IN THE SUPREME COURT OF FLORIDA

CASE NO. 83,108

JANE DOE, for and on behalf of
CHARLENE DOE, a Minor Child,

Appellant,

-vs.-

ALLSTATE INSURANCE COMPANY,

Respondent.

ON CERTIFIED QUESTIONS FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPELLANT'S INITIAL BRIEF

ROY D. WASSON
Suite 402 Courthouse Tower
44 West Flagler Street
Miami, Florida 33130
(305) 374-8919

JAMES W. GUARNIERI
608 East Morgan Street
Brandon, FL 33510
(813) 685-4414

Attorneys for Appellant

ROY D. WASSON, ATTORNEY AT LAW
SUITE 402 COURTHOUSE TOWER, 44 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 · TELEPHONE (305) 374-8919

TABLE OF AUTHORITIES

ROY D. WASSON, ATTORNEY AT LAW
SUITE 402 COURTHOUSE TOWER, 44 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 · TELEPHONE (305) 374-8919

OTHER AUTHORITIES **PAGE**

ROY D. WASSON, ATTORNEY AT LAW
SUITE 402 COURTHOUSE TOWER, 44 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 · TELEPHONE (305) 374-8919

STATEMENT OF THE CASE AND OF THE FACTS

This case is before this Court on questions of Florida law certified by the Eleventh Circuit Court of Appeals as dispositive of the appeal pending before that court, pursuant to Article 5, § 3(b)(6) of the Florida Constitution. The case involves the issue whether Allstate is liable to pay proceeds under the liability portion of its policy of homeowners insurance, notwithstanding the lack of coverage under the terms of that policy, under either waiver or estoppel theories.

This case is on appeal from a final judgment entered upon the trial court's grant of a motion for summary judgment in favor of the Appellee herein, Allstate Insurance Company. Allstate commenced the action in the United States District Court for the Middle District of Florida by filing a Complaint for Declaratory Decree against the Appellant, Jane Doe, and against William Lucas and Peggy Lucas. R1-1. As established by the Complaint, the Lucases were the named insureds under a "Deluxe Homeowners Policy" issued by Allstate. R1-1-2. By its Complaint, Allstate sought a declaration that there was no coverage under the policy for injuries sustained by Charlene Doe as the result of the sexual molestation of her by William Lucas. R1-1-7. Allstate also sought a declaration that it owed no duty to provide a defense to William and Peggy Lucas in a state court lawsuit which Jane Doe had brought against the Lucases on behalf of her daughter. R1-1-7.

As established by the parties' stipulation, "[o]n December 29, 1985, WILLIAM LUCAS committed acts of lewd and lascivious behavior

ROY D. WASSON, ATTORNEY AT LAW
SUITE 402 COURTHOUSE TOWER, 44 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 • TELEPHONE (305) 374-8919

on CHARLENE DOE." R2-59-2. On August 29, 1986, Mr. Lucas pleaded guilty to two felony counts arising out of that molestation of the minor child and was sentenced to state prison. R1-30-Ex. A. After he was sentenced, Mr. Lucas took the position that he "was completely out of touch" during the time he performed the deviate acts, stating that he "was lost and confused during the last part of 1985 and the early part of 1986." R2-50-Ex. A. William Lucas testified by deposition that, at the time he perpetrated the acts of molestation upon the minor child, William Lucas did not think that those acts would be harmful to her. (Lucas deposition filed under seal at 21-22).

By letter dated November 16, 1986, counsel for Jane and Charlene Doe advised Allstate that his client "was injured in the home of the Lucas[es]." R1-30-Ex. B. Allstate disclosed in discovery below that "Peggy Lucas informed an Allstate adjuster on December 3, 1986 that her husband had been convicted." R1-30-Ex. C at 2 ¶ 12. Further, Allstate disclosed that "[t]he criminal Judgment and Sentence were received by Allstate from Peggy Lucas on December 17, 1986." R1-30-Ex. C at 2 ¶ 12. Allstate stipulated below that it was "relying upon these facts and documents [made known to it in 1986] to show that coverage is excluded under the policy."

As correctly found by the Magistrate Judge below, in October of 1988, nearly two years after Allstate was put on notice of the facts giving rise to its coverage defense, Jane Doe "filed an action for damages against William and Peggy Lucas in the

ROY D. WASSON, ATTORNEY AT LAW
SUITE 402 COURTHOUSE TOWER, 44 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 · TELEPHONE (305) 374-8919

Thirteenth Judicial Circuit in and for Hillsborough County, Florida . . ., alleging that the minor child Charlene Doe has suffered emotional and psychological injuries as a result of being sexually molested by William Lucas in December 1985." R2-57-2. The Lucases provided Allstate with the suit papers served upon them in that action. R1-30-Ex. D.

Allstate acknowledged receipt of those suit papers from its insureds by a letter dated November 9, 1988, which made no mention of any lack of coverage for the subject incident, but which indicated instead that there was coverage for the incident, where it stated that the "the amount of damages claimed in the suit may be in excess of the protection afforded under your policy [because t]he suit papers do not indicate the extent of damages that the plaintiff(s) hope(s) to recover." R1-30-Ex. D (emphasis added). The letter stated: "Under your policy . . ., the limit of liability could be less than the amount which may be recovered under the suit." Id. (emphasis added). The next sentence stated: "If the verdict is in excess of the policy limit, you will be personally liable for such excess." Id. (emphasis added). That letter went on to advise that Allstate had appointed counsel to defend the Lucases. R1-30-Ex. D.

Allstate obtained no waiver or release from the Lucases prior to having counsel of its choosing appear and defend on their behalf. R1-30-Ex. E ¶ 9. Similarly, that defense was initiated without Allstate's issuance of a reservation of rights letter. R1-30-Ex. E ¶ 8.

ROY D. WASSON, ATTORNEY AT LAW
SUITE 402 COURTHOUSE TOWER, 44 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 · TELEPHONE (305) 374-8919

The Does' state court Complaint for damages set forth two counts against the Lucases: Count One contained claims against William Lucas only, based upon intentional tort theories; Count Two sounds solely in negligence against Peggy Lucas, asserting, inter alia, that she should have known of her husband's "tendencies of pedaphilia [sic] or other sexual perversion" and that she "breached her duty of care by allowing her husband to be with the minor child unsupervised and alone in a bedroom at the house." R1-1-Ex. B ¶¶ 11, 12.

