IN THE SUPREME COURT
OF THE STATE OF FLORIDA

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AWILDA VEGA and
JUSTINO VEGA, JR., etc.

Petitioners,

Fla. Sup. Ct. Case No.: 85,334
(5th DCA Case No.: 94-00425)
651 So.2d 743

vs.

INDEPENDENT FIRE INSURANCE COMPANY,

Respondent.
_______________________________________/

DISCRETIONARY PROCEEDING TO REVIEW A DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT

RESPONDENT'S BRIEF ON THE MERITS

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(Respondent answers this question in the negative)

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Text

16 Appleman, Insurance Law and Practice § 9403 at 22, 23 . . . 16

The jury returned its verdict favorable to Independent Fire, finding that there had been misrepresentations made on the application with regard to the occurrence of the at-fault accident, and the driving citations/tickets, and the jury further found that these misrepresentations were material, and were relied upon by Independent Fire in issuing the insurance policy. After the jury returned its verdict, the trial court issued its declaratory judgment, granting rescission of the policy based upon the material misrepresentations made by the Brighams in the application for insurance, and based on the detrimental reliance on those misrepresentations by Independent Fire in issuing the policy.

The Vegas appealed to the District Court of Appeal, Fifth District, which heard oral argument, and filed its decision on March 3, 1995. (R-4-11). This case has subsequently been reported as *Vega v. Independent Fire Ins. Co.*, 651 So.2d 743 (Fla. 5th DCA 1995).

In the instant opinion, the majority certified conflict with the opinion in *Fecht v. Makowski*, 172 So.2d 468 (Fla. 3rd DCA 1965). Petitioners thereafter sought review by this court, requesting that this court invoke its discretionary jurisdiction. This court has dispensed at present with any briefs on jurisdiction, and has ordered briefs on the merits.

RESPONDENT'S STATEMENT OF THE FACTS

The following statement of facts is derived from the facts as stated in the instant opinion of the fifth district. A more complete and accurate statement of facts (as presented to the district court) is contained in the appendix to this brief.

A policy of automobile insurance was issued by Independent Fire to Lyle and Pegg Brigham and their son, Robert Brigham, in 1988. The insurance policy was issued by Independent Fire upon its receipt of an application for insurance, signed by Lyle Brigham.

The application for insurance asked whether the proposed insureds, the Brighams and their son, had been involved in any accidents or received any citations/tickets during the preceding five years. This question was answered "No" on the application form, which was signed by Lyle Brigham and forwarded to Independent Fire. It was upon this application that the insurance policy was issued.

After receiving the application for insurance, Independent Fire routinely ordered a Florida motor vehicle report (driving record) on all three Brighams, and received that from the state. This driving record covered the fifteen months that the Brighams had lived in Florida, and this driving record did not show any accidents or tickets at all, and was "clean". Independent Fire

then issued the policy of automobile insurance to the Brighams, based on the representations contained in the application that there had been no accidents and no tickets, which representations were supported by the driving records Independent Fire had obtained from the State of Florida.

Thereafter, in 1991, Robert Lee Brigham was involved in a motor vehicle accident resulting in the deaths of Justino and Josefina Vega. After receiving a demand from the estates of the Vegas, Independent Fire engaged in further investigation, and received the homicide investigation report of the Florida Highway Patrol showing that Robert Lee Brigham had been involved in an accident and had received two traffic citations in Michigan, shortly before moving to Florida. This accident and these tickets occurred well within five years of the application for the Independent Fire insurance policy.

In the declaratory judgment action brought by Independent Fire, the jury determined that the statement on the application that there had been no accidents and no tickets constituted a material misrepresentation which was relied upon by Independent Fire. Based on the jury's interrogatory verdict, the court entered declaratory judgment in favor of Independent Fire.

ISSUE ON APPEAL

Petitioners do not state any issue on appeal. The majority opinion of the fifth district has suggested the issue is as paraphrased below.

> **WHETHER ANY ACTIVITY UNDERTAKEN BY AN INSURER TO VERIFY THE ACCURACY OF AN APPLICATION FOR INSURANCE, REGARDLESS OF HOW MINIMAL OR HOW ROUTINE, AND REGARDLESS OF THE INFORMATION DIVULGED, IS SUFFICIENT TO PERMIT A FINDING THAT THERE WAS NO RELIANCE BY THE INSURER ON THE REPRESENTATIONS MADE IN THE APPLICATION**

(Respondent answers this question in the negative)

RESPONDENT'S SUMMARY OF ARGUMENT

Insurers may rescind or void an insurance policy only when it is shown that there were misrepresentations made by the applicant for insurance, such misrepresentations were material, such misrepresentations were relied upon by the insurer in issuing the policy, and that the policy either would not have been issued, or would have been issued only at a higher premium, had the true facts been know.

Our Florida courts have uniformly held that if an insurer issues a policy with knowledge of the true facts, it will not be permitted to rescind or void the policy due to misrepresentations on the application. Similarly, if the insurer engages in activity of a kind and quality and quantity as to demonstrate that it did not rely on the misrepresentations, but instead relied solely on its own independent investigation, then the policy must be considered valid, despite misrepresentations in the application.

