SUPREME COURT OF FLORIDA

CASE NO. 85, 334

AWILDA VEGA and
JUSTINO VEGA, JR., etc.,

Petitioners,

v.

INDEPENDENT FIRE COMPANY,

Respondent.

ON DISCRETIONARY REVIEW FROM THE FIFTH DISTRICT COURT OF APPEAL

PETITIONERS' INITIAL BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

This action is before this Court on a conflict certified by the Fifth District Court of Appeal. In the decision *sub judice* the Fifth District rejected the rule of law set forth by the Third District in *Fecht v. Makowski*, 172 So. 2d 468 (Fla. 3d DCA 1965), that if an insurance company undertakes an investigation into the truthfulness of the representations contained in an application it must do so with all diligence and is charged with the knowledge it might have obtained had it conducted the investigation properly. This rule is based on longstanding decisions of this Court and has also been adopted by the Second District.

Petitioners, Awilda Vega and Justino Vega, Jr., contend that the Fifth District erred in blanketly rejecting the principle that insurance companies, like all other entities, have the obligation to exercise due care and should be held responsible when they fail to do so. Petitioners respectfully submit that this Court should reverse the decision *sub judice* and approve the decision of the Third District in *Fecht* and the Second District in *Security Life & Trust Company v. Jones*, 202 So. 2d 906 (Fla. 2d DCA 1967). To this end, the facts and history of this case which are pertinent to the issue at hand are set forth below.

A. Pertinent facts

1. The insurance application

In December of 1986, Mr. and Mrs. Brigham and their son, Robert, moved to Florida from Michigan. (T. 104; L. Brigham Deposition, p. 10; P. Brigham Deposition, p. 6).[1] In early

[1]All references to the record on appeal prepared by the Clerk of this Court appear as follows: (R.). References to the record prepared by the Clerk of the Fifth District appear as follows: (SR.)

August 1988, Mr. Brigham began shopping for automobile insurance for his family. He and his wife met with insurance agent Margaret Laser. (T. 104-105, 126; L. Brigham Deposition, pp. 13-14; P. Brigham Deposition, pp. 10-11).

Ms. Laser asked the Brighams questions from the insurance application and then filled in the answers herself. (T. 105, 126, 127; L. Brigham Deposition, pp. 14-15). She listed each of the three Brighams on the application as drivers who would be operating the insured vehicles. (P's. Ex. 1). Ms. Laser then asked whether the Brighams had been involved in any accidents or received any traffic citations during the preceding five years. (T. 104, 122). As to themselves, Mr. and Mrs. Brigham answered that they definitely had not. (T. 106, 127, 128; L. Brigham Deposition, p. 19; P. Brigham Deposition, p. 15). As to Robert, they were unsure and began conversing between themselves. (T. 106; L. Brigham Deposition, p. 21; P. Brigham Deposition, pp. 12, 15). Both Brighams testified that they knew Robert had been in an accident, but could not recall when it had occurred. (L. Brigham Deposition, pp. 28, 30-32; P. Brigham Deposition, p. 9). According to the Brighams, upon observing their indecisiveness, Ms. Laser said, "Don't worry. The company checks it out." (T. 107, 121, 122, 128; L. Brigham Deposition, pp. 21-22; P. Brigham Deposition, p. 15). Ms. Laser then checked "no" to the application question requesting information about accidents and moving violations. (T. 105, 126-127; L. Brigham Deposition, pp. 14-15).

References to the trial transcript appear as follows: (T.) References to the trial exhibits are by party and number. An agreed motion to supplement the record filed with the Fifth District on June 10, 1994 added depositions of which selected portions were read at trial to the record on appeal. Said depositions are referenced by deponent's name and page number. Unless otherwise stated, all emphasis in this brief is added.

The rest of the application was completed in the same manner and Mr. Brigham signed the application where Ms. Laser indicated they should. (T. 126, 127; L. Brigham Deposition, pp. 15-16). The Brighams left the agency that day knowing they had answered each question truthfully as to themselves, and relying on Ms. Laser's representation that the insurance company would run a check on Robert's driving record. (T. 112, 129; L. Brigham Deposition, pp. 15, 20).