That state court action proceeded for two full years more without Allstate advising the Lucases that it would be denying coverage. The Declaratory Judgment action was not filed in the district court until October of 1990, four years after Allstate had actual knowledge of all the facts giving rise to its belated denial of coverage. R1-1. During that entire time, as found by the Magistrate Judge: "Allstate has been defending the Lucases in the underlying state court action since its inception, but it did not send written notice of a reservation of rights to the Lucases." R-2-57-3.

Allstate attached exhibits to its Complaint for Declaratory Judgment, which included the Second Amended Complaint filed by Jane Doe in the state court action against the Lucases. R1-1-Ex. B. In that Second Amended Complaint filed in the state court damages action, Jane Doe described that "[o]n or about December 29, 1985, and on at least one other occasion, the exact date of which is unknown, Defendant, WILLIAM LUCAS, engaged in acts of perverted

ROY D. WASSON, ATTORNEY AT LAW
SUITE 402 COURTHOUSE TOWER, 44 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 · TELEPHONE (305) 374-8919

deviate sexual misconduct on the person of CHARLENE DOE [while Charlene was an invited overnight guest of Mr. Lucas and his wife and children]." R1-1-Ex. B at ¶¶ 3-6.

In its Complaint for Declaratory Decree, Allstate identified three policy provisions upon which it based its request for a declaration that there was no coverage for the subject claims: Allstate asserted the lack of an "accidental loss" which it said was needed to trigger coverage in the first instance. R1-1-6 ¶ 22. Allstate relied upon the exclusion from coverage of liability for "any bodily injury . . . which may reasonably be expected to result from the intentional or criminal acts of an insured person or which are in fact intended by an insured person." R1-1-3 ¶ 7. And Allstate claimed that it was prejudiced by late notice of the claim against its insureds. R1-1-6 ¶¶ 20-21.

Allstate filed two motions for summary judgment. R1-9; R1-11. The first motion was based "on the ground that the subject insurance policy does not provide coverage for Charlene Doe's alleged injuries on the basis of the intentional or criminal acts exclusion." R1-9-1. Allstate's second motion for summary judgment was based "on the ground that there has been no accidental loss as is required by the policy." R1-11-1.

Jane Doe's Answer to Allstate's Complaint admitted most of the Complaint's factual allegations, but denied the conclusions that there was no coverage and raised affirmative defenses. R1-18. The defenses included the defenses that Allstate waived--or should be estopped from asserting--its defenses asserted by virtue of the

ROY D. WASSON, ATTORNEY AT LAW
SUITE 402 COURTHOUSE TOWER, 44 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 · TELEPHONE (305) 374-8919

fact that "Allstate has assumed the defense of the [state court] action with knowledge of all the facts to establish the defense of lack of coverage." R1-18-1, 2. Other affirmative defenses included the defense that Allstate was precluded from denying coverage by its conflict of interest. R1-18-2.

Allstate filed its motion to strike the affirmative defenses raised in Doe's Answer, and coupled that motion with an alternative motion for summary judgment on those defenses. R1-22. Jane Doe filed her response in opposition to that combination motion. R1-25.

Jane Doe filed her own motion for summary judgment, in which she sets forth the ground, among others, that Allstate had knowledge of all the facts needed to deny coverage to the Lucases but did not deny coverage until four years later, two years after the date the Florida case was filed. R1-29-1. Doe's Motion for Summary Judgment notes that "Allstate assumed the unconditional defense of the Lucases," and the motion adopts "the reasons more comprehensively set forth in the Memorandum of Law filed herewith." R1-29-1, 2.

Magistrate Judge Jenkins issued a Report and Recommendation on the three pending motions for summary judgment which recommended that Allstate's two motions be granted and that Jane Doe's motion for summary judgment be denied. R2-57. The magistrate judge's findings and recommendations will be addressed in detail below. Jane Doe responded, objecting to portions of the Report and Recommendations. (R2-60). The district judge considered the Report and Recommendations de novo in light of the parties' memoranda

ROY D. WASSON, ATTORNEY AT LAW
SUITE 402 COURTHOUSE TOWER, 44 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 · TELEPHONE (305) 374-8919

thereon, and entered an order granting Allstate's motions for summary judgment and denying Doe's motion. R2-72. Judgment was entered thereon. R2-73. This appeal ensued. R2-74.

The parties briefed the issues in the Eleventh Circuit, and oral argument was conducted. Thereafter, the Eleventh Circuit certified the subject questions to this Court.

QUESTIONS PRESENTED

The Eleventh Circuit, stating that it did "not intend the particular phrasing of this question to limit consideration of the problems posed by the entire case," presented the following as its certified questions:

> 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. [4th] Dist. Ct. App. 1981) STILL EXIST FOLLOWING AIU INS. CO. v. BLOCK MARINA INV., INC., 544 So. 2d 988 (Fla. 1989)?

While the federal appellate court phrased the question as involving only a single issue of state law, Appellant submits that there are instead three discrete issues of Florida law which are determinative of the appeal before in Eleventh Circuit.

Therefore, Appellant submits that the questions presented by this case should be rephrased as follows:

ROY D. WASSON, ATTORNEY AT LAW
SUITE 402 COURTHOUSE TOWER, 44 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 · TELEPHONE (305) 374-8919

I.

WHETHER AN INSURER EXPRESSLY WAIVES THE ABSENCE OF COVERAGE BY CORRESPONDENCE ACKNOWLEDGING THE EXISTENCE OF COVERAGE WRITTEN AFTER THE INSURER LEARNS OF FACTS UPON WHICH THE ABSENCE OF COVERAGE IS BASED

II.

WHETHER AN INSURER WITH KNOWLEDGE OF THE FACTS WHICH WOULD PERMIT IT TO DENY COVERAGE IMPLIEDLY WAIVES THE RIGHT TO DENY COVERAGE BY PROVIDING A DEFENSE WITHOUT A RESERVATION OF RIGHTS

III.

WHETHER AN INSURER WITH KNOWLEDGE OF THE FACTS WHICH WOULD PERMIT IT TO DENY COVERAGE MAY BE ESTOPPED FROM ASSERTING ITS RIGHT TO DENY COVERAGE BY PROVIDING A DEFENSE WITHOUT A RESERVATION OF RIGHTS

ROY D. WASSON, ATTORNEY AT LAW
SUITE 402 COURTHOUSE TOWER, 44 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 • TELEPHONE (305) 374-8919

SUMMARY OF THE ARGUMENT

As will be shown below, this Court should answer in the affirmative the Eleventh Circuit's questions, as well as each of the three questions which Appellant submits are presented, and hold that Allstate may be precluded from contesting coverage under any of three applicable doctrines: express waiver, implied waiver-by-defense, and estoppel-by-defense. First, Allstate expressly waived its right to deny coverage by making statements to the Lucases in writing which recognize the existence of coverage and which were wholly inconsistent with the nonexistence of coverage and its belated denial thereof.