Petitioners seek a radical extension of these principles, contending that an insurer undertakes any activity to verify the information provided by the applicant, regardless of how minimal or how routine, a conclusion may be reached that there was no reliance by the insurer on the representations, and thus the policy may not be rescinded. Petitioners so contend, even when the routine activity results in information that the representations are correct, and the insurer has no indication to the contrary.

This court should reject the construction of *Fecht v. Makowski*, which is advanced by petitioners, which rejection is suggested by Judge Griffin in her instant concurring opinion. In the alternative, if this court determines that the construction of *Fecht* advanced by petitioners is correct, this court should disapprove *Fecht*, and approve the opinion and decision of the fifth district.

ARGUMENT

ANY ACTIVITY UNDERTAKEN BY AN INSURER TO VERIFY THE ACCURACY OF AN APPLICATION FOR INSURANCE, REGARDLESS OF HOW MINIMAL OR HOW ROUTINE, AND REGARDLESS OF THE INFORMATION DIVULGED, IS SUFFICIENT TO PERMIT A FINDING THAT THERE WAS NO RELIANCE BY THE INSURER ON THE REPRESENTATIONS MADE IN THE APPLICATION

In their brief, petitioners do not frame any issue on appeal. The issue stated above is paraphrased from the issue as framed in the majority opinion below. 651 So.2d at 745. In framing this issue, the majority was stating its reading and understanding of the holding in *Fecht v. Makowski,* 172 So.2d 468 (Fla. 3rd DCA 1965). The majority obviously and understandably disagreed with the above statement (as does respondent), and thus certified conflict with the *Fecht* opinion.

The only evidence at the trial of this case of any activity undertaken by the respondent insurer was that of a routine request to the state of Florida for a copy of the driving record of each proposed insured, and each record was reported as "clean". While the driving records contained only the record of the fifteen months that the proposed insureds had been residing in Florida, there was nothing in the driving records to indicate that there had been any previous or other violation or accident. If the decision and opinion in *Fecht v. Makowski* can be read to hold that this activity of the insurer, standing alone, can be sufficient to support a finding by a jury that there was no reliance by the insurer on the applicant's representations that there had been no tickets or accidents, then *Fecht* is clearly wrong, and should be disapproved.

If, as suggested by the concurring judge, the decision and opinion in *Fecht* does **not** so hold, and merely contains language which is "a bid broad", then *Fecht* may be in harmony with the instant fifth district opinion and with other Florida case law.

Florida statutory law and case law does not (and should not) allow an insurer to rescind or void a policy on the basis of even material misrepresentations made in the application, if the insurer never relied on the representations in issuing the policy. Stated another way, Florida law does not allow an insurer to issue a policy while knowing that there have been material misrepresentations, or being clearly on notice of those, and to thereafter collect premiums, but then rescind the policy if a large claim is made. If there is either **activity** <u>or</u> **knowledge** on the part of an insurer, of a kind and quality so as to allow a reasonable conclusion that the insurer did not rely on the material (mis)representations made in the application, then such insurer will not be permitted to rescind or void the policy on the basis of those misrepresentations. Conversely, it would be bad public policy and extremely unfair to allow insureds to intentionally lie, or be exceedingly careless with the truth, as to material representations in an application, and then avoid the consequences of that solely because the insurer made a good faith, reasonable, and routine effort to verify the representations, when that effort did not result in any information which cast doubt on the representations.

The above principles are in accordance with present Florida

law, including: the instant opinion under review; *Fecht v. Makowski*, 172 So.2d 468 (Fla. 3rd DCA 1965); *Johnson v. Life Ins. Co. of Georgia*, 52 So.2d 813 (Fla. 1951); *Security Life & Trust Co. v. Jones*, 202 So.2d 906 (Fla. 2nd DCA 1967), *cert. denied*, 209 So.2d 672 (Fla. 1968); *Columbian Nat. Life Ins. Co. v. Lanigan*, 154 Fla. 760 19 So.2d 67 (1944); and *Talley v. National Standard Life Ins. Co.*, 178 So.2d 624 (Fla. 2nd DCA 1965). The instant petitioners would, however, construe the *Fecht* opinion's overly broad language to require that rescission may be unavailable, even where there were intentional material misrepresentations, if the insurer made any attempt to verify the accuracy of the representations; even when the attempt was a routine request for a driving record, and even when the driving record was absolutely consistent with the representations.

Adopting and approving such a rule as advanced by petitioners is not necessary to ensure fairness to insureds, and would probably cause unfortunate and unintended results. Under present Florida law, insurers may routinely request driving records of proposed insureds. If the insurer thereby learns of tickets or accidents which were not disclosed on the insurance application, a different policy can be issued, or a higher premium charged, or the applicant can be sent to another carrier, or to the "assigned risk" pool. This can prevent a later forfeiture as to a forgetful insured, who made an unintentional and innocent misrepresentation on his or her application.

