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IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

RICHARD BLUMBERG,

Petitioner,

v.

USAA CASUALTY INSURANCE COMPANY,
FEDERAL INSURANCE COMPANY, and
THE BRUNER INSURANCE AGENCY,

Respondents.

PETITIONER'S AMENDED INITIAL BRIEF ON THE MERITS

CASE NO.: 95,740

L.T. CASE NO.: 96-13505(25)

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TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS i

CERTIFICATE OF FONT SIZE ii

TABLE OF CITATIONS. iii

PREFACE vi

STATEMENT OF THE CASE AND FACTS 1

SUMMARY OF ARGUMENT 6

ARGUMENT 9

POINT I

THE FOUR YEAR STATUTE OF LIMITATIONS FOR NEGLIGENCE DID NOT BEGIN TO RUN UNTIL THE LITIGATION RELATING TO INSURANCE COVERAGE WAS CONCLUDED BY FINAL JUDGMENT WHICH WAS WHEN REDRESSABLE HARM WAS ESTABLISHED. 9

POINT II

THE TRIAL COURT ERRED IN FINDING AS A MATTER OF LAW THAT BLUMBERG WAS JUDICIALLY ESTOPPED FROM ASSERTING A NEGLIGENCE CLAIM AGAINST BRUNER. 21

CONCLUSION 27

CERTIFICATE OF SERVICE 28

CERTIFICATE OF FONT SIZE

Arial 14 Point proportional

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TABLE OF CITATIONS

CASES PAGE(S)

Adams v. Sommers,
475 So. 2d 279 (Fla. 5th DCA 1985) 14, 15

Airport Sian Corp. v. Dade County,
400 So. 2d 828 (Fla. 3d DCA 1981) 10

Atkins v. Crossland,
417 S.W.2d 150 (Tex. 1967) 10

Babcock v. Whatmore,
707 So. 2d 702 (Fla. 1998) 24

Bauman v. Centex Corp.,
611 F.2d 1115 (5th Cir. 1980) 10

Bierman v. Miller,
639 So. 2d 627 (Fla. 3d DCA 1994) 12

Birnholz v. Blake,
399 So. 2d 375 (Fla. 3d DCA 1981) 10

Branford State Bank v. Hackney Tractor Co.,
455 So. 2d 541 (Fla. 1st DCA 1984) 17

Chapman v. Garcia,
463 So. 2d 528 (Fla. 3d DCA 1985) 12, 14

Colhoun v. Greyhound Lines, Inc.,
265 So. 2d 18 (Fla. 1972) 10

Dimino v. Farina,
572 So. 2d 552 (Fla. 4th DCA 1990) 24, 26

Johnson v. Deluxe Tire Service. Inc.,
544 So. 2d 1158 (Fla. 5th DCA 1989) 17

Kellermeyer v. Miller,
427 So. 2d 343 (Fla. lstDCA1983) 9

Leenen v. Rutaers Ocean Beach Lodae,
662 F. Supp. 240 (S.D. Fla. 1987) 17

Lisbon Contractors v. Miami-Dade Water & Sewer Auth.,
537 F. Supp. 175 (SD. Fla. 1982) 17

Lund v. Cook,
354 So. 2d 940 (Fla. 5th DCA 1978) 16

Palm Beach Co. v. Palm Beach Estates,
110 Fla. 77, 148 So. 544, 549 (1930) 23

Peat. Marwick. Mitchell & co. v. Lane,
565 So. 2d 1323 (Fla. 1990) 6, 11, 13, 18, 21, 22

Silvestrone v. Edell,
721 So. 2d 1173 (Fla. 1998) 6, 11, 12, 18, 20, 21

Thronebura v. Boose. Casey. Ciklin. Lubitz,
Manens. McBane & O'Connell. P.A.,
659 So. 2d 1134 (Fla. 4th DCA 1995) 12, 13

Wildenberg v. Eaale-Picher Ind., Inc.,
645 F. Supp.29 (SD. Fla. 1986) 10

Zitrin v. Glaser,
621 So. 2d 748 (Fla. 4th DCA 1993) 12, 13, 14

Zuckerman v. Ruden. Barnett. McClosky.
Smith, Schuster & Russell. P.A.,
670 So. 2d 1050 (Fla. 3d DCA 1996) 12, 13

STATUTES AND OTHER AUTHORITIES

22 Fla. Jur. 2d, Estoppel and Waiver, § 50, pages 479-480 23

Fla. Stat. § 95.031(1) . . . , ... , , ... 6, 9

ATLAS PEARLMAN TROP & BORKSON ATTORNEYS AT LAW

PREFACE

Appellant RICHARD BLUMBERG will be referred to as BLUMBERG.