Second, Allstate impliedly waived the lack of coverage by knowingly and voluntarily relinquishing its right to contest the issue throughout the four-year period from its knowledge of the facts giving rise to that defense, while providing the Lucases with their defense without reservation of rights.

Third, Allstate is estopped from raising the coverage question by virtue of Allstate's unqualified provision of a defense during the long period of delay before denying coverage. Allstate's insureds were presumptively and demonstrably prejudiced by Allstate's delay, and estoppel is warranted by the serious conflict of interest between Allstate and the Lucases.

ROY D. WASSON, ATTORNEY AT LAW
SUITE 402 COURTHOUSE TOWER, 44 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 · TELEPHONE (305) 374-8919

ARGUMENT

INTRODUCTION:

THE DOCTRINES OF EXPRESS WAIVER, IMPLIED WAIVER-BY-DEFENSE, AND ESTOPPEL-BY-DEFENSE EXIST TO PRECLUDE INSURERS FROM CONTESTING THE TOTAL ABSENCE OF COVERAGE AND NOT JUST TO PRECLUDE RELIANCE UPON COVERAGE EXCLUSIONS

It is a well-known principle of law in Florida and many other jurisdictions that, as a general rule, the doctrines of waiver and estoppel may not be employed to give rise to insurance coverage where no coverage existed under the terms of the policy in the first place. See, e.g., Crown Life Ins. Co. v. McBride, 517 So. 2d 660 (Fla. 1987). The application of the doctrines of waiver and estoppel usually is limited to prevent the forfeiture of a policy or to bar assertion of a defense to coverage that would otherwise exist. However, that general rule is not blindly applied without exception. See, e.g., Kramer v. United Services Auto. Assn., 436 So. 2d 935 (Fla. 4th DCA 1983)(misstatement by insurer as to coverage may estop denial of coverage).

The general rule against finding coverage by waiver and estoppel is subject to the important exception applicable to the present case that--where a liability insurer has knowledge of all the facts which would permit it to deny coverage because coverage does not exist under the policy--but it expressly recognizes coverage or provides a defense to its insured for an extended period of time without denying coverage or issuing a reservation of

ROY D. WASSON, ATTORNEY AT LAW
SUITE 402 COURTHOUSE TOWER, 44 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 · TELEPHONE (305) 374-8919

rights, then either or both the doctrines of waiver and estoppel may be employed to preclude the insurer from raising the absence of coverage.

The exception to the general rule (that the non-existence of coverage may not be waived) is so widely accepted that a Texas court in a 1990 case noted as follows: "We have found no case, nor has either party cited a case, in which the general rule was applied where there was an [unreserved] assumption of the insured's defense by the insurer." State Farm Lloyds, Inc. v. Williams, 791 S.W. 542, 551 Tex. App. 1990). Of course, under the law of Florida and elsewhere "[i]t is settled that an insurer may provide a defense to its insured while reserving the right to challenge coverage if timely notice of such reservation is given to the insured." Centennial Ins. Co. v. Tom Gustafson Inds., Inc., 401 So. 2d 1143, 1144 (Fla. 4th DCA 1981)(emphasis added).

This introductory section will summarize the elements of both estoppel and waiver under the numerous authorities discussing the exception to the general rule. As a preliminary matter, Appellant notes that many of the authorities unfortunately speak of "waiver and estoppel" in a single breath without discussing the different elements of each as they may apply to the present situation, and other authorities seem to intermingle the elements so as to imply that proof of one is both necessary and sufficient to establish the other. Appellant suggests that those analyses are inappropriate, as follows: "The doctrines of waiver and estoppel are frequently confused and sometimes are incorrectly regarded as synonymous. But

ROY D. WASSON, ATTORNEY AT LAW
SUITE 402 COURTHOUSE TOWER, 44 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 · TELEPHONE (305) 374-8919

there is a well-recognized distinction between the two; one may exist without or apart from the other." 22 Fla. Jur. 2d, Estoppel and Waiver § 28 (1980). Accord., e.g., Thomas N. Carlton Estate v. Keller, 52 So. 2d 131 at 132-33 (Fla. 1951).

The following decision from the old Fifth Circuit applies principles of Texas law similar to Florida law to recognize both the general rule against finding coverage by waiver or estoppel and the exception; and describes the different requirements for a finding of estoppel or a waiver where the insurer provides a defense as follows:

> While waiver or estoppel may preclude an insurer's policy defense arising out of a condition or forfeiture provision, these doctrines do not normally operate to prevent the assertion of a defense of noncoverage. . . .
>
> There is an exception to this general rule. If an insurer assumes the insured's defense without obtaining a non-waiver agreement or a reservation of rights and with knowledge of the facts indicating noncoverage, all policy defenses, including those of noncoverage are waived, or the insurer may be estopped from raising them. . . . The theory underlying this exception is based upon the apparent conflict of interest that might arise when the insurer represents the insured in a lawsuit against the insured and simultaneously formulates its defense against the insured for noncoverage. For estoppel to prevent the assertion of a defense of noncoverage in accordance with this exception, there must be a showing of prejudice. As to the application of waiver, the proponent must demonstrate a voluntary relinquishment of a known right.

Pacific Indem. Co. v. Acel Delivery Service, Inc., 485 F.2d 1169, 1173 (5th Cir. 1973)(emphasis added).

The estoppel-by-defense aspect of the subject exception is by far the most often discussed theory of the two in the cases and other authorities. "The general rule is this: a liability

ROY D. WASSON, ATTORNEY AT LAW
SUITE 402 COURTHOUSE TOWER, 44 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 · TELEPHONE (305) 374-8919

insurer, by assuming the defense of an action against the insured, is thereafter estopped to claim that the loss resulting to the insured from an adverse judgment in such action is not within the coverage of the policy . . . ." Annot., Liability Insurance: Insurer's Assumption of or Continuation in Defense of Action Brought Against the Assured as Waiver or Estoppel as Regards Defense of Noncoverage or Other Defense Existing at Time of Accident, 38 A.L.R.2d 1148, 1150 (1954). "Stated another way, the defense by an insurer of an action against an insured is incompatible with a denial of liability under the policy unless the insurer has taken appropriate steps to reserve the question of liability." State Farm Lloyds, Inc. v. Williams, 791 S.W. 542, 550 Tex. App. 1990).

