUCOLO was a resident of ELIZABETH BUCOLO's household at 1000 N.W. 181 Street, Miami, Florida.
>
> 2. Michael R. Jenks, Esq. and Charles T. Kessler, Esq. were hired by CONSOLIDATED AMERICAN INSURANCE COMPANY, INC. as independent counsel, within the provisions of Florida Statutes § 627.426(2)(b)(3), to provide a defense for the Cross-Defendants, ELIZABETH DE SILVA BUCOLO and CHARLES BUCOLO, respectively.
>
> 3. CONSOLIDATED AMERICAN INSURANCE COMPANY, INC. knew or should have known of that certain coverage defense asserted in its crossclaim, and any other coverage

defenses, prior to August 19, 1985 when Michael R. Jenks, Esq., filed a Notice of Appearance on behalf of the Cross-Defendant, ELIZABETH BUCOLO, or alternatively, before August 21, 1985 when said counsel filed a Motion to Dismiss.

4. CONSOLIDATED AMERICAN INSURANCE COMPANY, INC. mailed to the Cross-Defendant, CHARLES BUCOLO, its written notice of reservation of rights to assert a coverage defense no earlier than September 23, 1985.

5. CONSOLIDATED AMERICAN INSURANCE COMPANY, INC. did not comply with the time parameters, regarding written notices of reservation of rights to assert a coverage defense, contained in Florida Statutes §627.426(2)(a).

(R. 246-247).

Consolidated thereafter appealed the trial court's final judgment regarding coverage to the Third District Court of Appeal. The Third District affirmed the summary final judgment in per curiam fashion on the authority of AIU Insurance Company v. Block Marina Investment, Inc., 512 So.2d 1118 (Fla. 3d DCA 1987).

After denial of the Appellant's motion for rehearing, discretionary review was sought before this Court. On November 7, 1988, this Court accepted jurisdiction.

POINTS ON APPEAL

I.

WHETHER THE LOWER COURT ERRED IN CONCLUDING THAT, BECAUSE OF A FAILURE TO COMPLY WITH THE TIME REQUIREMENTS OF FLORIDA CLAIMS ADMINISTRATION ACT, SECTION 627.426, FLORIDA STATUTES (1982), AN INSURER MUST BOTH DEFEND AND PROVIDE LIABILITY COVERAGE FOR A PERSON DEMANDING SUCH BENEFITS WHERE THE ACTS GIVING RISE TO THE COVERAGE DEMAND NEVER WERE COVERED IN THE FIRST INSTANCE.

II.

WHETHER THE LOWER COURT ERRED IN APPLYING THE FLORIDA CLAIMS ADMINISTRATION ACT, SECTION 627.426, FLORIDA STATUTES (1982), TO COVERAGE DEMANDS UNDER A CONTRACT WHICH PREEXISTED THE STATUTE WHERE THE STATUTORY APPLICATION BOTH SUBSTANTIVELY AND UNCONSTITUTIONALLY IMPAIRS THE RIGHTS OF THE PARTIES AS SET FORTH IN THEIR AGREEMENT.

III.

WHETHER THE TRIAL COURT ERRED IN CONCLUDING THAT A VIOLATION OF THE FLORIDA CLAIMS ADMINISTRATION ACT, SECTION 627.426, FLORIDA STATUTES (1982), EXISTED AS A MATTER OF LAW WHERE SUBSTANTIAL, MATERIAL ISSUES OF FACT EXISTED REGARDING WHEN THE INSURER WAS APPRISED OF THE RESPONDENT'S DEMAND FOR COVERAGE AND WHEN THE INSURER SHOULD HAVE KNOWN OF ANY BASIS FOR PRECLUDING INSURANCE RESPONSIBILITY.

SUMMARY OF THE ARGUMENT

I.

Section 627.426, Florida Statutes cannot serve to create coverage by estoppel. Traditionally, the common law of this state has long recognized that concepts of waiver and estoppel cannot create coverage, but only serve to prohibit an insurer's attempt to forfeit coverage which previously existed.

Applying standard rules of statutory construction, it becomes clear that § 627.426, Florida Statutes was never intended to create coverage previously excluded by the terms and conditions of an insurance contract. Such an interpretation leads only to application of the statute in an unreasonable, capricious, and absurd fashion.

A review of the statutory language employed by the legislature makes clear that coverage must exist in the first instance before § 627.426, Florida Statutes, provisions can apply.

Because the acts in the instant case of Charles Bucolo, as set forth in the Complaint, are specifically excluded under the terms and conditions of the subject insurance policy, no coverage existed in the first instance. As such, any purported violation of § 627.426, Florida Statutes, cannot result in the creation of coverage in contravention of the insurance policies.

II.

The most cursory review of the record in this case demonstrates that the subject insurance policies covered periods from 1972 to 1975 and from 1975 to 1978. Section 627.426, Florida Statutes, enacted in 1982, cannot be retroactively applied to the instant insurance policies. Any such application necessarily changes the substantive rights of the parties as set forth in those contracts and resultingly would constitute an unconstitutional impairment of those contracts. Under such circumstances, the trial court erroneously applied § 627.426, Florida Statutes.

III.