Appellee THE BRUNER INSURANCE AGENCY will be referred to as BRUNER.

Non-Party St. Paul Fire and Marine Insurance Company will be referred to as St. Paul.

The Record will be designated as R.

STATEMENT OF THE CASE AND FACTS

On or about December 23, 1982, St. Paul issued a homeowner's insurance Policy No. 968JV3292 to BLUMBERG which was subject to renewal each year through 1992. (R. 2). The St. Paul policy was obtained by BLUMBERG through BRUNER. (R. 2). The property insured under the St. Paul policy was located at 5200 N.E. 32nd Avenue, Ft. Lauderdale, Florida (the "5200 Property"). (R. 2). In or about December, 1989, BLUMBERG and his wife purchased a new home located at 3020 North Atlantic Boulevard, Ft. Lauderdale, Florida (the "3020 Property"). (R. 2). In an effort to obtain insurance on the 3020 Property, BLUMBERG contacted BRUNER and requested that St. Paul insure the 3020 Property. (R. 2). BRUNER informed BLUMBERG that after inquiry to St. Paul, BRUNER was advised that St. Paul did not insure beach front property and that BLUMBERG would have to look for another insurance company. (R. 3).

After BLUMBERG and his family moved to the 3020 Property, BRUNER reduced the insurance coverage at the 5200 Property to reflect the transfer of furnishings, jewelry, and other possessions to the 3020 Property. (R. 216). The premium for the insurance due St. Paul dropped from approximately $3500.00 to approximately $1,500.00. (R. 216). After BLUMBERG moved,

renewal notices were sent to the 3020 Property and BRUNER knew that BLUMBERG and his family had moved to the 3020 Property. (R. 216).

In 1989, BLUMBERG provided the financing for a sports card store that was operated by Mr. Mark Schreiber ("Schreiber"). (R. 216). The financing provided by BLUMBERG was used for the purchase of inventory and BLUMBERG's investment was secured by the inventory. (R. 216). In October, 1991, Schreiber accepted a corporate accounting position and attempted to sell the store. (R. 216). In early November, 1991, due to Schreiber's inability to sell the store, Schreiber turned the inventory over to BLUMBERG. (R. 217). Since there was sufficient room to store the sports cards at the 5200 Property, BLUMBERG instructed Schreiber to deliver the inventory to the 5200 Property. (R. 217). The cards became BLUMBERG's private property and were brought to the 5200 Property. (R. 217).

On November 4, 1989, BLUMBERG telephoned BRUNER to advise that the sports cards were at the 5200 Property and to verify that he had insurance coverage for the cards. (R. 217). After BRUNER advised that it was unsure if the cards were covered, BLUMBERG checked with the insurance company providing insurance for the 3020 Property and with the insurance company providing coverage for an individual renting the 5200 property to determine if

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there was coverage. (R. 217). BLUMBERG was advised that the other insurance policies did not provide coverage. (R. 217). Accordingly, on November 6, 1989, BLUMBERG sent a letter via facsimile to BRUNER informing BRUNER that he expected St. Paul to provide coverage. (R. 217). On Friday, November 8, 1989, BRUNER contacted BLUMBERG and advised that BRUNER had spoken to St. Paul and confirmed that there was coverage for the sports cards. (R. 218).

The 5200 Property was burglarized and virtually all the sports cards were stolen. (R. 218). BLUMBERG made a claim with St. Paul for the theft of the sports cards. (R. 218). St. Paul did not deny the claim, but disagreed as to the value of the sports cards. (R. 218). St. Paul made a number of settlement offers in order to resolve the claim relating to the theft. (R. 218). Since St. Paul's settlement offers were unacceptable, in March, 1992, BLUMBERG filed a Complaint against St. Paul. (R. 218). At the time BLUMBERG filed the action against St. Paul and subsequent thereto, BRUNER advised that it believed that the St. Paul policy provided coverage for the theft. (R. 218). In fact, in opposition to St. Paul's Motion for Summary Judgment, BRUNER submitted an affidavit in which BRUNER specifically

stated that it believed that BLUMBERG had homeowner's insurance and contents coverage on the 5200 Property at the time of the theft. (R. 218).

On or about June 16, 1993, BLUMBERG filed his Second Amended Complaint which asserted a promissory estoppel claim as an alternative theory of recovery. On April 26, 1995, BRUNER testified in a deposition that the facts stated in his Affidavit, including his belief that the St. Paul Policy provided coverage, were true and correct as of April 26, 1995.

