IN THE SUPREME COURT OF FLORIDA

CASE NO.: 83,108

ALLSTATE INSURANCE COMPANY,

Plaintiff/Appellee,

v.

JANE DOE for and on
behalf of CHARLENE DOE

Defendant/Appellant.

ON CERTIFIED QUESTION FROM THE
UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

ANSWER BRIEF OF PLAINTIFF/APPELLEE, ALLSTATE INSURANCE COMPANY

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STATEMENT OF THE CASE AND FACTS

ALLSTATE submits that the following should be added to the DOES' statement:

During the proceedings at the trial court level, the Magistrate Judge found that no coverage exists under the subject homeowners policy (R. II-57 at pp. 9-10). The DOES then conceded that no coverage exists (R. II-72 at p. 2). The only issues needed to be resolved were raised by the DOES's affirmative defenses as to estoppel and waiver:

First Affirmative Defense

> Allstate Insurance Company has waived or should be estopped from raising a coverage defense after Allstate has assumed the defense of the action with knowledge of all the facts to establish the defense of lack of coverage. This action was not brought until nearly two years after the original suit was filed and practically four years after they first had notice of the basis of this claim and sufficient facts to permit them to deny coverage in this case.

Second Affirmative Defense

> Allstate Insurance Company should be estopped because during the pendency of this claim and their undertaking of the defense in this cause their interests conflicted with the interests of the insured. Yet they controlled the defense and litigation and settlement negotiations in this matter until the rights of the Lucases and particularly Peggy Lucas were prejudiced.

(R. I-18 at pp. 1-2). These two affirmative defenses frame the issues of estoppel and waiver by defense.[1]

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[1]The DOES raised two other affirmative defenses related to the existence of coverage under the policy (R. I-18 at pp. 2-3). In light of DOES' confession of no coverage (R. II-72 at p. 2), the remaining defenses became moot and are irrelevant to these proceedings.

Both ALLSTATE and the DOES moved for summary judgment on the issues of estoppel and waiver by defense. Both parties requested that the issues be resolved as a matter of law on the cross-motions for summary judgment without the need for a trial (R. II-59 at p. 3).

The insureds, WILLIAM and PEGGY LUCAS, are defendants to this action. They did not assert estoppel and waiver by defense nor did they join in the DOES' assertion of these issues. Despite the close of the discovery period, the DOES did not obtain any discovery from the insureds. Moreover, they did not obtain affidavits or other documents from the insureds to support DOES' motion for summary judgment (R. I 29 and 30).

The Magistrate Judge recommended that ALLSTATE's motion be granted and concluded that there was no evidence of prejudice to support DOES' argument of estoppel or waiver by defense (R. II-57 at p. 17). The DOES objected to the Magistrate Judge's finding of no prejudice (R. II-60). That was the sole objection raised and the only issue ruled on by the District Judge (R. II-72 at pp. 2-3). The District Judge agreed that no prejudice was shown in the record (R. II-72 at p. 10).

SUMMARY OF ARGUMENT

All parties to this appeal, as well as the trial court, agree that the subject policy does not provide coverage for the claims against ALLSTATE's insureds, WILLIAM and PEGGY LUCAS, arising out of an incident of sexual molestation of a minor. DOES complain because ALLSTATE defended its insureds in a state court action, arising from such molestation, without sending a reservation of rights letter or obtaining a nonwaiver agreement. If a remedy exists for such complaint, it must be found under the Claims Administration Statute or it does not exist. The Statute and its construction by this Court in AIU Insurance Co. v. Block Marina Investment, 544 So. 2d 998 (Fla. 1989), are inconsistent with any remedy being available for DOES' complaint. Under Florida law, coverage cannot be created under a policy because an insurer fails to send a reservation of rights letter or obtain a nonwaiver agreement. The doctrine of "waiver or estoppel by defense" cannot be used after the enactment of the Statute, and its interpretation in AIU Insurance, to create coverage under a policy where it otherwise does not exist.