Finally, a review of the record in the instant case demonstrates that substantial, material issues of fact precluding summary judgment as to whether Consolidated violated the Claims Administration Act. In particular, the record was devoid of any evidence indicating when a demand had been made for coverage for Charles Bucolo. Indeed, the only record evidence before the lower tribunal indicated that notification had been presented of the coverage reservation of rights within thirty (30) days of the insurer's knowledge of the subject claims. As such, reversal is warranted.

ARGUMENT

I.

THE LOWER COURT ERRED IN CONCLUDING THAT, BECAUSE OF A FAILURE TO COMPLY WITH THE TIME REQUIREMENTS OF FLORIDA CLAIMS ADMINISTRATION ACT, SECTION 627.426, FLORIDA STATUTES (1982), AN INSURER MUST BOTH DEFEND AND PROVIDE LIABILITY COVERAGE FOR A PERSON DEMANDING SUCH BENEFITS WHERE THE ACTS GIVING RISE TO THE COVERAGE DEMAND NEVER WERE COVERED IN THE FIRST INSTANCE.

The Third District Court of Appeal, in affirming the trial court decision below on the authority of AIU Insurance Company v. Block Marina Investments, Inc., 512 So.2d 1118 (Fla. 3d DCA 1987) and Section 627.426(2)(a), Florida Statutes (1982), flatly concluded that the insurer was responsible for the provision of liability coverage and a defense to a possible insured for acts plainly excluded from coverage under the relevant insurance policies.[1] A review of the common law applicable to creating coverage by estoppel, the text of the Florida Claims Administration Act, and the case law construing the statutory provision makes clear that the Third District's analysis in its Block Marina decision, as applied to the instant case, was erroneous and should be reversed.

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[1]It is well settled in the Third District of Appeal that sexual molestation constitutes an intentional act for insurance coverage purposes. Landis v. Allstate Insurance Company, 516 So.2d 305 (Fla. 3d DCA 1987); See, also (Footnote Continued)

Any analysis of the obligations set forth in Section 627.426 Florida Statutes, must necessarily begin with an examination of Florida common law prior to its enactment. The general rule in Florida has been well established for a substantial period of time that the doctrine of waiver and estoppel cannot apply to create insurance coverage that did not previously exist. As noted by this Court, waiver and estoppel may only serve to preclude enforcement by an insurer of a forfeiture provision:

> The general rule is well established that the doctrine of waiver and estoppel based upon the conduct or action of the insurer (or his agent) is not applicable to matters of coverage as distinguished from grounds for forfeiture 18 Fla. Jur.2d Insurance, Section 677, and 43 M. Jur.2d Insurance, Section 1184. State Liquor Stores #1 v. United States Fire Insurance Company, Fla. App. 1971, 243 So.2d 228; Johnson v. Dawson, Fla. App. 1972, 257 So.2d 282. See also, Alaska Foods, Inc. v. American Manufacturers Mutual Insurance Company, Alaska 1971, 482 P.2d 842; Commonwealth Insurance Company of New York v. O. Henry Tent & Awning Company, 7th Cir. 1961, 287 F.2d 316. In other words, while an insurer may be estopped by its conduct from seeking a forfeiture of a policy, the insurer's coverage or restrictions on the underlying coverage cannot be extended by the doctrine of waiver and estoppel. [Emphasis in original].
> Six L's Packing Company, Inc. v. Florida Farm Bureau Mutual Insurance Company, 268

(Footnote Continued)
McCullough v. Central Florida YMCA, 523 So.2d 1208 (Fla. 5th DCA 1988). It was undisputed below that an intentional act exclusion was contained in the subject contracts.

So.2d 560, 563 (Fla. 4th DCA 1972), adopted, 276 So.2d 37 (Fla. 1973).

Accord, Raymond v. Halifax Hospital Medical Center, 466 So.2d 253 (Fla. 5th DCA 1985); Starlite Services, Inc. v. Prudential Insurance Company of America, 418 So.2d 305 (Fla. 5th DCA), petition dismissed, 421 So.2d 518 (Fla. 1982); Radoff v. North American Company for Life & Health Insurance, 358 So.2d 1138 (Fla. 3d DCA 1978); Manacare Corp. v. First State Insurance Company, 374 So.2d 1100 (Fla. 2nd DCA 1979); Unijax, Inc. v. Factory Insurance Assoc., 328 So.2d 448 (Fla. 1st DCA), cert. denied, 341 So.2d 1086 (Fla. 1976); Hayston v. Allstate Insurance Company, 290 So.2d 67 (Fla. 3d DCA 1974); Johnson v. Dawson, 257 So.2d 282 (Fla. 3d DCA), cert. denied, 266 So.2d 673 (Fla. 1972); Kaminer v. Franklin Life Insurance Company, 472 F.2d 1073 (5th Cir. 1973); Reisman v. New Hampshire Fire Insurance Company, 312 F.2d 17 (5th Cir. 1963)[2]

The only exception to the above stated rule is set forth in this Court's recent decision of Crown Life Insurance Company v. McBride, 517 So.2d 660 (Fla. 1987). In that decision, this Court held that the doctrine of promissory estoppel may permit recovery from an insurance company where refusal to enforce a promise "would be virtually to sanction