In August, 1996, the St. Paul matter went to trial. (R. 218). The Honorable Patti Englander Henning, after presentation of BLUMBERG's evidence, granted a directed verdict against BLUMBERG on his breach of contract count against St. Paul. (R. 218). The court found, as a matter of law, that since BLUMBERG no longer resided at the 5200 Property, the St. Paul policy in effect did not provide coverage for the theft of the sports cards. (R. 219).

Since BRUNER knew that BLUMBERG and his family had moved away from the 5200 Property, BLUMBERG asserted in this action against BRUNER that BRUNER was negligent in not procuring an insurance policy that provided coverage for his property and that BRUNER should have advised BLUMBERG that there was no coverage under the St. Paul policy for the

5200 property after BLUMBERG and his family moved to the 3020 Property. (R. 219). Until such time as the court granted St. Paul's Motion for Directed Verdict, which resulted in a Final Judgment against BLUMBERG, BLUMBERG believed that there was coverage under the St. Paul policy. (R. 219). Until such time as the court granted St. Paul's Motion for Directed Verdict, BLUMBERG did not believe that he could assert a negligence claim against BRUNER. (R. 219). Within months of the directed verdict and before the Final Judgment was entered, BLUMBERG instituted an action against BRUNER. (R. 219).

In the St. Paul matter, BLUMBERG prevailed on his promissory estoppel claim and received a verdict that was substantially less than the value of the stolen sports cards. Due to a previously served Offer of Judgment, St. Paul was entitled to offset this verdict by its attorneys' fees and costs incurred from the date of its Offer of Judgment. Thus, BLUMBERG was faced with the likelihood of the entry of an adverse judgment against him. BLUMBERG and St. Paul thereafter settled the St. Paul matter whereby BLUMBERG dismissed his promissory estoppel claim, a Final Judgment was entered against BLUMBERG, and he received nothing from St. Paul. (R. 219).

SUMMARY OF ARGUMENT

The Fourth District incorrectly decided that the statute of limitations in a negligence action against an insurance agent or broker begins to accrue when an insured files a lawsuit against an insurance company that denies coverage. It is well established that: "A cause of action accrues when the last element constituting the cause of action occurs." Fla. Stat. § 95.031(1). This Court has held that a cause of action for negligence does not accrue under Florida law even if the last element, damages, has occurred, unless and until the plaintiff knew or should have known that he had been damaged. Peat. Marwick, Mitchell & Co. v. Lane, 565 So. 2d 1323 (Fla. 1990). Additionally, even where negligence has occurred, this Court has held that the statute of limitations does not begin to run until a Final Judgment has been entered which establishes redressable harm. Silvestrone v. Edell, 721 So. 2d 1173 (Fla. 1998).

Until the court in the St. Paul action granted a directed verdict finding that the St. Paul policy did not provide coverage, BLUMBERG did not know or believe that he was damaged by BRUNER's negligence. BRUNER maintained throughout the St. Paul action that coverage was in effect. If the court in the St. Paul action found that the St. Paul policy provided coverage,

BLUMBERG would not have been able to assert a negligence claim against BRUNER. Accordingly, BLUMBERG's cause of action against BRUNER accrued when Judge Henning, in the St. Paul action, found that the policy did not provide coverage and a Final Judgment was entered against BLUMBERG.

After the Trial Court Judge in the St. Paul action granted a directed verdict finding that the St. Paul policy did not provide coverage, the matter went to the jury on BLUMBERG's promissory estoppel claim against St. Paul. The jury found that BLUMBERG established promissory estoppel by clear and convincing evidence and awarded BLUMBERG a verdict in the amount of $25,000.00. However, the jury verdict was subsequently dismissed by stipulation. A final judgment was rendered against BLUMBERG and BLUMBERG recovered nothing in the St. Paul matter.

The trial court in this matter also erroneously found that BLUMBERG was judicially estopped from asserting a negligence claim against BRUNER due to the jury verdict in favor of BLUMBERG on his promissory estoppel count. Judicial estoppel only applies when an inconsistent position is successfully asserted and the parties and questions sought to be asserted in the second matter are the same. BLUMBERG's position was not successfully maintained, a judgment was not rendered in his favor, the positions taken by

BLUMBERG were not inconsistent, and the parties and questions were not the same. Additionally, BRUNER cannot establish that it was misled or changed its position such that it would be unjust for BLUMBERG to assert a negligence claim against BRUNER. Accordingly, the trial court erred in finding that BLUMBERG was judicially estopped from asserting a negligence claim against BRUNER.