2. Independent Fire's independent investigation and subsequent issuance of the policy

In fact, Independent Fire not only ordered a motor vehicle report on Robert, but also on Mr. and Mrs. Brigham as well. (Sheridan Deposition, p. 26; P's Ex. 6; Ds' Ex. B). According to William Sheridan, Assistant Vice President and Underwriting Manager for Independent Fire, the company orders a motor vehicle report on *every* new applicant. (Sheridan Deposition, pp. 4, 26). Independent Fire goes to this expense because the motor vehicle reports, along with the type of vehicle being insured, are the most important sources of the information the underwriters need to determine whether the application meets the company's criteria. (Sheridan Deposition, p. 28).

When Independent Fire received the motor vehicle reports on the Brighams, it knew they only covered the year and a half prior to the date of the application. (Sheridan Deposition, pp. 31-32; 34-35). Independent Fire knew that Mr. Brigham's Florida driver's license was first issued on September 4, 1987, Mrs. Brigham's on June 10, 1987 and Robert's on May 6, 1987. (P's Ex. 6; Ds' Ex. B). Independent Fire also knew that the Brighams had been licensed prior to moving to Florida and that they owned other vehicles which were not located in Florida. (P's Ex. 1; Sheridan Deposition, pp. 42-43). Knowing that the motor vehicle reports contained only a fifteen month

driving history, knowing that the insurance application requested the Brighams' driving history for *the past five years*, and knowing that its own underwriting policies required that it obtain an applicant's driving history for at least *the past three years*, Independent Fire nevertheless issued the Brighams an automobile liability policy. (Sheridan Deposition, pp. 17, 35; P's Ex. 1, 6; Ds' Ex. B).

3. The automobile accident, Independent Fire's belated additional investigation, and the underlying declaratory action

Independent Fire collected insurance premiums from the Brighams for the next three years. At that time, Robert was involved in an automobile accident which resulted in the deaths of the Vegas' parents. (Sheridan Deposition, pp. 37, 39). When Independent Fire received a demand on the policy, it completed the investigation it had begun when the Brighams first applied for insurance and learned that Robert had been involved in one accident and received two traffic tickets in Michigan prior to moving to Florida. (Sheridan Deposition, p. 37). With this belatedly acquired information, Independent Fire filed the instant suit to rescind the policy based on the responses in the Brighams' original application. (SR. 1-4). Independent Fire named the Brighams and the Vegas as defendants. (SR. 1-4).

B. History of the case

1. The trial and the trial court's refusal to give Defendants' requested jury instruction

At trial, the Vegas presented the testimony and evidence described above regarding Ms. Laser's advices to the Brighams, Independent Fire's undertaking to conduct an independent investigation of the Brighams' driving records, and its self-evidently incomplete efforts in that regard.

(T. 84-89, 107, 128; Sheridan Deposition, p. 17, 35, 37). Independent Fire denied that it had placed any reliance on the motor vehicle reports, claiming instead that it had relied solely on the Brighams' application. (T. 79-87; Sheridan Deposition, p. 10, 15-16, 26).

The Vegas requested in writing that the trial court provide the jury with the following special jury instruction on their theory of the case, i.e., that if Independent Fire did not rely solely on information given in the application but undertook an independent investigation, it was charged with all knowledge it might have obtained had it pursued the inquiry to the end with all diligence and completeness:

> If an insurance company undertakes its own investigation, it must perform that investigation with reasonable diligence, and the company will be viewed as having all of the knowledge which that diligent investigation might have turned up. *Fecht v. Makowski,* 172 So. 2d 468, 471 (Fla. 3d DCA 1965).

(SR. 128). The lower court refused to give this instruction. (T. 182). Having not been told about the Vega's defense, the jury returned a verdict in favor of Independent Fire and a final declaratory judgment was rendered in accordance with that verdict. (T. 226-227; SR. 161-162).