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[2]As noted in then Judge Grimes' dissent in Peninsular Life Insurance Company v. Wade, 425 So.2d 1181 (Fla. 2nd DCA 1983), this view represents a solid majority position in this country. See 1 A.L.R.3d 1139 (1965).

the perpetration of fraud or would result in other injustice." Crown Life Insurance Company v. McBride, supra, 517 So.2d at 662. In reaching that result, however, this Court again reenforced the general principle that coverage cannot be created by waiver or estoppel:

> The general rule in applying equitable estoppel to insurance contracts provides that estoppel may be used defensively to prevent a forfeiture of insurance coverage, but not affirmatively to create or extend the coverage. Six L's Packing Company v. Florida Farm Bureau Mutual Insurance Company, 268 So.2d 560 (Fla. 4th DCA 1972), cert. discharged, 276 So.2d 37 (Fla. 1973). "[E]quitable estoppel is not designed to aid a litigant in gaining something, but only in preventing a loss. In other words, it will not avail in offense, but only in defense." Kerivan v. Fogal, 156 Fla. 92, 96, 22 So.2d 584, 586 (Fla. 1945).
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> Crown Life Insurance Company v. McBride, supra, 517 So.2d at 661.

Under such circumstances, it is clear that the inability to establish coverage by estoppel has been firmly entrenched within the common law of this state for many years.

Enacted by the legislature in 1982, Section 627.426(2) provides in pertinent part:

> A liability insurer shall not be permitted to deny coverage based on a particular coverage defense unless:
>
> (a) Within 30 days after the liability insurer knew or should have known of the coverage defense, written notice of reservation of rights to assert a coverage defense is given to the named insured by registered or certified mail sent to the last known address of the insured or by hand-delivery; and

> (b) Within 60 days of compliance with paragraph (a) or receipt of a summons and complaint naming the insured as a defendant, whichever is later, but in no case later than 30 days before trial, the insurer:
>
> > (1) Gives written notice to the named insured by registered or certified mail of its refusal to defend the insured;
> > (2) Obtains from the insured a non-waiver agreement following full disclosure of the specific facts and policy provisions upon which the coverage defense is asserted and the duties, obligations, and liabilities of the insurer during and following the pendency of the subject litigation; or
> > (3) Retains independent counsel which is mutually agreeable to the parties. Reasonable fees for the counsel may be agreed upon between the parties, or if no agreement is reached, shall be set by the court.

Any review of the legislature's language found in Section 627.426(2), Florida Statutes, must take place within the context of certain well-known principles of statutory construction. Statutes in derogation of the common law are to be strictly construed and will not be interpreted to displace the common law further than is clearly necessary. Carlile v. Game & Fresh Water Commission, 354 So.2d 362 (Fla. 1977); Southern Attractions v. Grau, 93 So.2d 120 (Fla. 1956); Sullivan v. Leatherman, 48 So.2d 836 (Fla. 1950). Although it is well settled that the courts are not to be concerned with the wisdom of an enactment, the courts will avoid an interpretation of a statute which would produce unreasonable, absurd, or ridiculous consequences. St. Petersburg v. Siebold, 48 So.2d

291 (Fla. 1950); Foley v. State, 50 So.2d 179 (Fla. 1951); Johnson v. State, 91 So.2d 185 (Fla. 1956). When the meaning of a statute is at all doubtful, the law favors a rational, sensible construction. The courts should not let literal interpretations lead to unreasonable results. State v. Webb, 398 So.2d 820 (Fla. 1981); Wakulla County v. Davis, 395 So.2d 540 (Fla. 1981); Agrico Chemical Company v. State Department of Environmental Regulation, 365 So.2d 759 (Fla. 1st DCA 1978), cert. denied, 376 So.2d 74 (Fla. 1979).

Against this backdrop, any analysis of Section 627.426(2), Florida Statutes, can only lead to the conclusion that its provisions solely relate to forfeiture rights. Because the legislature elected not to define the provisions of Section 627.426(2), Florida Statutes, the courts must simply construe the language in a plain and ordinary manner. Indeed, the provisions of this section flatly state that a liability insurer cannot "deny coverage based on a particular coverage defense." The very language itself presupposes existence of actual coverage before the coverage of Section 627.426 can apply. Without a covered claim, no "coverage" exists and no "defense" to indemnifying coverage may be had by an insurer. Under such circumstances, the legislature's enactment clearly requires a claim to be covered in the first instance before Section 627.426(2), Florida Statutes, can impact on the preexisting relationship between the insured and the insurer.

Section 627.426, Florida Statutes, sets out a procedure for an insurance company to raise coverage forfeiture defenses when denying coverage to their insured. The language of the statute clearly contemplates that the insured is covered, but may be subject to forfeiture of coverage for some breach of condition. Although the conditions found in each insurance policy necessarily vary, examples of forfeiture provisions include the typical duty to notify, duty to communicate, and duty to cooperate. If within thirty (30) days after an insurer knows or should have known of the coverage forfeiture right under the insurance policy, it must advise the insured by written notice of the reservation asserting this defense and then within sixty (60) days of the notice advise the insured in writing of the insurer's refusal to defend, obtain a non-waiver agreement from the insured, or retain independent, mutually acceptable counsel. Where the law once required a showing of prejudice by the insured to raise an estoppel to forfeiture, such a requirement has been eliminated by the legislature in favor of the thirty (30) day notice provision as set forth in Section 627.426, Florida Statutes.