ARGUMENT

POINT I

THE FOUR YEAR STATUTE OF LIMITATIONS FOR NEGLIGENCE DID NOT BEGIN TO RUN UNTIL THE LITIGATION RELATING TO INSURANCE COVERAGE WAS CONCLUDED BY FINAL JUDGM-ENT WHICH WAS WHEN REDRESSABLE HARM WAS ESTABLISHED.

The Florida Statute of Limitations is governed by Chapter 95, Florida Statutes. Section 95.031(1), Florida Statutes' provides: "A cause of action accrues when the last element constituting the cause of action occurs." Applying the general principles of Section 95.031, Florida Statutes, to a negligence claim against an attorney, the court in Kellermever v. Miller, 427 So. 2d 343, 345 (Fla. 1 st DCA 1983) explained the "last element" rule as follows:

> Appellants do not deny that the applicable statute of limitations for legal malpractice is two years. They correctly point out, however, that in Florida it is the accrual of a cause of action which commences the running of the statute of limitations. Nor do appellants deny that they discovered Miller's alleged negligence by at least April 1975, but they correctly argue that an act of negligence alone does not constitute a cause of action in tort without damages. Since damages are an essential element of a cause of action for negligence, and since a cause of action for statute of limitation purposes does not accrue until the last element constituting the cause of action occurs, the issue of when legally cognizable damages occurred is dispositive of this case.

(citations omitted); see also Airport Sian Corp. v. Dade County, 400 So. 2d 828, 829 (Fla. 3d DCA 1981) ("Until damages are actually incurred, a party cannot state a cause of action and the statute of limitations does not begin to run."); Birnholz v. Blake, 399 So. 2d 375, 377 (Fla. 3d DCA 1981) ("It is settled that the essential elements of a cause of action accrue when the last element necessary to constitute the cause of action occurs.").

Not all jurisdictions follow the last element rule. Texas law, for example, requires only that a "legal injury" has been sustained, with legal injury defined as a violation of one's rights. See Bauman v. Centex Corp., 611 F.2d 1115, 1118-19 (5th Cir. 1980), citing Atkins v. Crossland, 417 S.W.2d 150 (Tex. 1967). Similarly, New York law requires merely a "wrongful invasion," rather than actual damages, for the cause of action to accrue and the statute of limitations to begin to run. The Southern District of Florida noted this distinction, and the uniqueness of Florida law in Wildenbera v. Eaale-Picher Ind., Inc., 645 F. Supp. 29, 30 (S.D. Fla. 1986) when deciding a choice of law question:

> It is axiomatic that a cause of action for negligence, or products liability, or breach of warranty does not accrue until the complaining party sustains some type of damage. A cause of action sounding in tort arises in the jurisdiction where the last act necessary to establish liability occurred. Colhoun v. Greyhound Lines. Inc., 265 So. 2d 18 (Fla. 1972). **In Florida, the "last act"**

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> **is discovery of the damage.** In New York, it appears that the "last act" necessary to establish liability is the wrongful invasion or exposure . . . .

(emphasis added). Under New York law, the asbestos plaintiff's claim in Wildenberg was barred because the cause of action accrued on the date of exposure. Under Florida law, however, it was timely. Id.

The seminal case on this issue is Peat, Marwick in which this Court held that a cause of action for negligence does not accrue under Florida law even if the last element -- damages -- has occurred, unless and until the plaintiff knew or should have known that he had been damaged. In Peat, Marwick, this Court held that an action against an accountant for malpractice did not accrue at the time the negligent advice was rendered, when the IRS notified the taxpayers of its conclusive determination that the taxpayers owed the government a deficiency, nor when litigation ensued in tax court over the delinquency. It did not begin to accrue until a final judgment was entered by the United States Tax Court following the taxpayer's appeal. 565 So. 2d at 1326-27. This Court held that the taxpayers suffered no actual damage until all their appeals in the tax court were exhausted. Id. at 1326.

This Court recently clarified when a cause of action for litigation-related legal malpractice accrues. In Silvestrone, 721 So. 2d 1173, this Court

established a bright-line rule that in those cases that proceed to final judgment, the statute of limitations begins to run when the final judgment becomes final. Such a bright-line rule should also be established in cases involving insurance agents and brokers.

> This bright-line rule will provide certainty and reduce litigation over when the statute starts to run. Without such a rule, the courts would be required to make a factual determination on a case by case basis as to when all the information necessary to establish the enforceable right was discovered or should have been discovered.

Id. at 1173.