If the instant petitioners' position and construction of the

Fecht opinion is accepted by this court and adopted as law in this state, then the insurers will almost certainly refrain from routinely obtaining Florida driving records of applicants. Obtaining such driving record checks would present too great a risk to insurers. Innocent errors would therefore go undetected, and more forfeitures are likely to take place after losses occur, when the insurers do conduct investigations and discover such unintended misrepresentations.

At the trial of this declaratory judgment action, petitioners requested that the trial court instruct the jury that if an insurance company undertakes its own investigation, it must perform that investigation with reasonable diligence, and will be "viewed" as having all of the knowledge which a diligent investigation might have "turned up". The trial court correctly declined to so instruct the jury, since there was no evidence of any "independent investigation" by respondent Independent Fire, as that term is used under Florida law. The trial court recognized that the petitioners were attempting to elevate a routine request for and review of Florida motor vehicle driving record reports into some grand, "independent investigation". There was no evidence of any independent investigation by Independent Fire, and no evidence that Independent Fire, in issuing the policy, relied on some independent investigation, to the exclusion of the (false) representations made by the Brighams in the application for the insurance policy.

The jury instruction which was requested by petitioner cites *Fecht v. Makowski*, 172 So.2d 468 (Fla. 3rd DCA 1965) as its

authority. In stating its "general proposition" with regard to the knowledge an insurer will be charged with, the *Fecht* opinion cites as its sole authority the case of *Columbian Nat. Life Ins. Co. v. Lanigan*, 154 Fla. 760, 19 So.2d 67 (1944). Therefore, in examining this "general proposition", its origin, and under what circumstances it may be applicable, it is instructive to review the *Lanigan* decision. That decision states, at page 70, as follows:

> We think that the prime question involved may be summarized as follows: When at the time of application for insurance the insured in good faith and according to his best recollection gives true but incomplete information to the medical examiner of the company, asserting to the latter that such information may be incomplete, and referring the examiner to a convenient source as which such information may be fully supplemented by information more complete and detailed; and the medical examiner does not resort to such source of additional information but writes into the application from such facts as have been stated by the applicant his own version of the proper answers to be inserted to the questions propounded, at the same time assuring applicant that sufficient information has been given; and the company thereafter makes an independent investigation of the applicant of a medical risk before issuing the policy; may the company subsequently avoid the policy on the ground of fraudulent misrepresentation of material fact in the application, or misstatement of facts as to matters which increased the risk of loss? 19 So.2d at 70

Please note that the issue in *Lanigan* was apparently limited to **fraudulent** misrepresentations. Also, in *Lanigan*, the supreme court noted that the insurance company did not rely upon merely the confidential report made by the examining physician of the applicant, "but conducted a separate independent investigation of the applicant", which was "an independent investigation of

Lanigan's health and habits". 19 So.2d at 69, 71. Under those circumstances, the supreme court upheld a decree in favor of the beneficiaries, on a suit for rescission and cancellation by the life insurance company. Of course, in the instant case, there was no indication to the insurer that Robert Brigham had been in any accident, although this fact was well known to the Brighams. There was no indication of any tickets. Finally, there was no independent investigation conducted by Independent Fire.

In *Fecht v. Makowski*, 172 So.2d 468 (Fla. 3rd DCA 1965), the case which was cited by petitioners as authority for the requested jury instruction, the insured motel owners had completed an application for insurance on a motel. The application indicated the insured had no motor-powered boats, but only two canoes or rowboats. The agent conceded he never specifically asked the (then prospective) insureds whether they owned a motor-powered boat or not, and they never volunteered. The insurer's agent then made two inspections of the motel property, and as a result of these inspections, required certain repairs to be made. A motor-powered boat was an integral part of the motel operation, and **presumably** there to be seen when the inspections were performed (the opinion does not say). The appellate court, relying upon and extending considerably the actual holding of *Lanigan*, held that under these facts, the insurer was charged with all knowledge it might have obtained had it pursued the independent inquiry/inspection with reasonable diligence and completeness. Therefore, it was charged with knowledge of the boat, and so could not rescind the insurance

on the basis of the statement in the application that there was no motor-powered boat.

The brief of petitioners cites *Security Life & Trust Company v. Jones*, 202 So.2d 906 (Fla. 2nd DCA 1967), a case in which the insurer denied liability under a life insurance policy on the ground that the decedent had failed to disclose his health and medical history, including a serious collagen disease. However, the applications supposedly relied upon by that insurer contained inconsistent, and, in some instances, obviously false answers. In addition, the insurer made an independent inquiry of a treating physician of applicant. Further, in light of the treating physician's report, the insurer itself ran additional medical tests on the applicant. However, despite the fact that the insurance company was informed of easily obtainable hospital records at Lakeland General Hospital which contained and would have revealed the applicant's complete medical history, the insurer failed to consult those or to make further inquiry of the treating physician. On those facts, the second district held that the trial court did not err in submitting to the jury the issues of estoppel and waiver as to the applicant/insured's misrepresentations.