2. The appeal to the Fifth District and the opinion *sub judice*

The Vegas appealed, and a panel of the Fifth District affirmed in the opinion now under consideration. The court recognized that the requested instruction was a correct statement of the law under *Fecht v. Makowski*, 172 So. 2d 468 (Fla. 3d DCA 1968). *Vega v. Independent Fire Insurance Company*, 20 Fla.L.Weekly D556 (Fla. 5th DCA, March 10, 1995). However, the court rejected this rule of law, finding it contrary to public policy. *Id.* The court recognized that its decision conflicted with *Fecht* and certified that conflict. *Id.*

The Vegas filed a notice to invoke this Court's discretionary jurisdiction on the basis of the Fifth District's certification, and also on the grounds that the decision expressly conflicts with a decision of the Second District. (R. 13-14).[2] This Court issued an order which postponed its decision on jurisdiction and directed the parties to serve their briefs on the merits. (R. 23).

SUMMARY OF THE ARGUMENT

Pursuant to § 627.409, Fla. Stat., an insurance company may sue to revoke a policy based upon a misrepresentation in the application if it can show that the misrepresentation was either fraudulent or material or that the company would not have issued the policy had it known the true facts or the policy would have been issued at a higher premium. However, in order for an insurance company to revoke a policy based on this statute, it must *rely* on the misrepresentation to its detriment.

While it is true that an insurance company may rely on the representations contained in an application without investigating the truth or falsity thereof, an insurance company which conducts an investigation into those representations may be estopped from asserting detrimental reliance thereon. If an insurance company chooses to conduct such an investigation, it must conduct a reasonable investigation: an insurer is "charged with all knowledge that it *might* have obtained had it pursued the independent inquiry to the end with reasonable diligence and completeness." *Fecht*

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[2]The opinion in the case *sub judice* also conflicts with *Security Life & Trust Company v. Jones*, 202 So. 2d 906 (Fla. 2d DCA 1967) — a case in which the Second District approved the rule of law set forth in *Fecht*.

v. Makowski, 172 So. 2d 468, 471 (Fla. 3d DCA 1965). This rule of law is consistent with this Court's decision in *Johnson v. Life Insurance Company of Georgia*, 52 So. 2d 813 (Fla. 1951).

Moreover, the rule of law stated in *Fecht* is supported by the public policy of this state — the *Fecht* rule does not discourage insurance companies from conducting investigations nor does it encourage applicants to lie as the Fifth District suggests. In Florida, even innocent misrepresentations in an insurance application allow an insurer to void a policy if they are material. This bright line rule — where even honest mistakes can void a policy — protects insurance companies irrespective of the applicant's intentions. The necessary counterpart to this protection for insurers is the rule of law established by *Fecht* and implicit in § 627.409(1), Fla. Stat. — the insurance company must actually rely on the representation. Thus, if the company chooses to investigate the representation, it is only fair that it must conduct a reasonably diligent and complete investigation.

In the present case, the Vegas present evidence sufficent to warrant a jury question on whether Independent Fire conducted an investigation which negated its claim of detrimental reliance. The lower court refused to submit the Vegas' instruction on that point. Thus, the lower court prevented the Vegas from submitting their theory of the case to the jury. In affirming the trial court, the Fifth District improperly rejected the well established rule of law in *Fecht* and created a conflict where none previously existed. The Vegas respectfully submit that this Court should reverse the opinion *sub judice* and reaffirm the validity of those long-standing decisions brought into question thereby.

ARGUMENT

A. ARGUMENT ON THE MERITS

1. In order to void an insurance policy based upon misrepresentations in the application, Florida law requires a finding of detrimental reliance

In this case, Independent Fire sued to revoke the Brighams' insurance policy, contending that they had made a material misrepresentation. Section 627.409(1), Fla. Stat., allows such revocation if the insurance company shows that the misrepresentation was either fraudulent or material and that it would not have issued the policy had the true facts been revealed or the policy would have been issued at a higher premium. This statute "requires that the misrepresented facts should result in or *cause* the company to charge a higher premium for the unrevealed risk" or result in or cause the company to issue a policy where it otherwise would not have. *Fecht v. Makowski*, 172 So. 2d 468, 471 (Fla. 3d DCA 1965). (Emphasis in original). Thus, in order for an insurance company to take advantage of this law, it must ***rely*** on the application to its detriment. As the Third District stated in *Fecht*: "The statute clearly did not read the requirement of detrimental reliance out of the law." *Fecht*, 172 So. 2d at 471.