The accrual of negligence claims under Florida law has been addressed on numerous occasions in attorney malpractice cases. See Zuckerman v. Ruden, Barnett. McClosky, Smith, Schuster & Russell, P.A., 670 So. 2d 1050 (Fla. 3d DCA 1996); Thronebura v. Boose. Casey. Ciklin. Lubitz. Manens, McBane & O'Connell. P.A., 659 So. 2d 1134 (Fla. 4th DCA 1995); Bierman v. Miller, 639 So. 2d 627 (Fla. 3d DCA 1994) (Until the underlying action giving rise to the legal malpractice has been concluded, a malpractice action is premature because there is no redressable harm.); Zitrin v. Glaser, 621 So. 2d 748 (Fla. 4th DCA 1993); Adams v. Sommers, 475 So. 2d 279 (Fla. 5th DCA 1985); Chapman v. Garcia, 463 So. 2d 528 (Fla. 3d DCA 1985).

In Zuckerman, the legal representation involved a transaction in which the law firm was retained to represent a client in a loan transaction. When the mortgagor defaulted, a possible problem arose because the mortgagor's wife did not sign the mortgage which was on homestead property. The mortgagor claimed that the mortgage was invalid and unenforceable. While a foreclosure action was pending, the client sued his attorney. Since the malpractice action was filed more than two years after the mortgagee learned of the defect in the mortgage, the trial court granted summary judgment. The Third District reversed discussing the requirement of redressable harm by stating: "Only when the foreclosure action has been entirely resolved will the statute of limitations on the malpractice action begin to run." Id. at 1050.

In Throneburg, the Fourth District held that only knowledge of actual harm from legal malpractice begins the limitations period, while knowledge of potential harm does not. Relying upon and explaining Peat, Marwick the court held: "We understand Peat, Marwick to draw a distinction between knowledge of actual harm from legal malpractice and knowledge of potential harm. The former begins the limitations period; the latter does not."

In Zitrin, the Fourth District held that the limitations period does not begin to run until both factors referred to in Peat, Mat-wick are completed.

Mere knowledge of the injury or negligence, without the establishment of the existence of a redressable harm, will not start the limitations period running. 621 So. 2d 748.

In Chapman, a minor child, through her parents, sued her attorneys for legal malpractice when it was claimed that the attorneys allowed the statute of limitations to expire against medical malpractice defendants. The Third District held that so long as the underlying medical malpractice action, out of which the legal malpractice arose, was still pending, there was no cause of action for legal malpractice.

In Adams, it was alleged that attorneys committed malpractice in a transactional representation. The attorney was retained for the purpose of estate planning. Due to alleged malpractice, a court held that a mortgage was valid when, in fact, the attorney had previously advised that it would be of no force and effect. More than three years after the order was entered determining that the mortgage was valid, the client filed a malpractice action. The attorney prevailed in his motion for summary judgment by asserting that the cause of action accrued when the trial court entered the order determining that the mortgage was valid. On appeal, the Fifth District reversed and stated:

> Section 95.11(4)(a) provides that the period of limitations shall run from the time the cause of action is discovered or should have been discovered with the exercise of due diligence. This provision has been uniformly construed to mean that the event which triggers the running of the statute of limitations is notice to or knowledge to the injured party that a cause of action has accrued in his favor, and not the date on which the negligent act which caused the damages was actually committed. Here Adams was certainly aware that the satisfaction of mortgage had been set aside by the circuit court; however, that knowledge alone is not dispositive of when Adams discovered or should have discovered the alleged negligence of her attorney. Adams was only on notice of Sommers' possible negligence at that point and a jury could reasonably find that Sommers' assurances that the circuit court had no jurisdiction over the trust served to allay her concerns about any damages.
>
> In addition, the question of the validity of the satisfaction of mortgage was not finally resolved until October, 1981, when this court rendered its decision and no further review was sought. Had Judge Salfi's order been reversed by this court and the satisfaction of mortgage been upheld, Adams would not have had a legal malpractice action on that ground.

Id. at 280-281 (citations omitted).

If this Court was to affirm the District Court's decision, it would not only be inconsistent with Florida law, it also would create a "Catch-22" situation for any plaintiff who seeks to recover on a negligence theory against an insurance agent. If BLUMBERG had brought suit while the St. Paul case was pending, BRUNER would have argued "no harm, no foul," and the case would surely have been dismissed as untimely for lack of damages. In the

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insurance agent context, BLUMBERG would be unable to bring a claim against BRUNER for negligently failing to obtain an insurance policy if the insurance company fortuitously timely paid a claim. No harm would have been suffered, and thus no recovery could have been had. The cause of action, under Florida law, is not complete. The last element rule is not only the rule of law in Florida, it is irrefutably logical, as it would be an incredible waste of judicial resources to permit claims for negligence against insurance agents when claims were paid in full because the insurance company honored its obligation.