Petitioners also cite the case of *Trawick v. Manhattan Life Insurance Company of New York, New York*, 447 F. 2nd 1293 (5th Cir. 1971, as authority for the proposition that once an insurer undertakes to make an independent investigation, and circumstances are such that the insurer is in a position to ascertain the true facts by a reasonably diligent and complete search, then the

insurer is bound by what such a search would show. *Trawick* is diversity litigation decided on the basis of Mississippi law. The federal appellate court reversed a judgment notwithstanding the verdict which had been entered in favor of the defendant insurer,in a case where the insurer was relying on a misrepresentation with regard to the insured's heart condition. The opinion states, at page 1295, that there was "substantial evidence" from which a jury could have found that the insurer had actual knowledge of the insured's physical condition prior to the issuance of the policies, and that such knowledge would operate as a waiver to prevent the company from interposing its defense of material misrepresentation. The appellate court also noted that the insurance company had made an independent investigation of the applicant, and cited two of its prior decisions, including *New York Life Insurance Co. v. Strudel*, 243 F. 2d 90 (5th Cir. 1957), stating that if an insurer chose 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.

Not all of the above cases are construing Florida law, or the Florida statute which was applicable in the instant case. However, all seem to be at least somewhat in accordance with general principles of insurance law. General principles of insurance law, as well as section 627.409, Florida Statutes, indicate that in order for an insurance policy to be void because of (mis)representations in the application, the insurer must have

relied on such misrepresentations in issuing the policy. As stated by *Appleman*:

> If the insurer, in issuing the policy, does not rely upon the representations made by an applicant, but upon facts derived wither from its own investigation or that of its agent, the policy must be considered valid.
> *16 Appleman, Insurance Law and Practice* § 9402 at 22, 23

The facts of the decisions discussed above are in marked contrast to the facts of the case at bar. In the instant case, there were not any obviously false or inconsistent answers in the application. There was no reason for the insurer to believe or even suspect that the information given on the application regarding Robert Lee Brigham's driving record was false. It was undisputed that the insurer's underwriters absolutely relied on that information in issuing the preferred category policy. There was no "independent investigation" conducted by the insurer--it merely made a routine request for a Florida Transcript of Driver Record (motor vehicle report, or "MVR") on the three people to be named drivers on the applied-for policy. This was a routine inquiry which was done in the case of every new application. There was nothing on any of these driving record reports which indicated any moving violations or accidents involving any of the three proposed insureds. As noted by the concurring judge, Judge Griffin, there was nothing in any of these driving record reports to put any reasonably prudent person on notice that any misrepresentation had been made in the application, or that any independent investigation or further inquiry should be pursued.

The facts of the instant case are not analogous to the cases cited in petitioners' brief and previously discussed in this brief, such as *Fecht, Security Life,* or *Trawick,* but are somewhat analogous to a case cited as authority in both *Security Life,* and *Trawick.* That case is *New York Life Insurance Company v. Strudel,* 243 F.2d 90 (5th Cir. 1957). In *Strudel,* the applicant for life insurance gave false answers on the application to several questions regarding a prior heart attack and subsequent treatment for that heart attack. Upon receiving the application, the insurer addressed an inquiry through the Medical Information Bureau to other insurance companies, asking about any previous applications submitted by the applicant. It received an answer from one insurer to the effect that such insurer had considered the applicant for life insurance some three years earlier, but any information regarding that was confidential and could not be divulged. The fifth circuit held that this provided no evidence from which a jury could lawfully find that the insurer was precluded from rescinding the policies which had been issued.

The fifth circuit *Strudel* opinion discussed at length the principle that if it can be shown that there was no actual reliance, or that there should not have been any reliance by the insurer on the misrepresentations contained in the application, then there will be no voiding or rescinding of the policy. It noted that if the insurer chooses to make an independent inquiry, and is in a position to ascertain the facts by a reasonable search in the course of such independent inquiry, then the insurer will

not be permitted to claim reliance on the falsehoods contained in the application.

> However, the mere fact that in order to test the truth of the representations some independent inquiry is made, which really is in the nature of a fishing expedition rather than a systematic search that will necessarily reveal the truth if carried out with reasonable thoroughness, does not indicate lack of reliance... *Strudel*, 243 F.2d at 93.

The *Strudel* court reversed a jury verdict in favor of the beneficiary of the life insurance policies against the insurer, and remanded for entry of judgment in favor of the insurer, based on the misrepresentation in the application. It properly determined that a mere independent inquiry, such as to the Medical Information Bureau, would not constitute an "independent investigation", of the type which would be evidence that the insurer was not relying on the representations made in the application.

In our instant case, Independent Fire merely made a routine request for the Florida driving records of the proposed insureds--a very similar action to a life insurer making an inquiry through the Medical Information Bureau, as was done in *Strudel*. Independent Fire had no reason to suspect that the proposed insureds had stated (gross) falsehoods on the application, and the Florida driving records received by Independent Fire gave no indication of any such misrepresentations. Therefore, no independent investigation was ever conducted by Independent Fire. *It was uncontradicted* that Independent Fire's first notice or knowledge of the falsehoods with regard to the prior accident and prior moving violations was after the accident involving the instant petitioners, and Independent

Fire then moved quickly to rescind and void the automobile insurance policy.