The authorities seem at first blush to be in agreement that the estoppel-by-defense doctrine requires some showing of prejudice to the insured from the insurer's delay in disclaiming coverage, or other unfairness in addition to the delay itself. "It seems well-established that, if a liability insurer's defense of an action against an insured is to work an estoppel barring the insurer from subsequently raising the defense of non-coverage . . . it must be shown that prejudice resulted from the insurer's conduct in defending the action against the insured." Id. § 5[a] at 1157. However, upon closer scrutiny it becomes clear that the insured in estoppel-by-defense cases does not necessarily bear the burden of making an affirmative showing of prejudice, as indicated by the following:

ROY D. WASSON, ATTORNEY AT LAW
SUITE 402 COURTHOUSE TOWER, 44 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 • TELEPHONE (305) 374-8919

> But this requirement as to prejudice has been nullified in effect by many of the courts as a result of their ruling either that prejudice in such a case will be conclusively presumed or that prejudice is an inevitable effect of the insured's loss of the right to maintain control of the defense.

Couch on Insurance 2d § 51:166. See also id. § 51:85, where the same author cites a number of authorities for the proposition that the mere act of appearing on behalf of an insured and controlling the insured's defense to a claim known to the insurer to be outside the policy's coverage is presumptively prejudicial and will prevent the insurer from contesting coverage even without a further showing by the insured:

> Where an insurer, without reservation and with actual or presumed knowledge [of facts which establish the nonexistence of coverage], assumes the exclusive control of the defense of claims against the insured, it cannot thereafter withdraw and deny liability under the policy on the ground of noncoverage, prejudice to the insured by virtue of the insurer's assumption of the defense being, in this situation, conclusively presumed.

(footnotes deleted). The question of what party bears the burden and how it can be satisfied under Florida law will be addressed in the argument section below pertaining specifically to estoppel.

Waiver, on the other hand, whether of the express or implied varieties, should require no showing of prejudice to the insured from the insurer's unqualified provision of a defense. "Waiver carries no implication of fraud and does not necessarily imply that the person asserting it has been misled to his prejudice or into an altered position. The act or conduct of only one of the parties is

ROY D. WASSON, ATTORNEY AT LAW
SUITE 402 COURTHOUSE TOWER, 44 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 · TELEPHONE (305) 374-8919

involved." 22 Fla. Jur. 2d, Estoppel and Waiver § 28 (1980). Any type of right may be waived, and once a right which arose under a contract has been waived, it cannot be reasserted. "When a party waives a right under contract he cannot, without the consent of his adversary, reclaim it." Thomas N. Carlton Estate v. Keller, 52 So. 2d 131 at 132-33 (Fla. 1951).

Implied waiver-by-defense, as opposed to express waiver, is a doctrine by which waiver may be implied from the conduct of the insurer. The implied waiver doctrine plainly exists under Florida law in some categories of insurance cases, as illustrated by the following: "[T]here is no question but that in Florida the doctrines of implied waiver and estoppel may be asserted as a defense when an insurer seeks to impose a forfeiture." English & American Ins. Co. v. Swain Groves, Inc., 218 So. 2d 453, 457 (Fla. 4th DCA 1969)(emphasis added).

Appellant will in the following sections establish how the actions of Allstate in expressly acknowledging coverage, in failing to deny coverage, and providing a defense in a manner inconsistent with the absence of coverage, should be held to be precluded from denying coverage under the waiver theory (both express and implied) and under estoppel-by-defense.

I.

AN INSURER EXPRESSLY WAIVES THE ABSENCE OF COVERAGE BY CORRESPONDENCE ACKNOWLEDGING THE EXISTENCE OF COVERAGE WRITTEN AFTER THE INSURER LEARNS OF FACTS UPON WHICH THE ABSENCE OF COVERAGE IS BASED

ROY D. WASSON, ATTORNEY AT LAW
SUITE 402 COURTHOUSE TOWER, 44 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 · TELEPHONE (305) 374-8919

The focus when addressing a question of waiver is on the express or implied intent of the party against whom waiver is sought, as opposed to being on the effect of that intent upon the party asserting waiver. "Waiver is commonly defined as the intentional or voluntary relinquishment of a known right." American Somax Ventures v. Touma, 547 So. 2d 1266, 1268 (Fla. 4th DCA 1989). Accord., e.g., Matter of Garfinkle, 672 F.2d 1340, 1347 (11th Cir. 1982). Of course, waiver may be express or implied, and the cases usually are addressed to whether certain conduct constitutes sufficient circumstantial evidence of knowledge of the facts which give rise to the right being waived and of the intent to forbear assertion of that right. See generally, e.g., Fireman's Fund Ins. Co. v. Vogel, 195 So. 2d 20 (Fla. 2d DCA 1967)(in a clear case, "conduct which warrants an inference of the relinquishment of a known right" will constitute waiver).

The facts of the present action constitute a clear case of Allstate's express and implied waiver of its right to deny coverage to the Lucases. To begin with, Allstate expressly acknowledged its intent to recognize the existence of coverage in its letter to the Lucases dated November 9, 1988. That letter not only made no mention of any lack of coverage for the subject incident, the letter affirmatively stated facts which reflected that there was coverage.

First, the November 9th letter expressly recognized that there was insurance protection up to the limits of the liability policy, where it stated that the "the amount of damages claimed in the suit

ROY D. WASSON, ATTORNEY AT LAW
SUITE 402 COURTHOUSE TOWER, 44 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 · TELEPHONE (305) 374-8919

may be in excess of the protection afforded under your policy [because t]he suit papers do not indicate the extent of damages that the plaintiff(s) hope(s) to recover." R1-30-Ex. D (emphasis added). Similarly, the letter went on to reinforce the recognition that coverage was to be provided, where it stated: "Under your policy . . ., the limit of liability could be less than the amount which may be recovered under the suit." Id. (emphasis added). Driving the point home that Allstate viewed the loss as covered up to those limits was the next sentence, which stated: "If the verdict is in excess of the policy limit, you will be personally liable for such excess." Id. (emphasis added). If the insureds only were to be held liable for the excess, then Allstate had expressly assumed the duty to pay that amount of a verdict up to the amount of the policy limits, whether there was coverage or not! That letter went on to advise that Allstate had appointed counsel to defend the Lucases, mentioned that the Lucases could retain separate counsel too, while taking pains to assure them thusly: "We do not mean to imply that it is necessary for you to hire your own lawyer . . . ." R1-30-Ex. D.