The Fifth District Court of Appeal implicitly adopted this kind of analysis and explicitly rejected the suggestion that coverage by estoppel can be created under Section 627.426, Florida Statutes. United States Fidelity & Guaranty Company v. American Fire & Indemnity Company, 511 So.2d 624 (Fla. 5th DCA 1987). In that case, United States Fidelity &

Guaranty Company issued a claims-made comprehensive liability policy to Adolf Construction. During the policy term of 1972 to 1973, Adolf installed electrical wiring in a construction project. In 1984, however, Robert Huddleston was electrocuted due to the alleged negligent installation of the wiring by Adolf. When sued by Huddleston, Adolf notified United States Fidelity & Guaranty Company of the claim, over ten years after the policy had expired.

After the trial concluded in a declaratory judgment action that United States Fidelity & Guaranty Company was required to provide coverage to Adolf because of the insurance company's failure to comply with the provisions of Section 627.426(2), Florida Statutes, the Fifth District Court of Appeal reversed. In doing so, the court held that Section 627.426(2), could not serve to create coverage which did not previously exist:

> Section 627.426(2) provides that a liability insurer shall not be permitted to deny coverage based on a particular coverage defense unless the insurer performs certain acts specified in the statute. However, the term "coverage defense" does not include a complete lack of coverage such as in this case, where the policy term had expired and the liability coverage terminated ten years before any claim was made on the policy. An insurer does not assert a "coverage defense" where there is no coverage in the first place. The legislature did not intend, by Section 627.426(2), to create coverage under a liability insurance policy that never provided that coverage, or to resurrect a policy that has expired by its own terms and no longer legally exist, to cover an accident or event

> occurring after its termination. United States Fidelity & Guaranty Company v. American Fire & Indemnity Company, supra, 511 So.2d at 625.

The Fourth District Court of Appeal recently discussed the meaning of "coverage defense" as used by the legislature in Section 627.426(2), Florida Statutes. Country Manors Association, Inc. v. Master Antenna Systems, Inc., ___ So.2d ___, Case No.: 86-0400 (Fla. 4th DCA November 16, 1988) [13 FLW 2522]. In rejecting a potential insured's suggestion that the insured was automatically entitled to coverage for failure to comply with the notice provisions of Section 627.426, the Fourth District Court of Appeal aligned itself with the Fifth District and held Section 627.426 cannot create coverage:

> [T]he terms "coverage defense" does not include a complete lack of coverage such as in this case, where the policy term was not yet in effect when the claim was first made against the association. See United States Fidelity & Guaranty Company v. American Fire & Indemnity Company, 511 So.2d 624 (Fla. 5th DCA 1987). An insurer does not assert a "coverage defense" where there was no coverage in the first place. Id. Although we affirm the trial court's ruling that International failed to comply with Section 627.426(2), Florida Statutes we find that the insurance company is not precluded from denying coverage because International did not assert a "coverage defense" since there was no coverage in the first place.
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> * * *
>
> [W]e construe "coverage defense" to mean a defense to coverage that otherwise insurer does not assert a "coverage defense" where there was no coverage in

the first place. United States Fidelity & Guaranty, 511 So.2d at 625. In the instant case, as with punitive damages, we have determined that treble damages are in the nature of a penalty and are never insurable by reason of public policy. Under Florida law, the doctrine of waiver and estoppel is not available to bring within the coverage of the policy risks not covered by its terms. Six L's Packing Company v. Florida Farm Bureau Mutual Insurance Company, 268 So.2d 560, 564 (Fla. 4th DCA 1972), cert. discharged, 276 So.2d 37 (Fla. 1973). Likewise, it follows that coverage for treble damages cannot be created by waiver and estoppel when such coverage could never exist in the first instance. The legislature did not intend, by Section 627.426(2), to create coverage under a liability insurance policy that never provided that coverage [. . .]

* * *

We also reverse the trial court's ruling that insurance coverage exists for the compensatory damages awarded for conversion. We agree with International's contention that no coverage exists because the policy specifically provides that coverage does not extend to acts of active and deliberate dishonesty, and that the conduct of the Association and its directors included acts of active and deliberate dishonesty. Although liability for conversion does not always require an act of active and deliberate dishonesty, Eagle v. Benefield-Chappell, Inc., 476 So.2d 716 (Fla. 4th DCA 1985); The Florida Bar v. Heller, 248 So.2d 644 (Fla. 1971), we find that the record supports a conclusion that the conversion by Country Manors Association was an act of active and deliberate dishonesty. At trial, a member of the board of directors testified that when he had the cable equipment dismantled, he and the other directors knew that the system and the equipment belonged to Master Antenna Systems. Furthermore, the policy provision denying coverage for active and

> deliberate acts of dishonesty is not a "coverage defense." As in our holding for the treble damages issue, we hold here that insurance coverage cannot be extended to include dishonest acts where no such coverage ever existed. See Six L's Packing Co., 268 So.2d at 564. Thus, the fact that International failed to comply with Section 627.426(2), Florida Statutes, does not affect the applicability of the rule that waiver and estoppel simply cannot create coverage where coverage never existed. As a result, we hold that no insurance coverage exists for the award of compensatory damages on the conversion claim[.]
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> Country Manors Association, Inc. v. Master Antenna Systems, Inc., supra, 13 FLW at 2525-2526.