As the *Strudel* decision clearly indicates, activity consisting of mere inquiry or routine attempt at verification of some fact will not constitute an "independent investigation", of the kind which would preclude an insurer from claiming reliance on the misrepresentations contained in the application. Nothing in *Fecht v. Makowski*, supra, suggests that it would differ from *Strudel*, so as to stand for the proposition that even a routine inquiry would constitute an "independent investigation". The instant trial judge and concurring appellate judge recognized such distinctions, even if the instant petitioners refuse to.

Although the *Strudel* decision is obviously analogous, the instant case is perhaps most akin to the case of *Talley v. National Standard Life Insurance*, 178 So.2d 624 (Fla. 2nd DCA 1965). There, the applicant for life insurance denied in his application that he had ever had heart trouble or related symptoms. The applicant did state he had spent ten days in a hospital for a complete physical and E.K.G. after an illness lasting one day, but stated there was "no evidence of cardiac trouble". The insurer then checked with the hospital, and the hospital in its report to the insurer failed to note that the applicant had been admitted with a diagnosis of "probable coronary disease". Therefore, after receiving the (erroneous) report from the hospital, the insurer issued the policy, and the insured subsequently died of a heart attack.

On these facts, the *Talley* court affirmed a final judgment for

the insurer, notwithstanding a jury verdict for the plaintiff. The appellate court noted that the fact that the insurer seeks to verify statements made by the applicant does not absolve the applicant from a duty to speak the truth. The court recognized that if an insurer undertakes an "independent investigation", and does not substantially rely on the applicant's representations, then such insurer may be precluded from voiding the policy because of misrepresentations. However, a mere request for a verifying hospital record would not constitute evidence of an "independent investigation", indicating a lack of reliance. As the court stated:

> This [the mere requesting of a hospital report] cannot be regarded as an "independent investigation". *Talley*, 178 So.2d at 625

Since the *Talley* court felt that the undisputed evidence at trial was that the defendant insurer relied substantially upon the (false) representations in the application, the insurer was entitled to void or avoid the insurance contract.

The case at bar is directly analogous to *Talley*. In *Talley*, the insurer requested a medical report of a hospital, received it, and issued the policy when the report did not contradict the representations contained in the application. In the instant case, Independent Fire routinely requested a Florida driving record on these applicants, received them, and issued a policy when the driving records did not contradict the representations made in the application. In neither case could the insurer's conduct be properly found to be an "independent investigation" of the kind

evidencing an intent to not place substantial reliance on the applications' representations--conduct showing a waiver of reliance on the representations.

One can baldly state, as petitioners have stated in their brief, that Independent Fire conducted an "independent investigation". One can then argue that Independent Fire therefore did not rely on the misrepresentations contained in the application, when it issued the policy. However, this is simply contrary to the evidence adduced at trial, in light of the cases referred to above--there was no independent investigation. It is also contrary to the rationale of the doctrines of waiver and estoppel, and the public policy and fairness considerations which are involved.

Obviously, it would not be just to allow an insurer to rescind or void a policy on the basis of misrepresentations contained in an application, when it never relied on the representations in issuing the policy. It would also be unfair to allow an insurer to issue a policy when it knows or clearly should know there have been material misrepresentations, to thereafter collect premiums, and then to rescind if a large claim is made. On the other hand, it would be grossly unfair to allow insureds to intentionally lie, or be exceedingly careless with the truth, and then put the insurer into what the *Strudel* court referred to as an "unconscionable squeeze play". This would be the result if even a routine inquiry to a medical information bureau or driving record department was held to constitute a *prima facie* showing of non-reliance on the

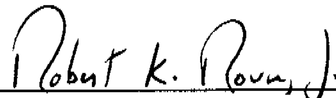
facts stated in the application.

In summary, as stated in the instant district court opinion, there was no proof at the trial below of any circumstances or facts which were known or should have been known to Independent Fire, to put it on notice that there had been any misrepresentations or falsehoods in the submitted application. There was nothing to indicate that it should go forth and conduct some kind of independent investigation, to try to search out driving records from the other forty-nine states, the District of Columbia, Canada, Mexico, and perhaps other countries, to try to investigate these applicants. No independent investigation was done by Independent Fire, and there was no evidence adduced at trial that Independent Fire relied on some kind of separate, independent investigation, rather than on the (false) representations contained in the application. Since there was no proof of any notice of any need for such independent investigation, and no proof that any independent investigation was carried out, there was no evidentiary basis for the giving of the requested jury instruction. The trial court was correct in declining to give this poorly worded requested instruction, when the facts of the case did not support the giving of it, and the appellate court was correct in affirming the trial court.

CONCLUSION

The opinion and decision in the instant case, *Vega v. Independent Fire Ins. Co.*, 651 So.2d 743 (Fla. 5th DCA 1995) is correct, and should be AFFIRMED.