The express terms of that letter are absolutely inconsistent with the position that there was no coverage under Allstate's policy for the subject incident. The letter could have no meaning other than as a statement that there was coverage for that incident up to the limits of the policy. Therefore, Allstate expressly waived its position that there was no coverage and the certified questions and proposed questions rephrased by Appellant should be

ROY D. WASSON, ATTORNEY AT LAW
SUITE 402 COURTHOUSE TOWER, 44 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 · TELEPHONE (305) 374-8919

answered "Yes."

II.

AN INSURER IMPLIEDLY WAIVES ITS RIGHT TO DENY COVERAGE BY PROVIDING A DEFENSE WITHOUT A RESERVATION OF RIGHTS WITH KNOWLEDGE OF THE FACTS UPON WHICH ITS DENIAL OF COVERAGE COULD BE BASED

In review, some of the highlights of the facts as they pertain to the implied waiver issue are as follows:

--The molestation of Charlene Doe took place on December 29, 1985. R2-59-2.

--On August 29, 1986, William Lucas pleaded guilty to two felony counts arising out of that molestation and was incarcerated in state prison. R1-30-Ex. A.

--By letter dated November 16, 1986, counsel for Jane and Charlene Doe advised Allstate that his client "was injured in the home of the Lucas[es]." R1-30-Ex. B.

--"Peggy Lucas informed an Allstate adjuster on December 3, 1986 that her husband had been convicted." R1-30-Ex. C at 2 ¶ 12.

--"The criminal Judgment and Sentence were received by Allstate from Peggy Lucas on December 17, 1986." R1-30-Ex. C at 2 ¶ 12.

--It was two years before the state court lawsuit was filed and four years before coverage was denied that Allstate had actual knowledge of all the facts it needed to deny coverage, as reflected by Allstate's stipulation below that it was "relying upon these facts and documents [made known to it in 1986] to show that

ROY D. WASSON, ATTORNEY AT LAW
SUITE 402 COURTHOUSE TOWER, 44 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 · TELEPHONE (305) 374-8919

coverage is excluded under the policy." R2-64-2.

--"Allstate has been defending the Lucases in the underlying state court action since its inception, but it did not send written notice of a reservation of rights to the Lucases." R-2-57-3.

The outrageous delay in denying coverage would be enough evidence of an intent to waive the defense, in and of itself, to defeat summary judgment. Insurers do not provide defenses without reservations in the first instance unless they intend to provide coverage; much less do they defend for years at a time prior to raising a coverage question unless they have chosen to forego the defense.

Allstate offered nothing in the way of an evidentiary showing to create an issue of fact as to a contrary meaning behind these years of inaction. Therefore, while Appellant has established in the preceding section Allstate's express waiver, this Court should answer in the affirmative the question proposed above whether implied waiver resulted from Allstate's provision of an unqualified defense to its insured's for a long time after it learned all it needed to know to deny coverage.

Appellant will distinguish the present case from Phoenix Assur. Co. v. Hendry Corp., 267 So. 2d 92 (Fla. 2d DCA 1972). In that case, the Second District reversed a summary judgment which had been entered in favor of the insured, holding that it could not affirm the determination that a "delay of eighteen (18) months prior to disclaiming liability, even with the knowledge of the facts during that time upon which it based its disclaimer, is

ROY D. WASSON, ATTORNEY AT LAW
SUITE 402 COURTHOUSE TOWER, 44 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 · TELEPHONE (305) 374-8919

sufficient alone to establish prejudice as a matter of law against Hendry [the insured] so as to estop Phoenix [the insurer] from disclaiming liability." 267 So. 2d at 94 (emphasis added).

The Phoenix Assurance case did not address the question of waiver-by-defense, but discussed only the issue of estoppel. As illustrated by the underlining of the above quoted portion of the holding, the Second District was not looking at the meaning of the eighteen month delay as it related to the intent of the insurer, but was looking the delay solely as it might constitute evidence of prejudice to the insured. As has been addressed--and as will be discussed in more detail below--there is no absolute requirement of prejudice from delay under the waiver doctrine, so the Phoenix Assurance case cannot present a barrier to reversal.

Additionally, it is self-evident that the eighteen month delay in Phoenix Assurance, which was far less than half the delay in the case at bar, is in no way comparable to the present situation. Even if the Second District had considered the waiver issue in Phoenix Assurance, there is nothing to indicate that its holding would be that a four-year delay does not amount to implied waiver.

Notwithstanding the usual common law principle under Florida jurisprudence--that the doctrine of waiver requires no showing of prejudice to the party asserting the doctrine--and notwithstanding the authority from other jurisdictions recognizing the distinction between waiver and estoppel in situations like that of the present case, Appellant expects that Allstate will continue to take the position that prejudice is a necessary element of the waiver-by-

ROY D. WASSON, ATTORNEY AT LAW
SUITE 402 COURTHOUSE TOWER, 44 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 · TELEPHONE (305) 374-8919

defense theory under Florida law. Appellant will first demonstrate that there is no persuasive authority establishing a requirement of any showing of prejudice in a waiver case, and then Appellant will demonstrate the existence of sufficient prejudice to satisfy such a requirement if there were some such authority.

There has been no Florida Supreme Court case expressly addressing the question whether the waiver-by-defense doctrine can apply under circumstances which do not also amount to an estoppel-by-defense. One early Supreme Court case, however, implicitly recognizes the difference between estoppel-by-defense and waiver-by-defense, in an appeal from a judgment in favor of an injured Plaintiff against the tortfeasor's insurer. See U.S.F. & G. Co. v. Snite, 143 So. 615 (Fla. 1932). In Snite the insurer appealed, asserting that the Plaintiff had not proven facts which would give rise to coverage, in that he "failed to establish the identity of the automobile . . . involved in the accident as the automobile covered by the policy." 143 So. at 616.

There was a two-pronged basis for the holding that the insurer could not contest coverage in the Snite case, the second prong of which is pertinent here. The first prong was that the insurer did not object to the introduction of the policy, and seemingly "conceded that the policy offered in evidence applied to the automobile involved in the accident." Id. The Court then went on to the second prong of its holding, which supports the notion that the waiver-by-defense doctrine exists under Florida law as a theory which does not require any showing of prejudice, holding: "Aside

ROY D. WASSON, ATTORNEY AT LAW
SUITE 402 COURTHOUSE TOWER, 44 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 · TELEPHONE (305) 374-8919

from this [failure to object to the introduction of the policy], however, the record shows that the surety company recognized its liability on this policy by defending the suit for damages for the injury alleged to have been occasioned by the collision . . . ." Id. (emphasis added). There was no discussion of any need for prejudice from the delay in denying coverage in Snite, and the case therein supports the proposition that a waiver-by-defense theory exists which does not require any consideration of prejudice.