In the event the Court determines that the doctrine survived AIU Insurance, ALLSTATE would request that the Court resolve two legal issues raised in this case with respect to the proper party to raise the doctrine and the proof necessary to establish the applicability of the doctrine. These issues were raised in the prior proceedings and would also be determinative of the appeal before the Eleventh Circuit. However, these issues are necessarily moot if this Court responds to the Eleventh Circuit that the doctrine did not survive AIU Insurance, as ALLSTATE requests.

Even if the doctrine had viability after the Statute and AIU Insurance, the doctrine should not be asserted by someone other than the insureds. In this case, the insureds, WILLIAM AND PEGGY LUCAS, have not claimed prejudice or detrimental reliance. The doctrine is being asserted by the DOES without any support from the LUCASES. Moreover, the DOES did not obtain any discovery from the LUCASES to support their contentions of estoppel or waiver by defense. In a situation such as presented here, where the insureds are a party to the suit but do not assert estoppel or waiver, a third party should not be able to assert the doctrine.

Finally, the doctrine cannot apply without a showing of prejudice to the insureds or detrimental reliance by the insureds. The mere provision of a defense without a reservation of rights does not constitute prejudice or detrimental reliance. Furthermore, prejudice should not be presumed. Instead, actual prejudice to the insureds must be alleged and proven. In this case, no prejudice to WILLIAM and PEGGY LUCAS has been proven.

CERTIFIED QUESTION

The Eleventh Circuit Court of Appeals certified the following question to this Court:

> If an insurance company assumes defense of an action with knowledge of facts which would have permitted it to deny coverage, is it estopped from subsequently raising the defense of non-coverage? In essence, does the exception to the rule of equitable estoppel set forth by the court in Cigarette Racing Team v. Parliament Ins. Co., 395 So. 2d 1238 (Fla. Dist. Ct. App. 1981) still exist following AIU Ins. Co. v. Block Marina Inv., Inc., 544 So. 2d 988 (Fla. 1989)?

This question accurately reflects the issue presented in the case based on the affirmative defenses raised by DOES and the arguments raised by both parties in the earlier proceedings. The DOES' restatement of the issues is, therefore, unnecessary. Furthermore, the DOES' issues go beyond the issues framed by the pleadings and preserved before the trial court. The DOES had previously attempted to raise new issues before the Eleventh Circuit Court of Appeals and ALLSTATE objected. See ALLSTATE's Answer Brief. The DOES are again attempting to raise new issues before this Court.[2] However, review by this Court should be limited to a resolution of the single legal issue certified by the Eleventh Circuit Court of Appeals.[3]

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[2]Specifically, the issue of express waiver by sending a letter to the insureds was not raised in the affirmative defenses nor was it preserved in the trial court proceedings. The issue was raised for the first time before the Eleventh Circuit Court of Appeals and ALLSTATE objected. The Eleventh Circuit Court of Appeals did not find it necessary to certify any issue with respect to express waiver to this Court. Thus, the issue of express waiver need not and should not be addressed by this Court.

[3]After resolution of the certified question by this Court, the Eleventh Circuit Court of Appeals should resolve the dispute as to what issues were preserved before the trial court. It is unnecessary for this Court to entertain that dispute.

ARGUMENT

A. WAIVER AND ESTOPPEL BY DEFENSE, AS RECOGNIZED IN CIGARETTE RACING, DID NOT SURVIVE AIU INSURANCE

In response to the certified question, it is Allstate's position that estoppel and waiver by defense are inconsistent with and did not survive enactment of the Claims Administration Statute, Section 627.426, Florida Statutes (1982). The Statute is intended to regulate the assertion of waiver and estoppel against insurers based on their conduct in handling or adjusting claims against the insured. The Statute generally precludes an insurer from relying on a "coverage defense" unless the insurer has given written notice of reservation of rights within 30 days after it knew or should have know of a "coverage defense". The Statute also requires the insurer to refuse to defend, obtain a nonwaiver agreement, or provide mutually agreeable counsel within 60 days of the reservation of rights.[4]

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[4]The Statute, Section 627.426(2), Florida Statutes, provides:

(2) 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 nonwaiver 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.