Of course, an insurance company may rely on the representations contained in an application without investigating the truth or falsity thereof. *See, e.g., Independent Fire Insurance Company v. Arvidson*, 604 So. 2d 854 (Fla. 4th DCA 1992). However, if an insurer undertakes its own investigation into the representations in an application, then it is no longer solely relying on those representations. Under those circumstances, the insurer cannot turn a blind eye to the results of its investigation and assert that nonetheless it really relied on the application. *See Home Insurance Co. v. Drescher*, 210 So. 2d 451 (Fla. 3d DCA 1968).

Neither can the insurer claim that it did not do a very thorough investigation. Rather the insurer is "charged with all knowledge that it *might* have obtained had it pursued the independent inquiry to the end with reasonable diligence and completeness". *Fecht*, 172 So. 2d at 471. Thus, in *Fecht*, the court held that "the company amply demonstrated that it did not rely upon the application by virtue of the fact that it twice conducted its own inspection of the property." 172 So. 2d at 471.

Courts applying Florida law have consistently held insurers to the knowledge they would have obtained if they conducted a reasonable investigation. *Trawick v. Manhattan Life Insurance Company of New York, New York*, 447 F.2d 1293, 1296 (5th Cir. 1971) (if an insurer chooses to make an independent investigation of an applicant and if the circumstances are such that it is in a position to ascertain the facts by a reasonable search, then the insurance company cannot avoid liability by pleading reliance on the insured's application); *Lighting Fixture and Electric Supply Co. v. Continental Insurance Co.*, 420 F.2d 1211 (5th Cir. 1969) (if an insurer's actions constitute an independent investigation, then Florida law charges the insurer with all knowledge that it might have obtained had it pursued independent inquiry with reasonable diligence and completeness); *Fecht, supra; Security Life &Trust Company v. Jones*, 202 So. 2d 906, 908 (Fla. 2d DCA 1967) (if an insurer makes an independent inquiry and the circumstances are such that he is in a position to ascertain the facts by a reasonably diligent and complete search, he is bound by what a reasonably diligent and complete search would show). This rule is in accord with the general principle that once one undertakes a duty, even voluntarily, he must perform it with reasonable care and is responsible for the consequences of failing to use such care.

Further, the rule pronounced in *Fecht* follows directly from this Court's decision in *Johnson v. Life Insurance Company of Georgia*, 52 So. 2d 813 (Fla. 1951). In *Johnson*, the insured failed

to disclose — as required by the life insurance company — that he had received medical treatment within the two years preceding his application for insurance. 52 So. 2d at 814. When the insurer's agent visited the insured's home to collect premiums, he learned that the insured had been admitted to a tuberculosis sanitarium two months after the policy had been issued. Nevertheless, the agent continued to collect premiums. Less than a year later, the insured died from tuberculosis and his wife sought to collect the benefits due. The insurer denied the claim on the basis of the misrepresentations in the application.

This Court held that the insurer had waived its right to void the policy because of the agent's "deliberate disregard of suspicious information", i.e., that the agent's knowledge that the insured was suffering from tuberculosis two months after the policy was issued should have excited the company's attention and prompted it to inquire further as to whether his statement that he had not recently had a medical examination was a misrepresentation. *Johnson*, 52 So. 2d at 815. This Court made it quite clear that it reached this conclusion even though the insurer did not have actual knowledge of the insured's misrepresentations:

> While, ordinarily, the insurer is not deemed to have waived its rights unless it is shown that it has acted with the full knowledge of the facts, the ***intention to waive*** such ***rights may be inferred from a*** *deliberate disregard of information sufficient to excite attention and call for inquiry as to the existence of facts* by reason of which a forfeiture could be declared. *See Zeldman v. Mutual Life Ins. Co. of New York*, 269 App.Div. 53, 53 N.Y.S.2d 792, 794, in which it was stated that ***"Constructive notice may,*** however, ***be the legal equivalent of knowledge, in the sense that circumstances putting the insurer on notice may not be deliberately disregarded."*** [cites omitted]
>
> In the instant case, the defendant had knowledge of the fact that the insured was suffering from tuberculosis only two months after the date of the issuance of the policy; and, from the very nature of this disease, the only reasonable inference is that the insured was suffering