There are cases at the intermediate appellate level, however, containing dicta to the effect that prejudice to the insured must be shown even in cases in which the insurer's failure to deny coverage rises to the level of a voluntary relinquishment of its right to do so. As will be shown, those cases are not persuasive on the point and the dicta should be disregarded.

In Liberty Mut. Ins. Co. v. Jones, 427 So. 2d 1117 (Fla. 3d DCA 1983), Robert Murphy was injured in a traffic accident as he rode as a passenger in a vehicle being driven by William Jones which was owned by County Home Bakers. Murphy filed suit against Jones, Country Home and its insurer, Liberty Mutual.[1] Murphy and Jones were both employees of Country Home acting within the scope of their employment at the time of the accident, and that fact ultimately was relied upon by Liberty Mutual in its defense to coverage under the "cross-employee exception" to liability under the policy. 427 So. 2d at 1118. However, there was no barrier to

[1]The claim against Liberty Mutual was not a coverage claim, but the insurer was joined, apparently because this case arose before the Florida "non-joinder of insurers" statute.

ROY D. WASSON, ATTORNEY AT LAW
SUITE 402 COURTHOUSE TOWER, 44 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 · TELEPHONE (305) 374-8919

coverage on the face of the Complaint, because the facts which would support the applicable exclusion were not pleaded.

There being no impediment to coverage on the face of the Complaint, the same law firm appeared on behalf of all three Defendants, apparently without any reservation of rights being issued. See id. Later, after discovery revealed the coverage defense, the original counsel representing the Defendants withdrew and Liberty Mutual denied coverage to Jones and Country Home. The case came to the Third District upon review of a summary judgment in favor of Jones on his cross-claim for legal fees on the coverage issue.

In reversing the summary judgment, the Third District addressed in dictum the necessity of a showing of prejudice to support the waiver-by-defense theory, stating: "A party claiming an estoppel or waiver because of a delay in disclaiming liability must show that his rights were prejudiced thereby." 427 So. 2d at 1118 (emphasis added). Similarly, the court in dictum noted that "Jones [has not] demonstrated how Liberty Mutual's [allegedly delayed] disclaimer has prejudiced him, an ingredient necessary to the viability of either of his theories. . . ." Id. (emphasis added).

The Third District's discussion of the need to show prejudice under the waiver theory in the Jones case is pure dicta because there was no evidence to support the threshold elements of a waiver claim: that the insurer provided a defense notwithstanding actual knowledge of the facts giving rise to a coverage defense. As

ROY D. WASSON, ATTORNEY AT LAW
SUITE 402 COURTHOUSE TOWER, 44 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 · TELEPHONE (305) 374-8919

stated, the fact that Jones and Murphy were co-workers acting within the course and scope of their employment at the time of the accident was not pleaded in the original complaint. Therefore, the insurer's lack of knowledge of a coverage defense is itself enough to support the Third District's holding that "[t]his record in devoid of evidence to support an estoppel or waiver." Id. There being no conduct which could rise to the level of a voluntary relinquishment of a coverage defense, there was likewise no need to address the question of whether prejudice would be required where a waiver otherwise existed. Therefore, the Jones case should not be held to be persuasive on the question whether prejudice is an element of waiver-by-defense under Florida law.

A further confirmation that the Jones dicta should be disregarded as nonpersuasive is that the first-quoted proposition above ("[a] party claiming an estoppel or waiver because of a delay in disclaiming liability must show that his rights were prejudiced thereby") is immediately followed by an unconditional citation to Phoenix Assur. Co. v. Hendry Corp., 267 So. 2d 92 (Fla. 2d DCA 1972), cert. disch., 277 So. 2d 532 (Fla. 1973). See Jones, supra, 427 So. 2d at 1118 (emphasis added). There was no use of any sort of citation signal (i.e., "cf.," "see," "see generally," etc.) to indicate anything other than that the cited authority directly held in accordance with the proposition preceding the citation. The Third District apparently misread the Second District's decision in Phoenix Assurance to deal with the elements of a waiver-by-defense claim.

ROY D. WASSON, ATTORNEY AT LAW
SUITE 402 COURTHOUSE TOWER, 44 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 · TELEPHONE (305) 374-8919

In actuality, the Phoenix Assurance case does not contain a holding defining the elements of a waiver-by-defense claim, and does not even mention the concept of waiver by name in dicta. The holding is limited to that intermediate appellate court panel's view as to the elements of a claim of estoppel-by-defense, as reflected by the Second District's language identifying the Appellant's argument on appeal and the court's language addressing that argument. The Appellant's single argument was restated by the court as follows:

> Hendry relies upon two cases . . . as the controlling law that supports its contention that when no disclaimer of liability or notice of reservation of rights to disclaim liability is given, the mere assumption of the defense of the suit estops Phoenix from denying its obligations in relation to the hazard presented by the Nickerson suit [against the insured for damages].

267 So. 2d at 93 (emphasis added). As noted above, there is nothing in the decision to reflect that Hendry argued the elements of a waiver-by-defense claim of coverage.

Likewise, the holding of the Second District in Phoenix Assurance does not deal with the elements of waiver-by-defense. That holding was applied instead only to cases in which there was a "party claiming an estoppel because of a delay in disclaiming liability." 267 So. 2d at 94 (emphasis added). There being neither dictum nor holding as to the elements of a claim of waiver-by-defense, the Phoenix Assurance case is not authority for the Third District's proclamation that waiver-by-defense requires a showing of prejudice.

ROY D. WASSON, ATTORNEY AT LAW
SUITE 402 COURTHOUSE TOWER, 44 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 · TELEPHONE (305) 374-8919

In the alternative, should this Court determine that some showing of prejudice must be made as an essential element of a claim of waiver, in providing the Lucases with an unqualified defense and directing the course of their defense to the state court lawsuit, Allstate obtained in exchange for its waiver the insureds' forbearance of their right to control their defense. The effect of that forbearance was to expose the Lucases to a direct and unacceptable conflict of interest on the part of Allstate, which is one of the forms of prejudice which will support the claim of waiver-by-defense, as noted by the following:

> A number of cases indicate or suggest that the rule is also justified by the fact that the insured is deprived of the right to control his defense; some of these cases further suggest that this situation is inherently prejudicial to the insured in the absence of a reservation of rights.