Respectfully submitted,



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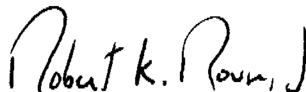
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail this 22nd day of May, 1995 to: Ms. Kimberly L. Boldt, Suite 2001, Terremark Centre, 2601 South Bayshore Drive, Coconut Grove, FL 33133, Stewart G. Greenberg, Esq., 7101 S.W. 102 Avenue, Miami, FL 33173, Mr. Lewis Jack, Esq. P.O. Box 345118, Coral Gables, FL 33114-5118, Lyle and Pegg Brigham 1783 Wilkig Avenue, S.E., Palm Bay, FL 32909, and Robert L. Brigham, 1136 Delmar Terrace, N.E., Palm Bay, FL 32905.

SMITH, SCHODER, ROUSE & BOUCK, P.A.



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Appendix

APPELLEE'S PRELIMINARY STATEMENT

Appellee, Independent Fire Insurance Company, was plaintiff below in the action for rescission and voiding of an insurance policy. It may sometimes be referred to in this brief as "Independent Fire". The instant appellants were defendants below, and may sometimes be collectively referred to as "the Vegas".

References to the record on appeal will be as follows: R-page number of record, as per the index to the record on appeal. References to the trial transcript will be as follows: T-page number of transcript of jury trial.

Many of the witnesses at the trial testified by deposition, and the court reporter did not report the published words of these depositions. Therefore, for ease, references to depositions read at trial will be as follows: D. name of person giving deposition; p.-page number of deposition.

APPELLEE'S STATEMENT OF THE CASE

Appellee, Independent Fire Insurance Company, initiated a complaint for the rescission and voiding of an automobile insurance policy which had been issued by Independent Fire to its named insured, Lyle J. Brigham. Lyle J. Brigham, his wife Pegg Brigham, and their son Robert Lee Brigham, defendants below, were specifically named as drivers to be covered under this insurance policy. This policy was applied for and issued in August, 1988. The instant appellants, the Vegas, were joined as defendants because they had been involved in a motor vehicle accident with Robert Lee Brigham in 1991, and had advised the Brighams and Independent Fire that a claim would be made for liability coverage to Robert Lee Brigham under this policy.

The complaint was filed on January 27, 1992, and after approximately two years of discovery, including numerous depositions, the case was tried in December of 1993. This was a jury trial, conducted so that a jury could determine the factual issues raised by the pleadings.

Independent Fire's complaint for rescission and for the voiding of the automobile insurance policy alleged that misrepresentations or omissions or concealment of facts or incorrect statements were made by Lyle Brigham and Pegg Brigham in the application submitted, and upon which application the insurance policy was issued. (R-1-9) The complaint further alleged that these misrepresentations, etc. were material either to the acceptance of the risk or the hazard assumed by Independent Fire,

in issuing the policy. It was specifically alleged in the complaint that there had been a misrepresentation and concealment of the driving record of Robert Lee Brigham, the son of Lyle and Pegg Brigham, and a named driver on the policy which was issued. It was further alleged in the complaint that Independent Fire would have refused to issue the policy which it issued, if it had known the true facts about Robert Lee Brigham's driving record, including that he had, within three years of the application, been convicted of two moving violations, and had been in an at-fault accident. Finally, Independent Fire alleged that any policy issued, even if one had been issued, would have been at a higher premium rate, if Independent Fire had known the true facts with regard to the driving record. (R-1-19) The Brighams filed an answer to this complaint (R-20-21), as did the instant appellants, the Vegas. (R-24-26) In their answer, the Vegas raised as an affirmative defense that Independent Fire was barred by waiver and/or estoppel, because it collected premiums from the Brighams, when it knew or should have known of the misrepresentations, etc. regarding the driving record. They also alleged affirmatively that the pleaded misrepresentations were not material. (R-24-26)

The case was tried before a jury on the factual issues presented. At the trial, the appellants/defendants Vega submitted a requested jury instruction, in writing, which stated as follows:

> If an insurance company undertakes it owns 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. 3rd DCA 1965).

The trial court refused to give that instruction. (T-182) After due deliberation, the jury returned its interrogatory verdict, finding as follows:

> Whether misrepresentations or omissions or concealment of fact or incorrect statements were made in the application submitted **upon which application the insurance policy was issued?** Yes
> (emphasis supplied)
>
> Whether the misrepresentations or omissions or concealment of facts or incorrect statements were material either to the acceptance of the risk or to the hazard assumed by Independent Fire? Yes
>
> Whether Independent Fire would have refused to issue the policy, had it known the true facts? Yes
>
> Whether Independent Fire would have issued the policy at a higher premium rate had it known the true facts? Yes
>
> Whether Independent Fire knew before June 8, 1991 (date of underlying auto accident) that the facts stated in the application with regard to traffic citations and accidents were incorrect, but continued to keep the policy in force and effect? No.
> (T-226, 227)

Independent Fire moved for entry of final declaratory judgment, based on the jury's verdict, and the record of the action. (R-159, 160) After hearing on this motion, the court entered the Final Declaratory Judgment which is the subject of this appeal, and which declared that there was no liability coverage afforded to the Brighams, and that the policy was void and rescinded. (R-161-162) This appeal of that final declaratory judgment ensued.