> therefrom on the date of the issuance of the policy. Instead, however, of making the further inquiry dictated by reasonable prudence, the defendant deliberately disregarded this information, and we think ***it must now be held to be charged with knowledge of the facts which such inquiry would have disclosed***, and upon which defendant now relies as a defense to the payment of the full amount due under the policy.[3]

52 So. 2d at 815.

Thus, *Johnson* holds that an insurance company may waive its right to void a policy for misrepresentations in an application when it continues to collect premiums after obtaining either actual or constructive knowledge of the false information. The only difference between *Fecht* and *Johnson* is the manner in which the insurance company obtained the information. In *Johnson*, the insurance company's agent happened to learn of circumstances indicating there might have been false information given in the application while collecting a premium from the insured. In *Fecht*, the agent was actually conducting an investigation. Certainly, an insurer should not be held to a higher standard when he happens onto information, than when he deliberately sets out to discover it. The Fifth District's premise — that *Fecht* is an unwarranted extension of this Court's opinion in *Johnson* — is illogical. Rather, it is the Fifth District's opinion in *Vega* which contravenes *Johnson*. *Fecht* and *Johnson* provide the better rule of law and should be approved by this Court.

2. Public Policy supports the decision in *Fecht v. Makowski*

The Fifth District rejected the rule of law stated in *Fecht* as poor public policy. *Vega*, 20 Fla. L. Weekly at D557. In fact, *Fecht* is fully supported by the public policy of this state. Even

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[3]Based on the above quotes, it is hard to see how the Fifth District could conclude that *Johnson* is contrary to *Fecht* and only applies when "the facts constituting constructive notice ... border on actual knowledge." *Vega*, 20 Fla. L. Weekly at D557.

innocent misrepresentations in an insurance application allow an insurance company to void a policy if they are material. *Continental Assurance Company v. Carroll*, 485 So. 2d 406 (Fla. 1986); *Life Insurance Company of Virginia v. Shifflet*, 201 So. 2d 715 (Fla. 1967); *Travelers Insurance Company v. Zimmerman*, 309 So. 2d 569 (Fla. 3d DCA 1975). The law does not consider the insured's degree of fault in making the misrepresentation — even honest mistakes can void coverage. The only question is whether the insurer would have issued the policy at the same rate. § 627.409(1), Fla. Stat. This simple bright line rule protects insurance companies irrespective of the applicant's intentions. Under it, if an insurer issues a policy in reliance on an innocent misstatement, it may void the policy just as readily as if the answer were fraudulently given.

However, a necessary complement of this broad protection for insurers is that the insurers must first establish that they actually relied on the representation by the insured. If an insurer chooses to not rely and instead to investigate, it is only fair that it be held to the knowledge it would acquire if it conducted the investigation with reasonable diligence and completeness. Everyone has an obligation to use reasonable care. There is no reason insurance companies should be treated differently.

To hold that an insurance company which has knowledge, either actual or constructive, of a misrepresentation in an insurance application may wait to act upon that information until after the insured faces some type of liability or loss is to condone the 'gotcha' defense. Under the Fifth District's view, an insurance company which investigated the truthfulness of representations contained in an application and which had available information from which it should have determined, that misrepresentations were made could simply collect insurance premiums for years, and then when a loss occurred refund the premiums — a sum most likely minimal in

comparison to the extent of the liability — leaving the insured without the protection for which he had paid. This would severely prejudice insureds. An insurer's failure to notify an insured of any problems when the investigation is first done prevents the insured from correcting the situation and obtaining substitute coverage. Even if the insurance company returns the premiums which the insured paid, the insured is now faced with a liability judgment or a personal financial loss for which he believed he had coverage.

3. Application of *Fecht* here

In the case at bar, the testimony established that Independent Fire ordered the motor vehicle reports on all three of the applicants because it orders these reports on *every* new automobile insurance application. Independent Fire does this for one purpose — *to determine whether or not the applicant told the truth* about how many accidents and/or traffic violations they have had within the past five years. Independent Fire admittedly checks the applicant's representations on that point because the applicant's driving history is one of the most important sources of information needed by the insurance underwriter to determine whether the application meets the company's criteria for approval. In this case, Independent Fire failed to follow its own underwriting policies — it only obtained the Brighams' driving history for the year and a half prior to the date of the application instead of for the past three years.

