ORIGINAL

IN THE SUPREME COURT OF FLORIDA

ON REVIEW FROM THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT

Case No. 90,747

ALLEN GREEN, etc.,

Petitioner,

vs.

LIFE & HEALTH OF AMERICA, etc.

Respondent.

Amicus Brief of the Academy of Florida Trial Lawyers

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INTRODUCTION

The Academy of Florida Trial Lawyers, a voluntary organization of lawyers who represent victims of the wrongdoing of others, files this amicus brief in support of the Petitioner.

The Academy is in favor of allowing insurance companies to impose a different standard of accuracy than required under §627.409, Florida Statutes. The statute does not contain a knowledge or intent element, so that even unintentional or unknowing misstatements may prevent recovery under a policy if such statements alter the risk or the likelihood of coverage.

As explained in this brief, insurance contracts which require a lesser standard of accuracy in its policies should be enforceable where they are answered according to the applicant's "knowledge and belief'. This Court is being asked to adopt the Skinner standard (Skinner vs Aetna Life and Casualty, 804 F.2d 148 (DC CCA 1986) for use in examining the applicant's "knowledge and belief'. The standard should be what the applicant in fact believed to be accurate and true as the determining factor in judging the truth or falsity of his answer, but only so far as that belief is not clearly contradicted by the factual knowledge on which it is based.

The Academy submits that the Court should adopt Judge Pariente's dissenting opinion in this case, as the correct statement of law and policy where the contractual language drafted by the insurer differs from that required by statute.

STATEMENTOFTHECASEANDFACTS

As its statement of the case and facts, the Academy adopts the relevant portions of the opinion of the District Court of Appeal.

SUMMARY OF THE ARGUMENT

The First District Court in Carter vs United of Omaha Life Insurance correctly determined that "knowledge and belief' language in a contract drafted by the insurer imposes a different standard of accuracy than required under 5627.409, Florida Statutes.

Judge Pariente clearly outlines the sound policy reasons this Court should follow the Federal Court decisions interpreting that under a less stringent standard, an insured's answer should be subject to review. She embraced the opinion in Carter adopting the standard in Skinner vs Aetna Life & Casualtv, 804 F.2d 148 (DC CCA 1986) for use in examining an applicant's responses to questions asked according to the applicant's "knowledge and belief".

This Court should find that Carter correctly determined that "knowledge and belief" language in a contract drafted by the insurer imposes a different standard of accuracy than required under $627.409, Florida Statutes.

ARGUMENT

THE FIRST DISTRICT COURT IN CARTER VS UNITED OF OMAHA LIFE INSURANCE CORRECTLY DETERMINED THAT "KNOWLEDGE AND BELIEF" LANGUAGE IN A CONTRACT DRAFTED BY THE INSURER IMPOSES A DIFFERENT STANDARD OF ACCURACY THAN REQUIRED UNDER $627.409, **FLORIDA STATUTES, AND THAT THIS COURTSHOULD REVERSE THIS CASE AND ADOPT CARTER AS THE LAW OF THIS STATE.**

The issue in this case is to resolve the conflict between the Fourth District Court's opinion in this case and the First District Court of Appeal opinion in Carter vs United of Omaha Life Insurance, 685 So.2d 2 (Fla. 1 DCA 1996), hereinafter Carter. In this case, the Fourth District Court of Appeal stated "we note that in a situation factually similar to that in the instant case, the First District Court of Appeal recently applied William Penn Life Insurance Company vs. Sands, 912 F.2d 1359 (11 th Cir. 1990) and its progeny in reversing the trial court's grant of summary judgment in favor of an insurance company." 17 FLW at 1997.

In this brief, the Academy hopes to assist the Court in resolving the issue of whether or not an insurance company that includes "knowledge and belief' language in a contract drafted by that insurer imposes a different standard of accuracy than required under 5627.409, Florida Statutes.

Clearly incorrect and untrue statements to questions on an insurance application

material to the acceptance of the risk of the contract is precluded if the misrepresentation is material to the acceptance of the risk, or if the insurer in good faith would not have issued the policy in the terms it was issued, and that they do not have to be made with knowledge of the incorrectness and untruth to vitiate the policy. Life Insurance Company of Virginia vs Shifflet, 201 So.2d 715 (Fla. 1967). In short, Shifflet stands for the proposition that misrepresentations need not be knowingly made in order to void the policy. Continental Assurance Company vs Carroll, 485 So.2d 406 (Fla. 1986) at 408.

The reliance by the majority of the Fourth District Court of Appeals in this case appears to be misguided. In the first respect, the only issue Carroll dealt with was whether or not National Standard Life Insurance Company vs Permenter modified the strict rules set forth in Life Insurance Companv of Virginia vs Shifflet. Clearly that issue is not before this Court.

The second issue is whether the insurance company has the right to require a lesser standard of accuracy in its policies than is required under §627.409, Florida Statutes. In an application for insurance, 5627.409, Florida Statutes, provides: representation in applications, warranties (1) Any statement or description made by or on behalf of an insured or an annuitant in an application for an insurance policy or annuity contract or negotiations for policy or contract, is a representation; it is not a warranty. A misrepresentation, omission, concealment of fact or incorrect statement may prevent recovery under the contract or policy only if any of the followinn apply (emphasis added):

"A. The misrepresentation, omission, concealment or statement is

fraudulent or is material either to the acceptance of the risk or to the hazard assumed by the insurer.