The application of this rule by Florida courts is well established. For example, in Lund v. Cook, 354 So. 2d 940 (Fla. 5th DCA 1978), cert. denied 360 So. 2d 1247 (1978), the court applied the rule in an action against a surveyor to toll the statute of limitations for 18 years. The plaintiff filed an action against defendants who prepared a survey and plat delivered to the plaintiff 18 years earlier. The appellate court reversed the trial court's dismissal on statute of limitations grounds, holding that the claim did not accrue until the error was discovered and the plaintiff suffered monetary loss by being forced "to purchase all of the land shown on the survey as encroaching upon such other property." Id. at 941; see also Lisbon

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Contractors v. Miami-Dade Water & Sewer Auth., 537 F. Supp. 175 (S.D. Fla. 1982) (limitations period runs against engineering firm not from date soil quality test performed, but rather from date when cause of action was or should have been discovered); Branford State Bank v. Hackney Tractor Co., 455 So. 2d 541,547 (Fla. 1 st DCA 1984) (limitations for action for conversion of property runs not from date of conversion but rather from date plaintiff was aware of claim); Leenen v. Rutgers Ocean Beach Lodae, 662 F. Supp. 240 (S.D. Fla. 1987) (claims arising from exposure to overheated hot tub causing cerebral palsy in a child accrued not when pregnant mother realized tub was overheated but rather when child was born); Johnson v. Deluxe Tire Service, Inc., 544 So. 2d 1158 (Fla. 5th DCA 1989) (negligence statute of limitations runs from date accident occurred, not from date car repair company improperly adjusted rear wheel which later came off).

The foregoing cases each illustrate the longstanding principle of Florida statute of limitations analysis that: (1) the claim does not accrue until the last element of the cause of action -- damages -- has occurred: and (2) once the cause of action has accrued, the time period set forth in the statute of limitations does not begin to run until the cause of action was discovered or reasonably should have been discovered by the plaintiff. Florida courts have

applied the discovery rule in a wide range of cases and there is no reason to carve out an exception for cases involving negligent insurance agents.

Until the Court in the St. Paul action granted a directed verdict finding that the St. Paul Policy did not provide coverage, BLUMBERG did not know or believe he was damaged by BRUNER. (R. 219). BRUNER maintained throughout the St. Paul matter that there was coverage in effect. (R. 216). Until the Final Judgment was entered in the St. Paul action, the Trial Court could have changed its decision. In addition, even after the Final Judgment was entered, the Trial Court could have changed its decision and found as a matter of law that the insurance policy did provide coverage. This case presents the same issues addressed by this Court in Peat. Marwick and Silvestrone. The cause of action for negligence against BRUNER did not accrue when it failed to obtain a proper insurance policy, it did not accrue when St. Paul ultimately maintained that there was no coverage, and it did not accrue when litigation ensued against St. Paul. Peat, Mat-wick, 565 So. 2d 1323. The cause of action accrued when BLUMBERG was damaged. BLUMBERG was damaged when the Court in the St. Paul action found that the policy did not provide coverage and a Final Judgment was ultimately entered.

A bright-line rule in the insurance agent context is critical to ensure uniformity. If there is no bright-line test, every time an insurance company denies coverage under any type of insurance policy, it could be argued that the statute of limitations begins to accrue against the insurance agent. Such a rule is even more important in an insurance agent context than it is in an accountant or attorney malpractice context because almost every Florida resident maintains some sort of insurance (automobile, boat, homeowners, renters, life, disability, liability, workers' compensation, commercial liability, etc.). Only a limited portion of the population have occasion to hire accountants or attorneys. Additionally, insurance companies deny coverage under policies, or proceed with a reservation of rights, in many situations. Without a bright-line rule, the statute of limitations in an insurance agent negligence case could begin to accrue once there is a denial of coverage or even when a reservation of rights is asserted.

In a reservation of rights situation, the matter in which the insurance company has reserved its rights could proceed for a number of years. The insurance company may not choose to assert that there is no coverage until the conclusion of that matter. At that time, if the insurance company asserts that there is no coverage, the insured would likely file suit against the

insurance company. That action could continue for a number of years. Ultimately, if it is determined that there was no coverage, it is likely that more than four years would have passed from when the reservation of rights was asserted and a claim against an insurance agent for negligence could be barred.