At trial and on appeal to the Fifth District, the Petitioners contended that this testimony was sufficient to warrant a jury question. Had the jury been instructed as requested, in accordance with *Fecht*, it would have had to determine whether Independent Fire conducted an investigation which negated its claim of detrimental reliance.

It is black letter law that a party is entitled to have the jury instructed on his theory of the case when the evidence viewed in a light favorable thereto substantially supports that theory, even though it is controverted by the opposing party. *See, e.g., Seaboard Coastline Railway, Inc. v. Addison,* 502 So. 2d 1241, 1242 (Fla. 1987); *Hammond v. Jim Hinton Oil Co.*, 530 So. 2d 995 (Fla. 1st DCA 1988); and *Morganstine v. Rosomoff,* 407 So. 2d 941 (Fla. 3d DCA 1981); *Schreiber v. Walt Disney World Company,* 389 So. 2d 1040, 1041 (Fla. 5th DCA 1980). Here, the jury *was* properly instructed that an insurance company may rely on the representations contained in an application. *See, e.g., Independent Fire Insurance Company v. Arvidson,* 604 So. 2d 854 (Fla. 4th DCA 1992). However, by the lower court's refusal to submit the Vegas' instruction, the jury was not aware of the other side of the coin – that an insurance company is estopped from rescinding a policy on the basis of such reliance where it "pursue[d] an independent inquiry" into the veracity of those representations and that it is "charged with all knowledge that it *might* have obtained" had it conducted the inquiry with appropriate diligence. *Fecht,* 172 So.2d at 471. This failure to instruct prevented the Vegas from having a fair trial.

The Fifth District erred in affirming the lower court's refusal to give the *Fecht* instruction and the decision *sub judice* improperly rejects a rule of law well established in Florida. The opinion also creates conflict where none previously existed. It is respectfully submitted that this Court should reverse the Vega decision and reaffirm the validity of those long-standing decisions consistent with *Johnson v. Life Insurance Company of Georgia.*[4]

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[4]*See also Trawick v. Manhattan Life Insurance Company of New York, New York,* 447 F.2d 1293, 1296 (5th Cir. 1971) (if an insurer chooses to make an independent investigation of an applicant and if the circumstances are such that it is in a position to ascertain the facts by a reasonable search, then the insurance company cannot avoid liability be pleading reliance on the insured's application);

B. JURISDICTION

The Fifth District Court of Appeals certified that its decision in this case conflicted with the Third District's decision in *Fecht v. Makowski*, 172 So. 2d 468 (Fla. 3d DCA 1965). In the preceding sections of this brief, the Vegas have also identified other Florida cases which directly conflict with the Fifth District's opinion. Based on the express conflict certified by the Fifth District and the conflict with other appellate decisions, this Court clearly has a basis for exercise of its discretionary jurisdiction.

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if the circumstances are such that it is in a position to ascertain the facts by a reasonable search, then the insurance company cannot avoid liability be pleading reliance on the insured's application); *Lighting Fixture and Electric Supply Co. v. Continental Insurance Co.*, 420 F.2d 1211 (5th Cir. 1969) — relying on *Fecht v. Makowski*, 172 So. 2d 468 (Fla. 3d DCA 1962) — (if an insurer's actions constitute an independent investigation, then Florida law charges the insurer with all knowledge that it might have obtained had it pursued independent inquiry with reasonable diligence and completeness).

CONCLUSION

Based on the foregoing facts and authorities, Petitioners Awilda Vega and Justino Vega, Jr., respectfully submit that this Court should exercise its discretionary jurisdiction in this cause and should reverse the decision of the Florida Fifth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of Petitioners' Brief on the Merits was mailed this 26th day of April, 1995 to: ROBERT K. ROUSE, JR., ESQUIRE, 605 South Ridgewood Avenue, Daytona Beach, Florida 32114; LEWIS JACK, JR., ESQUIRE, P. O. Box 34118, Coral Gables, Florida 33114-5118; LYLE AND PEGG BRIGHAM, 1783 Wiklig Avenue, S.E., Palm Bay, Florida 32909; ROBERT LEE BRIGHAM, 1136 Delmar Terrace, N.E, Palm Bay, Florida 32903.