The general rule in Florida is that waiver and estoppel will not operate to create coverage in an insurance policy where none originally existed. Applying this rule, many cases prior to the Statute refused to create coverage based on an insurance company's conduct during its handling of litigation. E.g., Hayston v. Allstate Insurance Co., 290 So. 2d 67 (Fla. 3d DCA 1974) (insurer's participation in arbitration did not estop it from challenging coverage); Phoenix Assurance Co. of New York v. Hendry Corp, 267 So. 2d 92 (Fla. 2d DCA 1972) (18 month delay in asserting coverage is insufficient to establish prejudice warranting coverage by estoppel); Stevens v. Howe, 325 So. 2d 459 (Fla. 4th DCA 1975) (insurer not estopped to challenge coverage by defending insured without waiver of rights agreement); Garden Sanctuary, Inc. v. Insurance Company of North America, 292 So. 2d 75 (Fla. 2d DCA 1974) (insurer not estopped to challenge coverage by defending insured against both covered and uncovered claims).

Despite these cases, the Fourth District in Cigarette Racing Team, Inc. v. Parliament Insurance Co., 395 So. 2d 1238 (Fla. 4th DCA 1981), created an exception to the general rule that estoppel and waiver could not be used to create coverage. The Fourth District noted that the exception applies in the following circumstances:

> when an insurance company assumes the defense of an action, with knowledge, actual or presumed, of facts which would have permitted it to deny coverage, it may be estopped from subsequently raising the defense of non-coverage.

395 So. 2d at 1240. The Fourth District cited no Florida cases in support of its creation of this exception to the general rule. The lack of Florida citations raises the question whether

Cigarette Racing even accurately reflected Florida law prior to the enactment of the Statute. However, it is more than evident that Cigarette Racing does not reflect Florida law after the Statute. In fact, the Fourth District has now questioned whether its opinion in Cigarette Racing is valid law after the Statute. See State Farm Mutual Automobile Insurance Co. v. Hinestrosa, 614 So. 2d 633, 636 n. 1 (Fla. 4th DCA 1993).

In Hinestrosa, the Fourth District recognized that Cigarette Racing "is of doubtful validity". Id. The Fourth District noted, however, that even if Cigarette Racing clings to some remaining validity, prejudice must be demonstrated. The court found no prejudice when "the carrier defended the underlying personal injury law suit for the period from the filing of that claim until the filing of the declaratory judgment action." Id.[5]

It is significant to note that the opinion in Cigarette Racing was authored by Judge Downey. The opinion in Hinestrosa was authored by Judge Farmer but joined by Judge Downey.

ALLSTATE agrees with the Fourth District and with Judge Downey that Cigarette Racing did not survive the Statute and its interpretation in AIU Insurance Co. v. Block Marina Investment, 544 So. 2d 998 (Fla. 1989). In AIU Insurance, this Court resolved a conflict among the District Courts of Appeal concerning the application of the Statue. Of significance, the District Courts of Appeal had disagreed as to whether an insurer could be forced by the Statute to provide coverage where no coverage would otherwise exist.

[5]The Fourth District has apparently receded from its opinion in Florida Physicians Insurance Co. v. Stern, 563 So. 2d 156 (Fla. 4th DCA 1990).

Compare, AIU Insurance Co. v. Block Marina Investment, 512 So. 2d 1118 (Fla. 3d DCA 1987), with Country Manors Association, Inc. v. Master Antenna Systems, Inc., 534 So. 2d 1187 (Fla. 4th DCA 1988).

In AIU Insurance, this Court held that the Statute can only be used to prevent an insurer from denying coverage when it relies on a "coverage defense". This Court held that "coverage defense" means a defense to coverage that otherwise exists; it does not mean a disclaimer of liability based on a complete lack of coverage for the loss sustained. 544 So. 2d at 1000.[6] This Court relied on the general rule, recognized in Florida, that waiver and estoppel cannot be used to create coverage but can be used to avoid a forfeiture of coverage. This Court read the Statute not to change the general rule:

> We do not believe that the legislature intended by the enactment of Section 627.426(2), to give an insured coverage which is expressly excluded from the policy or to resurrect coverage under a policy or an endorsement which is no longer in effect, simply because an insurer fails to comply with the terms of the aforementioned statute.