Likewise, when insurance companies deny coverage, but pay claims or assert a reservation of rights and pay claims, it would not make sense to require an insured to bring a claim against an insurance agent for negligence when there has been no damage. Finally, one can imagine a situation where an insurance agent admittedly procures a policy that does not provide proper coverage to an insured, but no claim is ever made on the policy. Although the agent and the insured may recognize that negligence had occurred, the cause of action would not accrue because there would be no damages.

In this case, BLUMBERG believed that he had coverage. He sued St. Paul for breach of contract. Throughout the litigation, BRUNER maintained that there was coverage in effect. It would have been extremely awkward if not impossible to have brought BRUNER into the St. Paul action by asserting a negligence claim. On the one hand, BLUMBERG would be asserting that the policy provided coverage. On the other hand, BLUMBERG would have

to assert that BRUNER was negligent because the policy did not provide coverage. One could only imagine the difficulties of asserting these inconsistent positions to a jury at trial. Accordingly, the District Court's decision must be reversed on the basis of Peat, Marwick and Silvestrone and a bright-line rule should be established that a cause of action against an insurance agent for negligently procuring insurance coverage does not begin to accrue until a final judgment is entered finding that there is no coverage.

POINT II

THE TRIAL COURT ERRED IN FINDING AS A MATTER OF LAW THAT BLUMBERG WAS JUDICIALLY ESTOPPED FROM ASSERTING A NEGLIGENCE CLAIM AGAINST BRUNER.

Although the District Court did not address the issue because it ruled that the statute of limitations had expired, the Trial Court also erred in finding that BLUMBERG was judicially estopped from asserting a negligence claim against BRUNER. Until such time as the Court in the St. Paul action granted a directed verdict finding that the St. Paul policy did not provide coverage, BLUMBERG believed that BRUNER had procured an insurance policy that provided proper coverage to him. When it became apparent that BRUNER acted negligently by failing to obtain a proper policy of insurance, BLUMBERG

instituted an action against BRUNER for negligence. BRUNER's judicial estoppel argument is fatally flawed.

As this Court has stated, an individual is entitled to take a position in litigation and upon that position failing, has every right to institute a negligence claim for the breach of a duty. Peat. Marwick, 565 So. 2d 1323. In Peat, Marvvick, taxpayers listened to the advice of accountants. The IRS made a determination that the taxpayers owed taxes. The taxpayers litigated the issue and chose to appeal the decision based upon their belief that the accountants had given proper advice to them. After losing the tax court appeal, the taxpayers brought an action against the accountants because it became obvious that the accountants had negligently provided services which caused the taxpayers to incur additional taxes. Herein, BLUMBERG relied upon BRUNER to provide him with insurance. When he litigated this issue against St. Paul, a determination was made that the St. Paul policy did not provide coverage. Thus, BLUMBERG is entitled to assert a negligence claim against BRUNER and BLUMBERG's actions are consistent with Peat, Mat-wick.

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In addition, there are limitations placed upon judicial estoppel. The best summary of the requirements for a judicial estoppel claim are set forth in 22 Fla. Jur. 2d, Estoppel and Waiver, § 50, pages 479-480, as follows:

> [I]n order to establish an estoppel under the rule that a position taken in an earlier action estops the one taking such position from assuming an inconsistent position in a later action, the following must appear: (1) the inconsistent position first asserted must have been successfully maintained; (2) a judament must have been rendered; (3) the positions must be clearly inconsistent; (4) the parties and questions must be the same; (5) the party claiming the estoppel must have been misled and have changed its position; and (6) it must appear unjust to one party to permit the other to change its position

(emphasis added).

As the Fourth District has stated:

> The elements of the rule of estoppel forbidding the successful assertion of a consistent position in litigation were summarized in the case of Palm Beach Co. v. Palm Beach Estates, 110 Fla. 77, 148 So. 544, 549 (1930):
>
> > The real meaning of the rule concerning estoppels of the kind relied on by appellees is that a party, who in an earlier suit on the same cause of action, or in an earlier proceeding setting up his status or relationship to the subject-matter of his suit, successfullv assumes a factual position on the record to the prejudice of his adversary, whether by verdict, findings of fact, or admissions in his adversary's pleadings operating as a confession of facts he has alleged, cannot, in a later suit on the same cause of action, change his position to his adversary's injury, whether he was successful in the outcome of his former litigation or not.