As properly demonstrated by the Country Manors decision, the lower court should have never concluded Consolidated insured a risk specifically excluded under the policy terms due to a failure to comply with Section 627.426, Florida Statutes.

As the United States Fidelity & Guaranty Company and Country Manors cases point out, a contrary interpretation of Section 627.426(2), Florida Statutes, leads to unreasonable, absurd, and ridiculous consequences. If coverage for the subject claim is not required to exist prior to the application of the requirements in Section 627.426, Florida Statutes, a party seeking insurance protection after an event giving rise to a claim need only contact any number of insurers and make demand for coverage under Section 627.426(2), Florida Statutes, even though the party seeking insurance has no policy with that insurer. If any insurer fails to respond within thirty (30) days to "deny coverage based on a

particular coverage defense", the party seeking coverage automatically becomes covered, regardless of the fact that no contract of insurance existed with the insurer and that no premium was paid for such protection. Without the common sense requirement that the claim be covered in the first instance, the insurance companies are at the mercy of any person demanding insurance and a defense if no response is made in thirty (30) days. Such a result could not have been intended by the legislature.

The dilemma is not limited to situations in which the party demanding insurance has no relationship with the insurer. Although this state has routinely said that insurance for punitive damages is against public policy, is an insurer bound to cover the payment of punitive damages under a policy which specifically excludes such liability if the insurer fails to respond to a claim within thirty (30) days? The answer of the respondent is apparently yes. Such a result is contrary to the public policy of this state and again reaches an unreasonable, illogical, and ridiculous conclusion.

In another example, what is the result where an insured under a homeowner's policy demands the defense of a claim brought against him for his negligent operation of a motor vehicle, something specificly excluded by the home insurer? Even though the automobile was never covered under the homeowner's policy, the respondent would bind the home insurer to provide coverage and a defense to the insured for a risk not

covered by the homeowner's contract and premium payment simply because the insurer failed to respond within the time parameters of Section 627.426, Florida Statutes.

The Third District Court of Appeal's decision in AIU Insurance Company v. Block Marina Investments, Inc., 512 So.2d 1118 (Fla. 3d DCA 1987) provides virtually no guidance to this court in interpreting Section 627.426. In Block Marina, the insured obtained from AIU a comprehensive liability policy which contained a marina operator's legal liability endorsement. The policy period had coverage dates from June, 1983, through June 19, 1986, but the insured abandoned its operator's endorsement in early June, 1984. A few weeks after the endorsement was eliminated, a claim arose against Block Marina, arising out of the custody and repair of a vessel.

After demand was made of AIU to provide a defense, AIU advised that it would defend the lawsuit under a reservation of rights while it reviewed the coverage question. Two weeks before trial, AIU notified Block Marina, that it was not covered under the insurance policy and withdrew representation.

On appeal from a summary judgment against AIU which found that the insurer violated Section 627.426, Florida Statutes, by refusing to defend more than sixty (60) days after its reservation letter and within thirty (30) days of trial, the Third District Court of Appeal simply held that the statute was unambiguous. According to the Third District, the

contract of insurance between the parties was in effect and a legitimate question existed as to whether the policy provided coverage for the loss.

The suggestion that an effective contract of insurance and a legitimate question regarding coverage for a loss are the only two prerequisites which trigger the time requirements of Section 627.426, Florida Statutes, only raises more questions than it answers. For example, no qualitative difference exists between the existence of no insurance at all and a demand for coverage specifically excluded under a policy, such as a claim under a homeowner's policy for an automobile accident. Additionally, where do the lines get drawn in any judicial analysis of whether "a legitimate question" exists regarding coverage for the loss? The Third District's flat statement that the statutory language is unambiguous should provide little comfort to a court attempting to properly and reasonable apply Section 627.426 in logical fashion.

Under the Third District Court of Appeal's analysis, a preexisting insurance relationship must exist. As such, a person who has purchased life, health, medical, PIP, and uninsured motorist insurance coverage can expect a defense and liability coverage arising out of an injured party's claim against that person if each insurer fails to respond to a demand for that coverage within the time frames of Section 627.426, Florida Statutes. By the Third District's standards,

each unrelated insurer would owe that coverage so long as the undefined "legitimate question" existed regarding each insurance's application. It is respectfully submitted that such a construction would wreak havoc on this state's insurance industry and be felt by each Florida resident in his or her premium renewals.

It is respectfully submitted that it is the analysis of the Fourth and Fifth Districts, not the Third, which should be followed by this Court. The interpretation given Section 627.426(2), Florida Statutes, by the Fifth District in the United States Fidelity & Guaranty decision is reasonable, logical, and consistent with a substantial body of common law on this question. The term "coverage defense" does not include a complete lack of coverage. An insurer does not assert a "coverage defense" when no coverage exists in the first place. The legislature did not intend, by Section 627.426(2), to create coverage under a liability insurance policy that never provided that coverage.