APPELLEE'S STATEMENT OF THE FACTS

In December of 1986, Lyle Brigham and his wife Pegg Brigham moved to Brevard County from the State of Michigan. They took up residence in Palm Bay, rented a home for a period of months before moving into a new house, and moved into that new house in June of 1988. (D. Pegg Brigham, p. 6) Robert Lee Brigham, who was then 25 years old, moved to Florida from Michigan, a few months after his parents had arrived. He had lived with his parents in Michigan. (D. Pegg Brigham, p. 6)

In late July or early August, the Brighams decided to change their existing automobile insurance coverage, because they wanted to try to get a better premium rate. On August 8, 1988, Lyle Brigham and Pegg Brigham drove to Cocoa Beach and went to the Brevard Agency. They selected it because it was the "cheapest". (D. Pegg Brigham, p. 11) They met with Margaret Laser, an employee of that independent agency, who requested certain information from the Brighams to complete the insurance application. (D. Lyle Brigham, p. 14; D. Margaret Laser, pp. 8, 9)

One portion of the application asked for the names of the members of the household who would be regularly operating vehicles sought to be insured, and the Brighams advised that these would be Lyle Brigham, Pegg Brigham, and their son, Robert Lee Brigham, who had moved down and was now living with them in Palm Bay.

(Plaintiff's Exhibit 1; D. Lyle Brigham, p. 19) Then, under section 4 of the application, the question is asked whether, during the five years preceding the date of the application, any of the persons proposed to be insured as drivers had been involved in an accident, or been convicted of, or pled no contest to any moving traffic violation. (D. Lyle Brigham, p. 19; plaintiff's exhibit 1) Lyle Brigham answered "no" to that question, and the appropriate box was marked on the application for a "no" response. After the application was completed, Lyle Brigham had an opportunity to read it, and then signed the application. (D. Lyle Brigham, pp. 16, 17, 18)

The application was forwarded to the underwriting department of Independent Fire Insurance Company in Jacksonville, where it was reviewed by an underwriter to determine whether or not the Brighams qualified for Independent Fire's top category of policy, the "Preferred" category of policy. (D. Sheridan, pp. 8, 10) This category policy would be the policy which would carry the lowest premium, and the best coverage. (D. Sheridan, pp. 13, 24) The other categories of policies which were sold at the time by Independent Fire included a "standard" category and a "non-standard" category. (D. Sheridan, pp. 10; 13)

Based on the representations contained in the application, and specifically including the representations with regard to the driving record of the proposed insureds, which was represented to be "clean", Independent Fire issued a "Preferred" category policy to the Brighams. (D. Sheridan, pp. 10, 15, 16)

William Sheridan, the underwriter for Independent Fire, testified at trial by deposition which had been taken in connection with this action. His testimony was uncontradicted. He testified that in 1988, based on the underwriting guide which was in effect at that time, the "Preferred" policy could only be issued where all of the individuals had no more than one moving violation, and no at-fault accidents, within the three years before the issuance of the policy. (D. Sheridan, page 18, 19, 20) Mr. Sheridan testified without contradiction that in 1988, the application submitted by the Brighams would have been relied upon in making the decision as to the kind or category of policy which would be issued, which in this case was the "Preferred" category of policy. (D. Sheridan, pp. 10, 15, 16) Mr. Sheridan testified that although the application was relied on by the underwriter in the decision to issue the preferred policy to the Brighams, Independent Fire did routinely request driver's license information from the Department of Motor Vehicles of the State of Florida, and stated that this was done with respect to every new application. (D. Sheridan, p. 26) The driving record came back from the State of Florida, as to each of the three Brighams, and none of the driving records showed any moving violations or any accidents of any kind. (D. Sheridan, pp. 27, 30) There being no indication of any problem, the underwriter then accepted the application as containing valid information, and signed and processed the application, and the insurance policy was issued. (D. Sheridan, p. 31)

Contrary to the statements contained in the application which

was signed by Lyle Brigham, the Brigham's son, Robert Lee Brigham, had received two tickets or moving violations for which he had been convicted, within the three years preceding August 8, 1988. (D. Robert Lee Brigham, pp. 9, 12) These tickets were received in Michigan, where he had also been involved in a motor vehicle accident which occurred some twenty-two months before August 8, 1988, when the application was signed. (D. Robert Brigham, p. 20) His truck had been totalled in that accident, and he was living at home at the time it occurred, and his parents knew of the accident. (D. Robert Brigham, p. 19, 20) Robert Lee Brigham testified (by deposition read to the jury) that his parents knew of the tickets he had received in Michigan. (D. Robert Brigham, p. 19)