> The converse of the rule just stated is that, where a state of facts is alleged in a pleading by one party, but is denied by the opposite party, who prevails by verdict or findings of the court in sustaining his denial, the party who has successfully assumed a position of denial of his adversary's alleged facts is likewise estopped to question his adversary's subsequent allegation in a new litigation, of a different state of facts. This is so, because, for aught that appears to the contrary, the successful party's denial of his adversary's allegations may have been upheld because of the negative implied in the existence of the different state of facts alleged in the new suit.
>
> Clearly, to give rise to an estoppel, the inconsistent position first asserted must have been successfully asserted. . . . Because the doctrine of estoppel is based on equitable considerations, the fact that appellant's previous position neither gave him any advantage nor in any way disadvantaged appellee, indicates that the inconsistent position was not in fact successful.

Dimino v. Farina, 572 So. 2d 552, 556-557 (Fla. 4th DCA 1990), overruled on other grounds by Babcock v. Whatmore, 707 So. 2d 702 (Fla. 1998) (citations omitted) (emphasis added).

BRUNER did not to establish each of the foregoing requirements. BRUNER erroneously asserted that a jury verdict of promissory estoppel conclusively established each of the foregoing. However, the jury verdict was subsequently dismissed by stipulation. A Final Judgment was rendered aaainst BLUMBERG, and BLUMBERG recovered nothing in the St. Paul matter. (R. 219). As previously discussed, the positions asserted by

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BLUMBERG were not clearly inconsistent. The parties to this action and the St. Paul action are not the same. The cause of action asserted against BRUNER was for negligence while in the St. Paul matter the causes of action were for breach of contract and promissory estoppel. Finally, there was no allegation or anything in the record to show how BRUNER was misled and changed its position by the position taken by BLUMBERG in the St. Paul action. In fact, BRUNER took the same position as BLUMBERG took in the St. Paul action and even filed an affidavit indicating that it thought there was coverage under the St. Paul policy. (R. 210). Accordingly, it is hard to imagine how BRUNER changed its position.

BRUNER's estoppel argument neglected the fact that a Final Judgment was entered against BLUMBERG in the St. Paul action in which he recovered nothing. (R. 219). Therefore, if BLUMBERG was asserting an inconsistent position, the Final Judgment established that BLUMBERG was not successful. BLUMBERG's position has been consistent throughout the St. Paul action and in this matter. BLUMBERG, in reliance upon BRUNER, instituted an action against St. Paul for breach of contract. When the court determined that St. Paul, as a matter of law, did not breach the contract, BLUMBERG instituted an action against BRUNER for negligence. Had

BLUMBERG instituted two separate actions simultaneously, one against St. Paul and one against BRUNER, or instituted one action against St. Paul and BRUNER simultaneously, BLUMBERG would have been asserting inconsistent positions. On the one hand, he would have been asserting that the St. Paul policy provided coverage. On the other hand, he would have been asserting that the St. Paul policy did not provide coverage and that BRUNER negligently failed to obtain insurance coverage for him. Accordingly, estoppel does not apply.

finally, since the doctrine of estoppel is based on equitable considerations, the fact that BLUMBERG's previous position neither gave him any advantage nor in any way disadvantaged BRUNER is an indication that BLUMBERG was not in fact successful on an inconsistent position. Dimino, 572 So. 2d at 557. Based upon the foregoing, the trial court erred in finding that BLUMBERG was judicially estopped from asserting a negligence claim against BRUNER.

CONCLUSION

Based on the foregoing, the Fourth District's decision which affirms the summary judgment entered against BLUMBERG based on the statute of limitations should be reversed. BLUMBERG's negligence action against BRUNER should be allowed to proceed because it was timely filed within the four year statute of limitations. The trial court's finding that the Doctrine of Judicial Estoppel barred BLUMBERG's negligence claim should also be reversed and BLUMBERG should be allowed to proceed to trial on his negligence claim against BRUNER.

Respectfully submitted,

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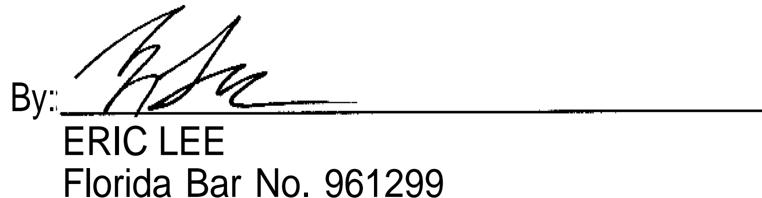

By: ______________________

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail this 25th day of January, 2000, upon: HINDA KLEIN, ESQ., Conroy, Simberg & Lewis, P.A., 3440 Hollywood Blvd., Second Floor, Hollywood, FL 33021.

ERIC LEE