In the instant case, the lower courts have bound Consolidated to defending and covering intentional sexual abuse, which was specifically excluded under the insurance policy's text. Because of a purported delay in telling the Respondent that these acts were not covered, however, Section 627.426, Florida Statutes, has been interpreted to create protection that did not previously exist. Such a result is contrary to the historical prohibition against establishing coverage by

estoppel and inconsistent with the only reasonable interpretation of Section 627.426(2), Florida Statutes. Because the only proper application of that section can be to preclude foreclosure of existing coverage unless there is compliance with the time deadlines, reversal on the instant facts is mandated.

WALTON LANTAFF SCHROEDER & CARSON
SUITE 2500, ONE BISCAYNE TOWER, 2 SOUTH BISCAYNE BOULEVARD, MIAMI, FL 33131 • TEL. (305) 379-6411

II.

THE LOWER COURT ERRED IN APPLYING THE FLORIDA CLAIMS ADMINISTRATION ACT, SECTION 627.426, FLORIDA STATUTES (1982), TO COVERAGE DEMANDS UNDER A CONTRACT WHICH PREEXISTED THE STATUTE WHERE THE STATUTORY APPLICATION BOTH SUBSTANTIVELY AND UNCONSTITUTIONALLY IMPAIRS THE RIGHTS OF THE PARTIES AS SET FORTH IN THEIR AGREEMENT.

The undisputed result in the instant case is that the lower courts have applied Section 627.426, Florida Statutes, enacted in 1982, to insurance contracts covering policy periods from May, 1972 to May, 1975 and from May, 1975, to May, 1978. (R. 246). The application of the statute to the instant contracts substantively and unconstitutionally impairs the preexisting duties between the parties. Article I, Section 10, Florida Constitution. Under such circumstances, the lower court orders cannot be permitted to stand.

It is well established that in the absence of clear legislative intent to the contrary, a newly enacted law is presumed to apply in prospective fashion only. Dewberry v. Auto-Owner's Insurance Company, 363 So.2d 1077 (Fla. 1978). The basis for any retrospective interpretation must be unequivocal and leave no doubt as to the legislative intent. See, e.g., Larson v. Independent Life & Accident Insurance Company, 29 So.2d 448 (Fla. 1947). Statutes which "create new obligations" and "impose new penalties" have been more rigidly construed under this general rule. Larson v. Independent Life

& Accident Insurance Company, supra. Courts look to the language of the statute itself to determine whether a clear legislative mandate for retroactive application exists. If no such mandate is found on the face of the statute itself, the statute will be presumed to operate only in prospective fashion. Indeed, this state's courts have always evidenced particular sensitivity to the retroactive application of insurance statutes to policies issued prior to the effective date of the statute. See, e.g., Dewberry v. Auto-Owners Insurance Company, supra; State Farm Mutual Automobile Insurance Company v. Gant, 478 So.2d 25 (Fla. 1985).

A review of the text contained in Section 627.426, Florida Statutes, gives no facial or unequivocal indication that the legislature intended retrospective application of its provisions. Accordingly, there is no basis to conclude retroactive application, as employed by the lower courts in the instant case, is appropriate.

The obligation of a contract is impaired in the constitutional sense when the substantive rights of the parties thereunder are changed or where new and different liabilities are imposed. Hardware Mutual Casualty Company v. Carlton, 151 Fla. 238, 9 So.2d 359 (Fla. 1942); Manning v. Travelers Insurance Company, 250 So.2d 872 (Fla. 1971); Commodore Plaza at Century 21 Condominium Assoc., Inc. v. Cohen, 378 So.2d 307 (Fla. 3d DCA 1979).

Applying these standards to the instant case, it is clear that Section 627.426(2), Florida Statutes, changes a substantive right or imposes new liabilities as contemplated by this court's decisions in the Carlton and Manning cases. While the thirty (30) and sixty (60) day provisions of Section 627.426, Florida Statutes, may at first glance be considered procedural in nature, the actual effect of subsection (2) must be deemed completely substantive because the provision mandates the new requirement to the preexisting insurance policies that failure to comply with the statutory thirty (30) and sixty (60) day requirements will waive existing defenses. Such legislation, if retroactively applied, clearly destroys vested contractual rights, creates new obligations, imposes new penalties on the insurer, and establishes an additional disability to a prior concluded transaction.

A statutory provision which effects an insurer's "duty to pay and to defend" has been held to be "substantive". In Prudential Property & Casualty Insurance Company v. Scott, 514 N.E.2d 595 (Ill. App. 1987), the court held that although the subject statute reflected the legislative intent that it should be applied retroactively, the substantive nature of the statute prohibited such an application. The relevant Illinois statute, which became effective in July, 1984, conflicted with the "family exclusion" clause of a Prudential policy which had been issued in January, 1983. The retrospective application of the statute would have required the imposition of new

obligations and would have abrogated the vested rights of the insurer which it acquired at the time of contract. As such, retroactive application would have illegally impaired the obligations set forth between the parties to that contract. See, also, Weisberg v. Royal Insurance Company of America, 464 N.E.2d 1170 (Ill. App. 1984) (retroactive application of Illinois statute to "limitation clause" of an insurance policy was violative of the insurer's contractual rights).