B. If the true facts had been known to the insurer pursuant to a policy requirement or other requirement, the insurer in good faith would not have issued the policy or contract, would not have issued at the same premium rate, would not have issued a policy or contract in as large an amount, or would not have provided coverage with respect to the hazard resulting in the loss."

The question presented to this Court is whether an insurance company can, by use of the language "knowledge and belief' in their insurance contract, impose a different standard of accuracy than that provided in §627.409(1), Florida Statutes.

Florida courts have long held that all ambiguities in insurance contracts, as contracts of adhesion, should be construed in the light most favorable to the insured. Fireman's Fund insurance Company of San Francisco. Cal., vs Boyd, 45 So.2d 499 at 501 (Fla. 1950). A contract of insurance prepared and phrased by the insurer is to be construed liberally in favor of the insured and strictly against the insurer where the meaning of the language used is doubtful, uncertain or ambiguous. Mitchell vs CIGNA Propertv & Casualtv Insurance Co., 625 So.2d 862 (Fla 3 DCA 1993). In determining the legislative intent of a statute, we look primarily to the language of the statute. Arthur Young & Co. vs Mariner Corp., 630 So.2d 1199, 1202 (Fla. 4 DCA 1994).

Courts always presume that the legislature--a body advised and informed by lawyers--adopted the particular wording of a statute advisedly and for a purpose. Sirmons vs State, 634 So.2d 153 (Fla. 1994)(Kogan, J., concurring)(citing Lee vs Gulf

Oil Corp., 148 Fla. 612, 4 So.2d 868 (1941).

Judge Joanos, of the First District Court of Appeal, correctly analyzed the issue before the Court. Since §627.409, Florida Statutes, does not contain a knowledge or intent element, even unintentional or unknowing misstatements may prevent recovery under a policy if such statements alter the risk or the likelihood of coverage. Houser vs Life General Security Insurance Companv, 56 F.3d, 1330 at 1334 (1 Ith Cir. 1995). National Union Fire Insurance Company of Pittsburgh. PA vs Sahlen, 99 F.2d 1532 at 1536 (11 th Cir. 1993). A misstatement is deemed material if the facts accurately stated might reasonably have influenced the insurer in deciding whether to accept the risk. Jackson National Life vs Proper, 760 F.Sup. 901 at 905 (M.D. Fla. 1991). Celtic Life Insurance Company vs Fox, 544 So.2d 245 at 247 (Fla. 2DCA 1989). The First District Court of Appeal in Strickland Imports vs Underwriters at Lloyds London, 668 So.2d 251 held that policy language which voids the contract only if the misrepresentations are intentional controls over the contrary provision of §627.409, Florida Statutes. See Traveler's Insurance vs Chandler, 569 So.2d 1337 (Fla 1DCA 1990) (Florida law does not preclude insurer from offering broader definition of uninsured motor vehicle than provided by statute, thereby affording greater coverage).

The Carter case then analyzed Federal cases which have interpreted 5627.409, Florida Statutes. In analyzing the Federal court's opinions, the Carter case determined that where under a less stringent standard an insured's answers were still subject to review, the Court approved the test pronounced in Skinner vs Aetna Life and Casualtv, 804 F.2d 148, for use in examining an applicant's responses to questions asked

according to the applicant's "knowledge and belief'. Under the Skinner standard, what the applicant in fact believed to be true is the determining factor in judging the truth or falsity of his answer, but only so far as that belief is not clearly contradicted by the factual knowledge on which it is based. Houser, 56 F.3d at 1335.

The Academy adopts the compelling opinion by Judge Pariente how this case should be reversed. Judge Pariente in detail explains the history as well as the policy reasons for this Court to adopt the First District Court's well-reasoned opinion in Carter. Judge Pariente's review of Federal court analysis clearly demonstrates that here the insurance company has requested a less stringent standard of accuracy than required by statute, and now seeks to protect itself from its own policy language.

This Court has long held that the insurance contract should be construed in favor of the insured and against the insurer. Boyd, supra. Judge Pariente demonstrates how the applicability of this standard is consistent with this Court's prior pronouncements in Shifflet and Carroll. The careful analysis provided by Judge Pariente clearly guides this Court on what action it should take. Judge Pariente correctly points out that the majority holding in this case ignores the principle that policy language chosen by the insurer controls over any contrary provision in $627.409, Florida Statutes, citing Carter 685 So.2d at 6 (citing Strickland Imports vs Underwriters at Lloyds of London, 668 So.2d 251 at 253 [Fla. 1 DCA 1996]).

Judge Pariente urges this Court to adopt the holding of the First District Court which correctly decided that where the insured in a contract of adhesion requires a lesser standard of knowledge, that this Court should not protect it from a risk it did not

seek protection from itself, and that the "knowledge and belief' qualifier in an insurance application imposes a less stringent standard than that provided in $627.409, Florida Statutes.

CONCLUSION

For the above-stated reasons, the Academy of Florida Trial Lawyers respectfully requests that the Court approve the First District Court in Carter vs United of Omaha Life Insurance determining that "knowledge and belief' language in a contract drafted by the insurer imposes a different standard of accuracy than required under 5627.409, Florida Statutes, and reverse the Fourth District Court opinion herein.

Respectfully submitted

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CERTIFICATE OF SERVICE

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