State Farm Lloyds, Inc. v. Williams, 791 S.W. 542, 551 Tex. App. 1990). Thus, the absence of the right to control the defense, coupled with the waiver discussed above, necessitate an affirmative response to the question whether the doctrine of waiver precludes Allstate from contesting the lack of coverage under the policy.

III.

THE COURT SHOULD RESPOND AFFIRMATIVELY THAT ALLSTATE IS ESTOPPED TO CONTEST COVERAGE BY VOLUNTARILY DEFENDING THE LUCASES WITHOUT A RESERVATION OF RIGHTS RESULTING IN PREJUDICE TO ITS INSUREDS

Appellant is entitled to prevail against Allstate under the

ROY D. WASSON, ATTORNEY AT LAW
SUITE 402 COURTHOUSE TOWER, 44 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 • TELEPHONE (305) 374-8919

estoppel-by-defense, whether or not Allstate's conduct in failing to issue a reservation of rights while it unconditionally defended the Lucases is recognized as the voluntary relinquishment of Allstate's right to deny coverage that it was. Whether or not there was a waiver, there was estoppel.

The applicability of the estoppel-by-defense doctrine was recognized by the Fourth District Court of Appeal in Cigarette Racing Team v. Parliament Ins. Co., 395 So. 2d 1238 (Fla. 4th DCA 1981). In the Cigarette Racing case, "Parliament Insurance Company assumed the defense of its insured, Cigarette, without a reservation of rights or a notice to Cigarette of possible non-coverage." 395 So. 2d at 1240. The Fourth District noted the general rule "that waiver and estoppel will not operate to create coverage in an insurance policy where none originally existed," but then recognized the applicability of the doctrine of estoppel-by-defense as follows:

> There is an exception to the rule, however, which provides that "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 1239, 1240 (quoting City of Carter Lake v. Aetna Cas. & Sur. Co., 604 F.2d 1052, 1059 (8th Cir. 1979)).

AIU Ins. Co. v. Block Marina Inv., Inc., 544 So. 2d 998 (Fla. 1989) should not be read to disapprove of either the waiver-by-defense or the estoppel-by-defense doctrine, because this Court there was facing a set of facts which neither called-for nor

ROY D. WASSON, ATTORNEY AT LAW
SUITE 402 COURTHOUSE TOWER, 44 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 · TELEPHONE (305) 374-8919

warranted the application of either doctrine, and because the legal issue before the Court was entirely different from that present in this case. In the AIU Insurance case, unlike the present case, the insurer did not wholly fail to provide any indication that it reserved its rights to contest coverage. To the contrary, the decision reflects as follows: "AIU informed Block Marina that although the claim was not one generally covered under the policy, it would provide a defense subject to a reservation of its right to assert a coverage defense . . . ." 544 So. 2d at 999 (emphasis added).

Likewise, there was no failure to reserve rights in the case cited as in conflict with the district court's decision in AIU Insurance which gave rise to Supreme Court jurisdiction. In U.S.F.&G. v. American Fire & Indemn. Co., 511 So. 2d 624 (Fla. 5th DCA 1987) the issue could not have been whether the failure to defend under a reservation of rights constituted waiver or estoppel, because the insurer providing a defense in that case, "American, notified Adolf [the insured]'s insurance agent that American would defend Adolf in the wrongful death action but reserved its right to assert a coverage defense." Id. at 625 (emphasis added). Thus, the AIU Insurance case did not involve either an estoppel-by-defense situation or a waiver-by-defense. Instead, that case involved the question of whether an insurer who has provided actual knowledge of its reservation of rights, but who failed to make a reservation under a specific statutory procedure waives its rights to deny coverage. The case at bar involves no

ROY D. WASSON, ATTORNEY AT LAW
SUITE 402 COURTHOUSE TOWER, 44 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 · TELEPHONE (305) 374-8919

such question, so the AIU Insurance case merits no further discussion.

Florida law recognizing the doctrine of estoppel-by-defense, Appellant asserts that such prejudice as will support the doctrine has conclusively been shown in the facts of this case. Some of the types of prejudice which will support a finding of estoppel-by-defense in other cases have been described as follows:

> Factors that may result in prejudice include the loss of a favorable settlement opportunity, inability to produce all testimony existing in support of a case, inability to produce favorable witnesses, loss of benefit of any defense in law or fact through reliance upon the insurer's promise to defend . . . .
>
> Prejudice to insured has been indicated by the conflict of interests that arose when the insurer assumed the defense with doubts concerning coverage and without notifying insured of the conflict.

Appleman's Insurance Law and Practice § 4693.

There are two sources in the record for a finding of such prejudice as will support the doctrine of estoppel-by-defense: 1) the presumed prejudice which arises in such situations; 2) the actual prejudice which occurred as the result of the conflict of interest between an insurer and its insured who is ignorant of the insured's intent to deny coverage, as reflected by Allstate's affirmative acts in other cases--while it controlled the Lucases' defense--to change Florida law to better enable it to defeat coverage here.

First, Appellant submits that prejudice should be presumed from the fact that Allstate controlled the Lucases' defense during

ROY D. WASSON, ATTORNEY AT LAW
SUITE 402 COURTHOUSE TOWER, 44 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 · TELEPHONE (305) 374-8919

the extreme delay of four years from the time that Allstate learned all the facts supporting its eventual denial of coverage. This case must present a more compelling factual basis than even those which have led to the holdings to the effect that: "prejudice in such a case will be conclusively presumed or that prejudice is an inevitable effect of the insured's loss of the right to maintain control of the defense." See Couch on Insurance 2d § 51:166.

There is no Florida Supreme Court case which expressly addresses the question whether prejudice will be presumed and the burden will shift to the insurer to rebut that presumption, but this Court should join the majority of jurisdictions on this point and recognize that presumption. There has been no development in the law over the nearly forty years since the majority rule was announced that "a greater number of courts have ruled either that prejudice is an inevitable effect of the insured's loss of the right to maintain complete control of the defense, or (what amounts to the same thing) that in a situation in which it appears that an insurer has assumed the defense of an action against an insured, prejudice to the insured will be presumed." Annot., 38 A.L.R.2d 1148, supra, at 1151 (emphasis added). Allstate having failed in its burden of rebutting that presumption of prejudice, it was the Appellant, and not Allstate, who was entitled to summary judgment.