544 So. 2d at 999.

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[6]Under AIU Insurance, there is no "coverage defense" in this case. ALLSTATE, relying on exclusionary language, contends that there is a complete lack of coverage. The federal Magistrate agreed that there is a lack of coverage under the policy (R. II-57 at pp. 9-10). Thereafter, the DOES conceded that the policy does not provide coverage (R. II-72 at p. 2). However, the Statute and AIU Insurance have a direct impact on one coverage issue in this case. In its Complaint, ALLSTATE contended that no coverage existed because of policy provisions regarding intentional or criminal acts, accidental loss, and late notice (R. I-1 at p. 6 π 22). Once the instant issue was raised in DOES' Answer (R. I-18) and motion for summary judgment (R. II-29), ALLSTATE did not rely on the late notice defense (R. II-35 at p. 4 n. 1). AIU Insurance would have precluded reliance on such defense since it would constitute a forfeiture of coverage. 544 So. 2d at 1000.

The result of AIU Insurance is that the insurer's post litigation conduct in, for example, failing to send a reservation of rights letter cannot form the basis for the creation of coverage expressly excluded by the policy. This Court recognized that, consistent with Florida's common law, the Statute can be used to prevent an insurer from declaring a forfeiture of coverage. 544 So. 2d at 1000. Beyond that use, the general rule would apply to preclude estoppel and waiver from creating coverage.

The impact of the decision in AIU Insurance is clear. When an insurer seeks to disclaim coverage based on exclusionary language, it need not send a reservation of rights letter or obtain a nonwaiver agreement. Since there is no coverage under the policy for the loss, the insurer's conduct, in not reserving rights or obtaining a nonwaiver agreement, will not expand the policy's coverage. This result is reasonable and fair to the insured who cannot expect to have coverage for a non-covered claim. In this case, the LUCASES cannot have any reasonable expectations of coverage for claims against them arising from the child molestation. See Landis v. Allstate Insurance Co., 546 So. 2d 1051 (Fla. 1989). Accordingly, the appeal in this case is inconsistent with the decision in AIU Insurance. Under this Court's interpretation of the Statute, insurers such as ALLSTATE do not need to send reservation of rights letters or obtain nonwaiver agreements when, as here, they are relying on express exclusionary provisions. Thus, ALLSTATE's failure to take these actions cannot create coverage under the policy.

Cigarette Racing is inconsistent with the Statute as interpreted by this Court in AIU Insurance. Cigarette Racing would allow coverage to be created under a policy even though

coverage is negated by an express exclusion. Moreover, coverage would be created because an insurance company failed to reserve its rights to deny coverage based on a policy exclusion. This Court held in AIU Insurance that compliance with the Statute is unnecessary if the insurer relies on a policy exclusion. In contrast, Cigarette Racing would require the insurer to comply with the Statute and send a reservation of rights letter even if the insurer is relying on an exclusion. The conflict between AIU Insurance and Cigarette Racing cannot be denied or ignored. Cigarette Racing must yield to AIU Insurance. Even the Fourth District has now recognized this result.

There is no suggestion in the AIU Insurance opinion that waiver and estoppel by defense is a valid doctrine under Florida law. This Court in AIU Insurance did not recognize the Cigarette Racing exception nor even mention that case. The only exception noted to the general rule was addressed in a footnote:

> A very narrow exception to this rule was recently recognized by this Court in Crown Life Insurance Co. v. McBride, 517 So. 2d 660 (Fla. 1987), in which we held that the doctrine of promissory estoppel may be utilized to create insurance coverage where to refuse to do so would sanction fraud or other injustice.

544 So. 2d at 1000 n. 1. Although this Court cited to Crown Life, promissory estoppel was apparently not warranted because it was not even discussed under the facts of the case. There was no suggestion that the insurer's conduct warranted consideration of promissory estoppel.

