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' REPLY BRIEF ON THE MERITS

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ARGUMENT

Independent Fire recognizes in its answer brief that Florida law does not permit an insurer to rescind an insurance policy based on material misrepresentations made in the application if the insurer did not rely on the representations in issuing the policy. (Respondent's Answer Brief, pp. 9, 15-16). Independent Fire further recognizes — as it must — that by conducting an investigation into the representations made in an insurance application, an insurance company may waive its right to rescind the policy based on lack of reliance. (Respondent's Answer Brief, pp. 15-16). Even though the Vegas' theory of the case was that Independent Fire had conducted such an investigation and had done so negligently, Independent Fire nevertheless concludes that the Vegas were not entitled to have the jury instructed on their theory of the case. Independent Fire reaches this conclusion based on its bald assertion that the evidence in this case shows, as a matter of law, that it did not conduct an independent investigation by ordering the Brighams' motor vehicle reports and that nothing in those admittedly incomplete driving reports would "put any reasonably prudent person on notice that any misrepresentation had been made in the application." (Respondent's Answer Brief, pp. 15-16). As will be shown below, this argument is not supported by Florida case law or the evidence in this case. In fact, both of these sources establish that the Vegas were entitled to have the jury instructed as they requested and that the failure to do so entitled them to a new trial.

A. The question is not what Independent Fire knew but what it should have known

The main thrust of Independent Fire's argument is that its actions in ordering the Brighams' motor vehicle reports to ascertain whether they were telling the truth in their insurance

application did not constitute an 'investigation' as a matter of law. In Independent Fire's view its actions constituted only a routine 'inquiry' which gave no indication of misrepresentations in the application and therefore did not constitute an 'investigation.'

The first problem with this analysis is that it stops short of the crux of this issue. The issue is *not* what information *was* revealed on the Brighams' fifteen-month driving history which Independent Fire did obtain, the point is what information Independent Fire *would* have obtained had it conducted its investigation with reasonable diligence and completeness, i.e., followed its own underwriting guidelines and obtained the Brighams' records for the past three years. The Vegas are not suggesting that Independent Fire should be charged with knowledge it, in fact, did not obtain, but that it should be charged with the knowledge it *should* have obtained had it conducted a thorough investigation.

If Independent Fire had followed its own guidelines and obtained the Brighams' driving records for the past three years and if the Brighams' three-year driving history was 'clean', then the Vegas would not be in a position to argue that Independent Fire's investigation was negligent. Moreover, in that scenario, Independent Fire would have been permitted to rescind the Brighams' insurance policy under *Fecht v. Makowski*, 172 So. 2d 468 (Fla. 3d DCA 1965) because it would have conducted a reasonable investigation which did not — and could not — turn up any information contradicting the representations in the application.

Instead, Independent Fire made an inquiry into the truthfulness of the representations by the Brighams' about their driving history which by its own standards was negligent. Now, Independent Fire wants to raise its ignorance of the facts as a basis to rescind the policy — facts it **would have learned** had it conducted a proper investigation. The law in

Florida, established by this Court in *Johnson v. Life Insurance Company of Georgia*, 52 So. 2d 813 (Fla. 1951) and followed by the Third District in *Fecht v. Makowski*, 172 So. 2d 468 (Fla. 3d DCA 1965) and the Second District in *Security Life & Trust Co. v. Jones*, 202 So. 2d 906 (Fla. 2d DCA 1967), prevents Independent Fire from hiding behind its ignorance when, but for its own negligence, it would have known the truth. The Vegas respectfully submit that the Fifth District's opinion *sub judice* contravenes this Court's decision in *Johnson* and should therefore be reversed.

B. Independent Fire's argument is one of semantics

The second defect in Independent Fire's argument is its assertion that it only made an 'inquiry' and that its 'inquiry' did not constitute an 'investigation'. This is just a game of semantics. Independent Fire ignores — even though quoted in its brief — the definition of 'investigation' given in the very case it relies on:

> "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.

New York Life Insurance Co. v. Strudel, 243 F.2d 90,93 (5th Cir. 1957). If anything is a "systematic search that will necessarily reveal the truth if carried out with reasonable thoroughness", it is the obtaining of an applicant's driving history for a specified period of time.

Independent Fire has admitted that an applicant's driving history is the single most important piece of information used in accessing the risks of issuing a policy and the rate at which the policy would be issued, if at all. Independent Fire has also admitted that it orders the driving history on *every* new applicant to determine whether that applicant told the truth and that it

orders that applicant's history for the past three years. Although there are other ways Independent Fire could determine whether the applicant told the truth about his driving history, it chooses to use a systematic, guaranteed search which requires only one telephone call to the Department of Motor Vehicles — a search which if carried out with reasonable thoroughness (i.e., ordering the three-year driving history as is its custom and practice) would necessarily reveal the information on the applicant's driving history.