In the instant case, the retroactive application of the substantive provisions contained in Section 627.426, Florida Statutes, to the instant insurance policies entered into before the effective date of Section 627.426 must be deemed violative of the constitutional restriction on the impairment of contracts. Dewberry v. Auto-Owners Insurance Company, supra; State Farm Mutual Automobile Insurance Company v. Gant, supra. Because Consolidated's contract rights became "vested" for the purpose of retroactive application analysis when the contract was entered into, rather than when the rights thereunder were asserted, Prudential Property & Casualty Insurance Company v. Scott, supra, the lower tribunal's application of the new substantive provisions in Section 627.426, Florida Statutes, constituted a facially invalid impairment of the contractual rights between the parties. Because the application of the substantive provisions found in the 1982 statute

to the contracts between the parties from the late 1970's constitutes an unconstitutional impairment of contract, this court should reverse the ruling below and remand the cause for further proceedings.

WALTON LANTAFF SCHROEDER & CARSON
SUITE 2500, ONE BISCAYNE TOWER, 2 SOUTH BISCAYNE BOULEVARD, MIAMI, FL 33131 • TEL. (305) 379-6411

III.

THE TRIAL COURT ERRED IN CONCLUDING THAT A VIOLATION OF THE FLORIDA CLAIMS ADMINISTRATION ACT, SECTION 627.426, FLORIDA STATUTES (1982), EXISTED AS A MATTER OF LAW WHERE SUBSTANTIAL, MATERIAL ISSUES OF FACT EXISTED REGARDING WHEN THE INSURER WAS APPRISED OF THE RESPONDENT'S DEMAND FOR COVERAGE AND WHEN THE INSURER SHOULD HAVE KNOWN OF ANY BASIS FOR PRECLUDING INSURANCE RESPONSIBILITY.

According to the record below, Charles Bucolo had notice of Consolidated's reservation of rights on September 23, 1985. In the record is devoid, however, of any evidence suggesting when a demand for coverage was made to Consolidated by Charles Bucolo. Because material issues of fact exist on that question as well as when Consolidated knew or should have known of any coverage defense, the trial court's conclusion that Section 627.426(2)(a), Florida Statutes, had been violated was erroneous.

Florida Rule of Civil Procedure 1.510(c), governing motions for summary judgment, provides in pertinent part:

> The motion shall state with particularity the grounds upon which it is based and the substantial matters of law to be argued and shall be served at least 20 days before the time fixed for the hearing. The adverse party may serve opposing affidavits prior to the day of hearing. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The law is well settled in Florida that a party moving for summary judgment must conclusively show the absence of any genuine issue of material fact and the Court must draw every possible inference in favor of the party against whom a summary judgment is sought. Moore v. Morris, 475 So.2d 666, 668 (Fla. 1985); Wills v. Sears, Roebuck & Company, 351 So.2d 29 (Fla. 1977); Holl v. Talcott, 191 So.2d 40 (Fla. 1966); Universal Underwriters Insurance Company v. Steven Hull Chevrolet, Inc., 513 So.2d 218 (Fla. 1st DCA 1987); Williams v. Bevis, 509 So.2d 1304 (Fla. 1st DCA 1987). A summary judgment is appropriate only when the facts are so crystallized that nothing remains but questions of law and there is not the slightest doubt as to any issue of material fact. Shaffran v. Holness, 93 So.2d 94 (Fla. 1957); O'Quinn v. Seibels, Bruce & Company, 447 So.2d 369 (Fla. 1st DCA 1984); Harris v. Lewis State Bank, 436 So.2d 338 (Fla. 1st DCA 1983).

If the evidence raises any issue of material fact, if it is conflicting, if it will permit different reasonable inferences, or if it tends to prove the issues, it should be submitted to the trier of fact as a question to be determined by it. Moore v. Morris, 475 So.2d 666 (Fla. 1985); Williams v. City of Lake City, 62 So.2d 732 (Fla. 1953); Burroughs Corp. v. American Druggists' Insurance Company, 450 So.2d 540 (Fla. 2d DCA 1984); Paparone v. Lake Placid Holding Company, 438 So.2d 155 (Fla. 2d DCA 1983).

As has been noted throughout this brief, Section 627.426(2)(a), Florida Statutes, provides that insurers are not permitted to deny coverage based upon particular coverage defenses unless they provide a written reservation of rights to the insured within thirty (30) days after the insurer knew or should have known of the coverage defense. The record is devoid of any evidence, however, to address these critical statutory questions.

The only evidence submitted by Charles Bucolo to purportedly support his motion for summary judgment was that Michael Jenks, Esquire, retained by Consolidated to represent Elizabeth Bucolo, filed a notice of appearance on August 19, 1985 and a motion to dismiss for Elizabeth Bucolo on August 21, 1985. (R. 6-7). Neither event, however, relates in any way to when Consolidated knew or should have known of coverage demands made by or for Charles Bucolo.

Charles Bucolo's contentions that the Plaintiff's mailing of an affidavit of service, reflecting that Charles Bucolo had been served on August 19, 1985, to Elizabeth Bucolo's attorney should be construed as giving Consolidated notice of Charles Bucolo's demand for coverage is equally unavailing. While the pleading was mailed to Elizabeth Bucolo's attorney, there was no evidence introduced of its receipt by that lawyer or any testimony presented as to whether that document was forwarded to Consolidated. Given the August 19, 1985, date of mailing, it is likely that a number of days would have had to have

passed before receipt of the pleading by Michael Jenks and further mailing delay experienced if Michael Jenks mailed the pleading to Consolidated. In any event, however, the record is devoid of any evidence on these primary questions necessary for a determination of when Consolidated knew of a demand for coverage.