In Crown Life, the father was allegedly led to believe by the insurer that his son would be covered under a new policy. Accordingly, the father allowed his prior policy to

lapse. When a claim was later made on the new policy, the insurer denied coverage. A lawsuit was brought asserting estoppel and oral contract. This Court reiterated the general rule that waiver and estoppel could not be asserted to create coverage. However, this Court recognized that equitable estoppel, which involves representations relating to a future act, applied to insurance contracts. This doctrine applies only where to refuse to enforce a promise "would be virtually to sanction the perpetuation of fraud or would result in other injustice." 517 So. 2d at 662. To show injustice, the insured must prove reliance on the promise to his detriment. Id.

After the opinion in AIU Insurance, the only avenues for relief which may be pursued by an insured are the Statute and Crown Life promissory estoppel. The Cigarette Racing exception is not available since it was not recognized by this Court, is inconsistent with Florida's general rule and was nevertheless effectively overruled by the enactment of the Statute and its interpretation in AIU Insurance. There is no need for this Court to adopt the Cigarette Racing exception.

In this case, DOES argue that ALLSTATE must provide coverage because it provided a defense without reserving rights or obtaining a nonwaiver agreement. However, the DOES do not seek relief under the Statute or under Crown Life. The DOES have intentionally ignored the Statute because DOES recognize that they cannot prevail under the Statute and prevent ALLSTATE from relying on exclusionary language. Instead, DOES'

argument relies on pre-statute cases and cases from other jurisdictions. Reliance on such cases is misplaced since they are inconsistent with the Statute and AIU Insurance.[7]

The asserted conduct in this case does not go beyond AIU Insurance. The DOES assert only that ALLSTATE failed to advise the LUCASES of a coverage issue by sending a reservation of rights letter or by obtaining a nonwaiver agreement. Consequently, this case is controlled by AIU Insurance and there is no need to rely on pre-statute cases.

B. EVEN IF THE DOCTRINE SURVIVED AIU INSURANCE, IT CANNOT BE ASSERTED BY THE DOES.

Even if the Cigarette Racing exception survived the Statute and AIU Insurance, it should not be permitted to be raised by the DOES under the circumstances of this case. Both the DOES and the insureds are defendants' to this declaratory judgment action brought by ALLSTATE. However, the issues of waiver and estoppel by defense were asserted by the DOES and not by ALLSTATE's insureds. In fact, there is no evidence in the record, or any discovery developed by the DOES, that the insureds ever complained because ALLSTATE defended them without asserting reservation of rights prior to the filing of the instant declaratory judgment action.

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[7]For example, the DOES rely on Pacific Indemnity Co. v. Acel Delivery Service, Inc., 485 F.2d 1169 (5th Cir. 1973), and assert that Acel allowed estoppel when the insurer withdrew from the defense only a few weeks prior to trial. However, those are the identical facts at issue in AIU Insurance, in which the insurer withdrew from its defense two weeks prior to trial. The insured in AIU Insurance argued that the disclaimer must occur at least 60 days before trial per the Statute. As noted above, the Florida Supreme Court did not find estoppel because the insurer was not required to comply with the Statute.

In Cigarette Racing, it was the insured that raised the issue and specifically claimed that it was prejudiced by the insurer's conduct. The focus under Cigarette Racing is on whether the insured, not a third party claimant or some other person, has been prejudiced. Accordingly, for Cigarette Racing to apply to this case, there must be proof that ALLSTATE's insureds, WILLIAM and PEGGY LUCAS, suffered prejudice. However, MR. and MRS. LUCAS have not claimed any prejudice. Although discovery was completed, the DOES never took the depositions of MR. or MRS. LUCAS in this case and never obtained any proof from them that they were prejudiced.

ALLSTATE has found no cases in which issues of waiver and estoppel were raised under circumstances analogous to this case. ALLSTATE has found no cases in which waiver and estoppel were raised by third parties to the insurance contract, even though the insureds were involved in the litigation but neither raised the issue themselves nor provided factual support for the issue. There is no justification for allowing waiver and estoppel to be asserted by a third party under these circumstances.