On deposition read at trial and through live testimony at trial, Lyle Brigham and Pegg Brigham denied that they ever knew that their son had received any tickets, in Michigan or elsewhere, before the Florida accident. (D. Lyle Brigham, pp. 28, 31; D. Pegg Brigham, pp. 9, 12, 15) They also claimed that they were not sure, at the time they filled out the application, as to exactly which year the motor vehicle accident occurred. (D. Pegg Brigham, p. 12) They conceded that they did know of the Michigan accident, and recalled seeing the damaged truck. (D. Lyle Brigham, pp. 28, 33, 38; D. Pegg Brigham, p. 9; T-133) However, they did not inform Margaret Laser of that accident. (D. Lyle Brigham, pp. 33, 34; D. Pegg Brigham; pp. 12, 16) At trial, Pegg Brigham testified that she and her husband discussed this accident, privately, at the time of the filling out of the application, but conceded that they did

not disclose the fact of the occurrence of this accident to Margaret Laser, who was taking the information for the application. (D. Pegg Brigham, pp. 12, 16; D. Lyle Brigham, p. 33, 34, T-133)

In 1991, Robert Lee Brigham, the son, was driving his own vehicle when involved in a motor vehicle accident with a vehicle occupied by the instant appellants, the Vegas. After that accident, a motor vehicle crash report/homicide report was obtained by Independent Fire, and this report showed the Michigan tickets and Michigan accident. This was Independent Fire's first notice of these facts. (D. Sheridan, page 39, 40) Independent Fire then wrote to its named insured, Lyle Brigham, advising him of the misrepresentations, informing him that the policy of insurance was rescinded, and returning all of the premiums he had paid on the policy, plus interest. (Plaintiff's Exhibit 4; D. Lyle Brigham, p. 35) The instant declaratory judgment action for rescission was filed shortly thereafter. (R-1-19)

ISSUE PRESENTED FOR REVIEW

The initial brief of Appellants does not actually state any specific issue presented for review in its table of contents or elsewhere. Based on its reading of appellant's initial brief, appellee would state the apparant issue on appeal as follows:

> WHETHER THE TRIAL COURT WAS CORRECT IN DECLINING TO INSTRUCT THE JURY AS REQUESTED BY APPELLANTS

APPELLEE'S SUMMARY OF ARGUMENT

This appeal is of a final declaratory judgment, rendered on the basis of a jury verdict, where the jury made determinations as to all disputed issues of fact. The jury found that there were material misrepresentations made by the insureds, the Brighams, when they applied for the insurance policy which was issued by the appellee, Independent Fire. The jury found that these misrepresentations were material, and were relied upon by Independent Fire when it issued the policy. The jury determined that Independent Fire would not have issued the policy, or would have issued it only at a much higher premium rate, if the true facts with regard to the driving record of Robert Lee Brigham had been made known to Independent Fire on the application. This driving record included two convictions for moving violations, and one at-fault accident, all within three years of the submission of the application and the issuance of the insurance policy.

On this appeal, appellants complain of only one supposed error--the refusal of the trial court to give one jury instruction as requested by the instant appellants. The trial court was absolutely correct in declining to give that requested instruction, since there was no evidence to support the giving of it. Under Florida law, the issues upon which instructions are required are those formulated by the pleadings and presented by the **evidence**.

The requested instruction was to the effect that if an insurer undertakes its own, independent investigation, it must perform that with diligence, and will be "viewed" as having all of the knowledge

which such a diligence investigation might have "turned up". The cited authority for this poorly worded instruction was a Florida decision of the third district. That decision stated a "general proposition" of insurance law: that, if an insurer does not rely upon representations made by an applicant, but upon facts derived from its own investigation, it cannot later rescind the policy on the basis of such misrepresentations.

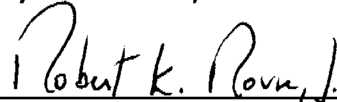
The "general proposition" is a sound one. However, it would not apply in the instant case, where there was no "independent investigation", as that term was used by the third district and by other courts. In the instant case, there was only a routine inquiry to the Department of Motor Vehicles, for a driving record report, to verify the representations made on the insurance application that the records of the proposed drivers were "clean". The driving record reports came back from the State of Florida indicating no conflict with the representations on the application, and thus, the instant insurance policy was issued on the basis of those (mis)representations.

In the instant case, there was no evidence that the insurance company did not rely on the application, and the misrepresentations contained in it. The routine request for and review of driving record information from Tallahassee could not be considered an "independent investigation", so as to trigger the general principle as stated by the third district, or the instruction based on that case. Since there was no evidence supporting it, the trial court was absolutely correct in refusing to give the poorly worded requested instruction.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail this 22nd day of May, 1995 to: Ms. Kimberly L. Boldt, Suite 2001, Terremark Centre, 2601 South Bayshore Drive, Coconut Grove, FL 33133, Stewart G. Greenberg, Esq., 7101 S.W. 102 Avenue, Miami, FL 33173, Mr. Lewis Jack, Esq. P.O. Box 345118, Coral Gables, FL 33114-5118, Lyle and Pegg Brigham 1783 Wilkig Avenue, S.E., Palm Bay, FL 32909, and Robert L. Brigham, 1136 Delmar Terrace, N.E., Palm Bay, FL 32905.

SMITH, SCHODER, ROUSE & BOUCK, P.A.



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