If for some reason this Court should hold that it did not recognize the waiver-by-defense doctrine in U.S.F. & G. Co. v. Snite, 143 So. 615 (Fla. 1932), as discussed in the preceding section, then that case should be considered as reflecting the

ROY D. WASSON, ATTORNEY AT LAW
SUITE 402 COURTHOUSE TOWER, 44 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 • TELEPHONE (305) 374-8919

existence of a presumption of prejudice in an estoppel-by-defense case. In Snite there was no affirmative showing of any harm or reliance by the insured, so if that case is not a waiver case, it is authority to support the recognition of presumed harm from the provision of a defense without reservation of rights.

Even if this Court should determine that Florida will follow the minority rule and refuse to recognize the presumption of legal harm from the extraordinary delay and other facts, the record does reflect actual prejudice which resulted from a conflict of interest between the Lucases and Allstate during the time Allstate defended the claim against its insureds. It should go without saying that the most fundamental source of a potential conflict between an insurer and its insured is on the question whether the loss will be within the coverage of the policy. It is in the interest of the insured for the facts and the law to coexist in such a state as his conduct was covered; yet it is in the interest of the insurer for the facts and the law to result in the absence of coverage.

The general principle applicable to conflict-of-interest prejudice is stated as follows:

> At least one of the reasons for the rule [of estoppel-by-defense] appears to be the existence of conflicts of interest, either actual or potential between the insured and the insurer in connection with the conduct of the defense of the insured. . . . For example, a conflict of interest might arise when the insurer represents the insured in a lawsuit and simultaneously formulates its defense of noncoverage against the insured.

State Farm Lloyds, Inc. v. Williams, 791 S.W. 542, 551 (Tex. App.

ROY D. WASSON, ATTORNEY AT LAW
SUITE 402 COURTHOUSE TOWER, 44 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 · TELEPHONE (305) 374-8919

1990). The case at bar involves much more than that abstract risk of a conflict of interest; it involves a demonstrable harm to the Lucases' defense to the state court action from the direct activities of Allstate Insurance Company while providing the Lucases with their defense.

At the time of William Lucas' molestation of Charlene Doe, and at the time the action for damages was filed by Jane Doe against the Lucases, the question of whether a child molester's acts of deviate behavior were covered under a homeowner's policy which excluded intentional injuries (and injuries which were expected by the insured) was controlled by Zordan v. Page, 500 So. 2d 608 (Fla. 2d DCA 1986). The Second District plainly held that there would be coverage under such policies, even for the intentional acts of deviate sexual relations with a child, so long as the insured possessed no subjective intent or expectation that injuries would result. Regardless of what the law is now, more than seven years after Zordan, it was the law when the damages case was pending. Under Zordan, so long as the jury believed William Lucas' testimony that, at the time he perpetrated the acts of molestation upon the minor child, William Lucas did not think that those acts would be harmful to her, he would have been covered under the Allstate policy in question.

While Allstate took its time in conducting its defense of William Lucas in the state court case--and while he was ignorant of Allstate's conflict of interest and intent to deny coverage--Allstate was consciously working against his interest in this Court

ROY D. WASSON, ATTORNEY AT LAW
SUITE 402 COURTHOUSE TOWER, 44 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 · TELEPHONE (305) 374-8919

to change the law in the Second District so as to eliminate any chance that Mr. Lucas' acts would be covered by the policy. In July of 1989, more than two and one-half years after the facts of this case were made known to Allstate, and several months after the state court lawsuit had been filed and could have been settled, this Court decided Landis v. Allstate Ins. Co., 546 So. 2d 1051 (Fla. 1989).

In Landis, the Court accepted Allstate's argument that specific intent to cause harm was not necessary upon which to base an exclusion of coverage; the intentional acts of the child molester in and of themselves would bar coverage. The fact of the prejudice to William Lucas is self-evident: If Allstate had denied coverage or reserved its rights to do so on the basis of such an argument in the present case, the Lucases would have been able to take action to resolve the Doe claim prior to the law changing against them.

There were other forms of prejudice from the delay in Allstate denying coverage to the Lucases. For example, as argued in Doe's Motion for Summary Judgment, "during the pendency of this litigation, the Lucas children have forgotten the names of witnesses who may prove beneficial to the Lucases' case." On the damages issue, in light of its intent to deny coverage, it would not concern Allstate one iota whether a verdict were large or small, so Allstate necessarily had less interest in pursuing discovery and investigation on the matter of damages sustained by Charlene Doe, to the prejudice of its insured.

ROY D. WASSON, ATTORNEY AT LAW
SUITE 402 COURTHOUSE TOWER, 44 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 · TELEPHONE (305) 374-8919

In fairness to counsel retained by Allstate to defend the Lucases, Appellant does not suggest any professional negligence, ethical misconduct, or other violation of his role as counsel for the Lucases. However, it is common knowledge that insurers control the purse-strings when it comes to financing discovery, retaining experts, and other expensive matters in defense of serious cases.

While counsel no doubt was doing all he could with the resources that Allstate allotted, the insurer's differing interest from that of the Lucases undoubtedly resulted in some prejudicial differences in the manner the litigation was conducted, however slight were those differences. "Once established, the amount of prejudice, whether large or small, becomes irrelevant when determining the applicability of the doctrine of estoppel." Florida Physicians Ins. Co. v. Stern, 563 So. 2d 156, 160 (Fla. 4th DCA 1990). There being actual prejudice shown from Allstate's conflict of interest and delay in denying coverage, the doctrine of estoppel-by-defense is applicable and the Eleventh Circuit's certified question should be answered in the affirmative.

ROY D. WASSON, ATTORNEY AT LAW
SUITE 402 COURTHOUSE TOWER, 44 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 · TELEPHONE (305) 374-8919

CONCLUSION

WHEREFORE, for the reasons and upon the authorities set forth above, the questions certified by the Eleventh Circuit Court of Appeals, as well as those rephrased by Appellant in this brief, should be answered in the affirmative.

Respectfully submitted,

ROY D. WASSON
Suite 402, Courthouse Tower
44 West Flagler Street
Miami, Florida 33130
(305) 374-8919

JAMES W. GUARNIERI
608 East Morgan Street
Brandon, FL 33510
(813) 685-4414

Attorneys for Appellant

By: _____
ROY D. WASSON
Fla. Bar No. 332070

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy hereof was served by mail, upon David B. Shelton, Esq., P.O. Box 1873, 11 East Pine Street, Orlando, FL 32802, on this, the 18th day of March, 1994.

ROY D. WASSON
Suite 402, Courthouse Tower
44 West Flagler Street
Miami, Florida 33130
(305) 374-8919

JAMES W. GUARNIERI
608 East Morgan Street
Brandon, FL 33510
(813) 685-4414

Attorneys for Appellant

By: _____
ROY D. WASSON
Fla. Bar No. 332070