ALLSTATE raised this issue before the trial court and the Magistrate Judge viewed it as a standing issue. The Magistrate Judge found that the DOES had standing based on Johnson v. Dawson, 257 So. 2d 282 (Fla. 3d DCA 1972). However, the facts of Johnson are significantly different. The issues of waiver and estoppel were raised in Johnson by a third party who had obtained a judgment against the insurance company's insured. The third party sought a writ of garnishment against the insurance company to recover on the judgment. The Third District held that the judgement creditor had standing to assert issues

of waiver and estoppel in the garnishment action without an assignment of rights from the insured.

The decision in Johnson has no application to this case. The DOES have not obtained a judgment against MR. and MRS. LUCAS. Accordingly, the DOES have not sued as a judgment creditor to garnish the proceeds of ALLSTATE's policy to recover on a judgment. Moreover, the situation in Johnson involved a garnishment proceeding. In a garnishment action, the third party steps into the shoes of and is substituted for the insured. Oper v. Air Control Products, Inc., 174 So. 2d 561, 563 n. 1 (Fla. 3d DCA 1965). Accordingly, estoppel and waiver were in essence being asserted by the insured in Johnson. The court in Johnson did not address the situation presented in this case and, therefore, does not control the result.

C. EVEN IF THE DOCTRINE SURVIVED AIU INSURANCE, PREJUDICE MUST BE SHOWN AS AN ESSENTIAL ELEMENT OF THE CLAIM

Detrimental reliance or prejudice is the critical element of the claim of estoppel or waive by defense. To the extent any such claim survived the Statute and AIU Insurance, DOES must prove prejudice. E.g. Hinestrosa, 614 So. 2d at 636 n.1. In fact, the court in Cigarette Racing expressly held that prejudice must be proved.

In the proceedings before the trial court, DOES unsuccessfully argued that prejudice exists, thus agreeing that prejudice was a necessary element of their claim. Only before the Eleventh Circuit Court of Appeals did the DOES argue that a showing of prejudice is unnecessary. To support their argument, DOES conceded that several cases state the general

rule that prejudice is required. However, DOES attempted to distinguish those cases by arguing that the rule was expressed in dicta. The element of prejudice is fundamental to the Cigarette Racing doctrine. DOES cannot wash away this fundamental requirement by contending it is all dicta.

Prejudice to the insured is essential regardless of whether the issue is approached from the perspective of waiver or estoppel. As the DOES recognize, the court in Liberty Mutual Insurance Co. v. Jones, 427 So. 2d 1117 (Fla. 3d DCA 1983), held that prejudice is an ingredient necessary to the viability of both waiver and estoppel theories. Moreover, some form of reliance or prejudice is required even to support waiver. E.g. McNeal v. Marco Bay Associates, 492 So. 2d 778, 781 (Fla. 2d DCA 1986) (waiver of contractual right must be supported by consideration or a party must believe to his detriment that a right has been waived).[8]

There is no clear and convincing evidence in the record of detrimental reliance or prejudice. The only asserted detrimental reliance is that ALLSTATE defended the LUCASES, that ALLSTATE waited two years before filing the instant declaratory judgment and that there was a "change" in the law in Florida in the interim. The Magistrate Judge and District Judge specifically found that these actions do not constitute detrimental reliance and that there is no record evidence of prejudice. There is no need for this Court to reconsider those findings.

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[8]Consequently, even if this Court were to address DOES' claim of express waiver, there must be a showing of prejudice to or detrimental reliance by MR. and MRS. LUCAS. No showing has been made.

At most, the facts in this case show that the LUCASES were defended without cost by counsel selected by ALLSTATE even though the insureds did not initially know of the coverage issues. This cannot amount to detrimental reliance. Since the policy does not provide coverage, ALLSTATE could have properly denied coverage and refused to defend. Instead, ALLSTATE provided a defense and the LUCASES received a real and significant benefit to which they were not otherwise entitled. Accordingly, they incurred a benefit rather than a detriment from ALLSTATE's defense. If anything, it is ALLSTATE who suffered the detriment. SeeState Farm Fire and Casualty Co. v. Nail, 516 So. 2d 1022, 1023 (Fla. 5th DCA 1987) ("providing a defense where there is no legal obligation to do so constitutes an irreparable injury").