The only evidence directly relating to when Consolidated knew or should have known of the demand for coverage and the existence of any defenses is the fact that Consolidated had hired counsel to defend Charles Bucolo as of August 30, 1985, the date his counsel filed a motion to dismiss on his behalf. (R. 10). In light of the fact that less than thirty (30) days passed between August 30, 1985, and September 23, 1985, the date notice was given to Charles Bucolo, the record plainly shows a summary judgment was not warranted.

Like any standard liability insurance policy, the Consolidated homeowner's coverage in the instant case requires the insured give notice of any claim for which coverage is sought as soon as practicable. Indeed, it is the notification and demand for coverage by the insured upon the insurer which triggers the insurer's obligations under the contract. Hartford Accident & Indemnity Company v. Mills, 171 So.2d 190 (Fla. 1st DCA 1965); see, e.g., Ideal Mutual Insurance Company v. Waldrep, 400 So.2d 782 (Fla. 3d DCA 1981). Such notice is necessary where there has been an occurrence that would lead a reasonable and prudent person to believe that a claim for

damages as arisen. Ideal Mutual Insurance Company v. Waldrep, supra. Because there is no evidence that either Elizabeth Bucolo or Charles Bucolo made demand upon Consolidated to provide Charles Bucolo with a defense prior to August 30, 1985, a violation of Section 627.426, Florida Statutes cannot be found as a matter of law.

Because there is no record evidence of any actual notice and demand by Charles Bucolo for coverage prior to August 30, 1985, an additional issue exists as to when Consolidated should have known of any coverage defenses. What constitutes a reasonable time for the detection of such defenses must be deemed a question of fact. Gonzalez v. U.S. Fidelity & Guaranty Company, 441 So.2d 681 (Fla. 3d DCA 1983); Sims v. American Hardware Mutual Insurance Company, 429 So.2d 21 (Fla. 2d DCA 1982); Ideal Mutual Insurance Company v. Waldrep, supra.

There were ample issues of material fact not resolved by the record before the courts below. While not being desirous of repetition, it must be emphasized that the following matters, critical to a determination under Section 627.426, Florida Statutes, were left unresolved:

> (1) The coverage issues presented by Plaintiff's complaint were different as to the named insured Elizabeth Bucolo and Charles Bucolo, an insured only when a resident relative;
>
> (2) That Consolidated did not know the whereabouts of Charles Bucolo to send him a reservation of rights letter;

(3) That Consolidated on August 19, 1985, and August 21, 1985, was unaware that Charles Bucolo had been served with a summons and complaint;

(4) That issues existed under the allegations of the complaint as to when and where the alleged acts of Charles Bucolo occurred. Under the allegations, Consolidated should have been a given a reasonable time to investigate;

(5) That Charles Bucolo had asserted his Fifth Amendment privilege against self-incrimination and was not providing any information to Consolidated regarding the allegations in the complaint, so that Consolidated had no way of determining from either of its insureds whether there was any policy defense.

Each and every one of these issues must be resolved before a determination can be made that Consolidated "knew or should have known" of coverage defenses more than thirty (30) days before September 23, 1985.

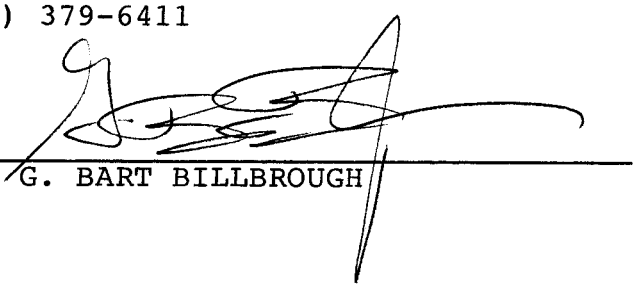
Under such circumstances, this Court should reverse the summary final judgment and remand this cause to the lower tribunal for consideration of the Section 627.426, Florida Statutes, compliance by the trier of fact.

CONCLUSION

Based upon the foregoing rationale and authority, the Petitioner respectfully requests this Honorable Court to reverse the summary final judgment entered below and to remand the cause for further proceedings as set forth herein.

Respectfully submitted,

WALTON LANTAFF SCHROEDER & CARSON
Attorney for Petitioner
One Biscayne Tower, Suite 2500
2 South Biscayne Boulevard
Miami, Florida 33131
(305) 379-6411

By: 
G. BART BILLBROUGH

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 2nd day of December, 1988 to: CARON BALKANY, ESQ., 850 San Pedro, Coral Gables, Florida 33156; and DANIELS N. HICKS, P.A., Suite 2400, New World Tower, 100 North Biscayne Boulevard, Miami, Florida 33132.

By: _____
G. BART BILLBROUGH

GBB19c/mkm

WALTON LANTAFF SCHROEDER & CARSON
SUITE 2500, ONE BISCAYNE TOWER, 2 SOUTH BISCAYNE BOULEVARD, MIAMI, FL 33131 • TEL. (305) 379-6411