C. Whether an insurer conducted an investigation is a question for the jury

The final problem with Independent Fire's argument is that it turns a jury question into one for the court to answer as a matter of law. In *Security Life & Trust Company v. Jones*, 202 So. 2d 906 (Fla. 2d DCA 1967), the Second District held that the plaintiff had introduced "sufficient evidence to present a ***jury question*** on the issues of estoppel and waiver" of the misrepresentations contained in his application:

> Appellant made independent inquiry of Dr. Stern and, in light of his report, ran additional tests. Appellant did not, however, consult the hospital records, which contained Mr. Jones' complete medical history, or make further inquiry of Dr. Stern. We feel that reasonable men would be justified in concluding that appellant should have taken further steps, by way of inquiry of the hospital records or further inquiry of Dr. Stern or both. Such further investigation would have revealed the facts, and reasonable men would be justified in charging appellant with knowledge of those facts. The trial court did not err in submitting to the jury the issues of estoppel and waiver of the insured's misrepresentations.

202 So. 2d at 909.

Here, once the jury decided the application contained a misrepresentation, their next inquiry should have been whether Independent Fire conducted its own investigation and,

if so, whether its actions in conducting that investigation negated its verbal representation that it relied on the application. By taking this factual issue away from the jury, the trial court refused to instruct the jury on the Vegas' theory of the case. This was contrary to well-established Florida law which entitles the Vegas to have the jury instructed on their theory of the case — even if the evidence on that theory is in conflict. *See, e.g., Seaboard Coastline Railway, Inc. v. Addison*, 502 So. 2d 1241, 1242 (Fla. 1987). Had the jury been given the requested instruction based on *Fecht*, they would have had the opportunity to properly resolve ***all*** of the issues presented by the evidence at trial.

D. Competent evidence was presented to support appellants' theory of the case

Although Independent Fire asserts — self-servingly — that the Vegas produced "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," this assertion baldly ignores the following facts established at trial which tend to prove that Independent Fire not only undertook an investigation, but did so negligently.

The evidence showed that Independent Fire obtained the Brighams' motor vehicle reports. (Sheridan Deposition, p. 26). William Sheridan, an assistant vice-president at Independent Fire, testified that the company's underwriters rely on motor vehicle reports as one of the most important sources of information to determine whether to issue the policy. (Sheridan Deposition, pp. 4, 26, 28). Furthermore, Mr. Sheridan testified[1] that (1) Independent Fire knew

[1] Portions of Mr. Sheridan's deposition were read into evidence at trial.

that the Brighams' had only been licensed in Florida for fifteen months at the longest; (2) Independent Fire knew that the Brighams' had been licensed in another state prior to moving to Florida; (3) Independent Fire knew that the reports only contained a fifteen month driving history when the application requested information for the previous five years; and (4) that by only obtaining the Brighams' driving history for the past fifteen months, Independent Fire failed to follow its own underwriting policies. (Sheridan Deposition, pp. 31-32; 34-35; 42-43; Plaintiff's Exhibit 6; Defendants' Exhibit B).

Once the Vegas' presented this evidence, which when viewed in the light most favorable thereto substantially supports their theory of the case, they were entitled to the requested jury instruction. The quality and quantity of such evidence presented at trial is not subject to an after-the-fact interpretation by Independent Fire's counsel who unsurprisingly controverts its validity. Instead, Vegas' theory of the case should have been presented to the jury for its resolution of the issue in light of these facts. Accordingly, the Fifth District erred in affirming the lower court's refusal to give the *Fecht* instruction.

E. Independent Fire's public policy argument shows that it does not rely on some representations contained in insurance applications

Finally, Independent Fire argues that the rule of law stated in *Fecht* is poor public policy because it will allow applicants to intentionally lie or be exceedingly careless with the truth and to get away with it if the insurer makes an effort to verify the representation in question. To illustrate this argument, Independent Fire uses a factual scenario which shows that it **does not**

rely on certain representations in an application — specifically, the applicant's representations as to his driving history in an application for automobile liability insurance.

No matter what a potential insured states on his insurance application in reference to his driving history, Independent Fire has admitted that it will obtain that person's motor vehicle report from the state. If — by pulling that report — Independent Fire "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." (Respondent's Answer Brief, pp. 10). Thus, by its own admission, Independent Fire does not issue the policy or the rate based on the applicant's answer to the driving history question, but on the results of its own 'inquiry' into the applicant's driving history.

If Independent Fire chooses to not rely on the representations in an insurance application, it is only fair that it be held to the knowledge it would acquire if it conducted the investigation or inquiry with reasonable diligence and completeness. Moreover, this Court's decision in *Johnson* supports charging an insurance company with the knowledge it either actually obtained from an investigation or the knowledge is should have obtained had it conducted the investigation properly. Insurance companies are not exempt from the obligation to use reasonable care and should not be made exempt by the Fifth District's improper decision in this case. The Fifth District's decision rejects a rule of law well established in Florida by this Court and other district courts of appeal. The opinion also creates conflict between the districts where none previously existed. It is respectfully submitted that this Court should reverse the Fifth District's

decision *sub judice* and reaffirm the validity of those long-standing decisions in *Fecht* and *Jones* which are consistent with *Johnson v. Life Insurance Company of Georgia.*[2]

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, reverse the decision of the Florida Fifth District Court of Appeal and order a new trial in this case.

Respectfully submitted,

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[2]*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); *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).

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of Petitioners' Reply Brief on the Merits was mailed this 12th day of June, 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.