In Crown Life Insurance Co. v. McBride, the plaintiff alleged that his father allowed a prior policy to lapse and took out a policy with defendant based on representations that plaintiff would be covered. 517 So. 2d 660, 661 (Fla. 1987). After claim was made, defendant denied coverage for plaintiff contending that he was not a covered dependent within the meaning of the policy. Id. The court held that these facts did not support promissory estoppel since there was no detrimental reliance. Id. at 662. Further, the court concluded that refusal to enforce the alleged promise would not perpetrate a fraud. Id. If the conduct in Crown Life is insufficient to demonstrate detrimental reliance warranting promissory estoppel, the alleged conduct in this case is insufficient as a matter of law. See also, Professional Underwriters Insurance Co. v. Freytes & Sons Corp., 565 So. 2d 900 (Fla. 5th DCA 1990).

The DOES ask this Court to adopt a presumption of prejudice when an insurer defends an insured without reservation of rights. No Florida case has recognized such a presumption. In fact, the few existing cases do not support the recognition of a presumption. In Cigarette Racing, the Fourth District did not indulge in a presumption of prejudice even though the insurer had defended the insured for 16 months. 395 So. 2d at 1239-40. Similarly, in Centennial Insurance Co. v. Tom Gustafson Industries, Inc., 401 So. 2d 1143 (Fla. 4th DCA 1981), the insured was defended for 14 months. The court still required a showing of prejudice by the insured. Id. at 1144. Also, in Phoenix Assurance Co. of New York v. Hendry Corp., 267 So. 2d 92 (Fla. 2d DCA 1972), the court did not presume prejudice even though the insured had been defended for 18 months.[9]

If coverage is to be created despite applicable policy exclusions, it should not be created based on a presumption. Actual prejudice must be alleged and proven. If DOES want to rely on Cigarette Racing, they must be bound by its actual prejudice requirement.

Recognizing that actual prejudice must be shown, the DOES assert that prejudice exists because of a conflict of interest and rely on Pacific Indemnity Co. v. Acel Delivery Service, Inc., 485 F.2d 1169 (5th Cir. 1973). In Acel, the court applied Texas law and addressed the conflict of interest which may occur when an insurer defends an insured but,

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[9]Even the cases relied on by the DOES do not require a presumption of prejudice. In State Farm Lloyds, Inc. v. Williams, the court denied a conclusive presumption of harm and held:

> unless a conflict of interests or other harm is clear and unmistakable, we are inclined to the view that the insured must show how he was harmed.

791 S.W. 2d 542, 553 (Tex. App. 1990).

at the same time, develops facts through the defense attorney which support a denial of coverage. Id. at 1176. The DOES have not proved that such a conflict existed in this case. This is not a case where ALLSTATE is disclaiming coverage based on facts developed by the attorneys retained to represent the LUCASES. Thus, there is no evidence to support any conflict of interest.

Nonetheless, DOES complain that LUCASES did not have the opportunity to control the defense. DOES have not presented any evidence as to the control of the defense or the extent of participation by the LUCASES in such defense. Furthermore, DOES have presented no evidence that the LUCASES were prejudiced by any decision made in such defense or that they were in any way dissatisfied with defense counsel or their defense.

The DOES also assert prejudice based on a "change" in the law prior to the filing of the declaratory judgment action. The DOES apparently suggest that if the LUCASES had known of the coverage issues sooner they could have obtained a declaration of coverage under the authority of Zordan v. Page, 500 So. 2d 608 (Fla. 2d DCA 1986). However, this is nothing more than pure speculation and fails to address the impact, if any, Zordan would have on the specific language of the subject policy. Moreover, there is no explanation of any purported "change" in the law. Even before the Florida Supreme Court's decision in Landis v. Allstate Insurance Co., 546 So. 2d 1051 (Fla. 1989), ALLSTATE had successfully argued that Zordan was not applicable to its policy language. For example, in Allstate Insurance Company v. Travers, 703 F. Supp. 911 (N.D. Fla. 1988), the Court ruled that it

did not have to decide whether Zordan was applicable since there was different policy language in the ALLSTATE policy.[10] Other courts found no coverage under the subject policy before the Florida Supreme Court's decision in Landis. E.g., Allstate Insurance Co. v. S.L., 704 F. Supp. 1059 (S.D. Fla. 1989); Allstate Insurance Co. v. Childs, Case No. 87-1055 (M.D. Fla. 1988) (slip opinion can be found in the record at R. I-10 Exhibit "A"). Accordingly, there is no merit to the DOES' assertion of a "change" in the law. Consequently, there is no proof of prejudice.

DOES suggest that LUCASES were prejudiced because the defense ALLSTATE provided was less than adequate. However, there is no evidence in the record of an inadequate defense. This argument is based on nothing more than pure speculation. In their brief, DOES attempt to compensate for the lack of evidence by appealing to "common knowledge" as to what an insurer "necessarily" and "undoubtedly" would do in hypothetical circumstances. See DOES' Brief at pages 33-34. ALLSTATE takes issue with such arguments and their criticism of insurer conduct. However, it is not necessary to resolve a dispute as to what is "common knowledge". If DOES actually believed that the defense was inadequate, they failed to developed any facts to support such a contention.[11] There

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[10]The policy in Zordan excluded coverage for injuries intended or expected by the insured. 500 So.2d at 609. The subject policy excludes coverage for injuries which may reasonably be expected to result from the intentional or criminal acts of an insured person. (R. II-57 at p. 6).

[11]It is interesting to note that DOES' trial counsel complained before the federal District Judge that he could not timely respond to ALLSTATE's motion to strike because he had to respond to a discovery appeal taken in the underlying state court action. (R. II-25 at p. 4). The taking of a discovery appeal is inconsistent with an inadequate defense.

is no record evidence whatsoever that the discovery and investigation conducted in defense of MR. and MRS. LUCAS was inadequate. Moreover, there is no record evidence whatsoever that there were differences in the manner in which the litigation was conducted. DOES' arguments should be limited to the record evidence, and the record evidence does not support a finding of actual prejudice.

In their brief, DOES claim that the LUCAS children have forgotten the names of witnesses who may prove beneficial to the case. See page 33. DOES cannot prove this by record evidence, cannot demonstrate that this constitutes prejudice, and cannot explain how this memory loss was caused by ALLSTATE's conduct. There is no record evidence to support this argument. There are no affidavits or depositions of the LUCAS children to factually support DOES' argument. Furthermore, there is no explanation as to how this "prejudice" was caused by ALLSTATE's conduct. The state court action was pending prior to the declaratory judgment action. DOES could have taken the children's depositions in such case. DOES cannot seriously argue that the children's memory would be better if ALLSTATE had sent a reservation of rights letter.

There is no evidence of prejudice in the record. DOES' arguments cannot create prejudice where none exists.

CONCLUSION

Waiver and estoppel by defense is not a legitimate affirmative defense in Florida after the adoption of the Claims Administration Statute and its application by this Court in AIU Insurance. Consequently, the certified question from the Eleventh Circuit should be answered in the negative: Cigarette Racing did not survive AIU Insurance.

Alternatively, if the affirmative defense is found to be valid, this Court should advise the Eleventh Circuit on the limitations to the application of the defense. First, it cannot be asserted by a third-party to the insurance policy such as the DOES. Second, even if the DOES could assert this affirmative defense, they must prove that the insureds were prejudiced. Prejudice to the insureds will not be presumed. In this case, they cannot prove the element of prejudice necessary to establish such defense. There is no record evidence of prejudice or detrimental reliance.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail this 11TH day of May, 1994 to ROY WASSON, Suite 402, Courthouse Tower, 44 West Flagler Street, Miami, Florida 33130 and JAMES W. GUARNIERI, ESQUIRE, 608 East Morgan St., Brandon, Florida 33510.

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