IN THE SUPREME COURT OF FLORIDA

CASE NO. 95,740
FOURTH DISTRICT CASE NO. 98-1549

RICHARD BLUMBERG,

Petitioner,

vs.

THE BRUNER INSURANCE AGENCY,

Respondent.

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PREFACE

Appellant, RICHARD BLUMBERG, will be referred to as BLUMBERG in this brief. Appellees, THE BRUNER INSURANCE AGENCY, will be referred to as BRUNER.

All references to the record will appear as follows:

(R.__)

All referenced to the Supplemental record will appear as follow:

(SR.___)

CERTIFICATE OF TYPE SIZE AND STYLE

This Brief has been prepared utilizing 14 point Times New Roman.

STATEMENT OF THE CASE AND FACTS

On November 8, 1991, Petitioner RICHARD BLUMBERG'S (BLUMBERG'S) house was burglarized and his baseball card collection stolen. (R.1-8) BLUMBERG sued his insurer St. Paul in Broward County, Case No. 92-06758, alleging, inter alia, that St. Paul breached its contract with him or, in the alternative, that coverage should be created by estoppel. (R.4, SR.1-10) The case was ultimately tried before a jury, at which time, for reasons immaterial to this appeal, St. Paul received a directed verdict on BLUMBERG'S breach of contract claim against it. (R.4)

BLUMBERG'S promissory estoppel count went to the jury, who was instructed that:

> Promissory estoppel may be utilized to create insurance coverage when to refuse to do so would sanction an injustice. Such injustice may be found where the promisor reasonably should have expected that his affirmative representations would induce the promisee into action or forbearance, and where the promisee shows that such reliance was to his detriment.
>
> Members of the jury, these are the essential elements of a claim for promissory estoppel which the Plaintiff is required to prove by clear and convincing evidence.

(R. 185, SR.26) On August 12, 1996, the jury rendered its verdict in favor of BLUMBERG on the promissory estoppel count and awarded BLUMBERG

$25,000. (R.185, SR.24) After St. Paul moved to tax attorneys' fees pursuant to its Offer of Judgment, BLUMBERG entered into a voluntary stipulation dismissing his promissory estoppel claim against the insurer with prejudice in exchange for St. Paul's agreement to forego its attorneys' fees. (SR.1) Judgment was rendered in St. Paul's favor on BLUMBERG'S breach of contract count only. (SR.1)

On October 1, 1996, two months after he received a jury verdict finding coverage by estoppel, BLUMBERG filed suit against Respondent THE BRUNER INSURANCE AGENCY (BRUNER), alleging that he had no coverage under the St. Paul policy for his loss and that BRUNER was negligent in failing to procure coverage for BLUMBERG'S loss. (R.1-8) BRUNER answered and raised the statute of limitations as an affirmative defense. (R.123-130)

BRUNER moved for summary judgment and further moved the trial court, Honorable George Brescher presiding, to take judicial notice of the entire court file in Blumberg v. St. Paul. (R.176-185, 186-187, 316-317) As grounds for its motion, BRUNER raised the statute of limitations and judicial estoppel. (R.176-185) As to the statute of limitations, BRUNER argued that the limitations period applicable to BLUMBERG'S negligence claim was four years and that it was

undisputed that the case against it was filed at least four and a half years after St. Paul denied coverage. (R.176-180) On the judicial estoppel issue, BRUNER argued that since BLUMBERG was successful in obtaining a jury verdict that he had had coverage for the loss, BLUMBERG was estopped from claiming in this litigation that he had no such coverage. (R.176-180)

After a lengthy hearing, Judge Brescher granted BRUNER'S request to take judicial notice of the entire St. Paul file and further granted its motion for summary judgment on April 20, 1998. (R.357-358, T.1-36)

BLUMBERG appealed the summary judgment to the Fourth District Court of Appeal. (R.359-360) The Fourth District rendered its decision in Blumberg v. USAA Casualty Ins. Co. et al., 729 So. 2d 460 (Fla. 4th DCA 1999). In affirming the trial court's summary judgment and adhering to its prior decision in Russell v. Frank H. Furman, Inc., 629 So. 2d 297 (Fla. 4th DCA 1993), the Fourth District opined that the statute of limitations for an insured's claim against an insurance agent for negligent procurement began to run, at the latest, when the insured filed suit against the insurer and since BLUMBERG failed to file suit against BRUNER within four (4) years of that date, the trial court correctly granted BRUNER'S motion for summary judgment on limitations grounds. Id. at 462.

BLUMBERG sought review from this Court on conflict grounds, asserting that the Fourth District's decision expressly and directly conflicts with, inter alia, Peat, Marwick, Mitchell & Co. v. Lane, 565 So. 2d 1323 (Fla. 1990), in which this Court held that a cause of action for accounting malpractice did not begin to accrue until such time as the plaintiff suffered redressable harm which, in that case, was not until the tax court entered judgment against the plaintiffs. BLUMBERG also argued that the Fourth District's opinion expressly and directly conflicted with Kellermeyer v. Miller, 427 So. 2d 343 (Fla. 1st DCA 1983) and Airport Sign Corp. v. Dade County, 400 So. 2d 828 (Fla. 3d DCA 1981), both of which held that the statute of limitations does not begin to run until damages, or "the last element" of a cause of action, has occurred. See, Kellermeyer, 427 So. 2d at 344; Airport Sign, 400 So. 2d at 829.

This Court issued its order accepting jurisdiction to consider this case on January 10, 2000.

POINTS ON APPEAL

I. This Court has no jurisdiction to consider this case because the Fourth District's opinion is not in express and direct conflict with Peat, Marwick and its progeny but is instead both factually and legally distinguishable on the merits.

II. The Fourth District correctly affirmed the trial court's summary judgment on statute of limitations grounds given the undisputed fact that BLUMBERG filed suit over 4 years from St. Paul's denial of coverage and the date BLUMBERG filed suit against the carrier.

III. The Fourth District could have affirmed the trial court's summary judgment in favor of BRUNER on the grounds that BLUMBERG was estopped from claiming that he had no coverage for his loss by virtue of the St. Paul jury verdict finding that BLUMBERG was entitled to coverage by estoppel.

SUMMARY OF ARGUMENT

This Court does not have conflict jurisdiction to consider this case. Both Peat, Marwick and Silvestrone, which are alleged to be in conflict with this case are professional malpractice cases and this case is not a malpractice case. Similarly, neither Kellermeyer nor Airport Sign, which are also allegedly in conflict with this case, address the issues presented in this case and they are therefore completely distinguishable. Since the asserted cases in conflict are factually and legally distinguishable, there is no express and direct conflict vesting this Court with jurisdiction.

Should this Court maintain jurisdiction to consider this case, it must approve the Fourth District's opinion affirming summary judgment in favor of BRUNER. BLUMBERG'S damages indisputably occurred when the insurer denied coverage for his claim, which was well over four (4) years before he brought suit against the agent. The Fourth District Court of Appeal correctly distinguished this case from Peat, Marwick because in that case, the Defendant/accountant represented the Plaintiffs through tax court proceedings, only after which the Plaintiffs discovered that their accountant's advice was incorrect. Here, on the other hand, BRUNER did not represent BLUMBERG in his proceedings against St. Paul and

BLUMBERG knew, or should have known, that BRUNER might have been negligent in failing to procure his requested coverage at the time the carrier denied coverage. Further, unlike in the malpractice cases asserted to be in conflict with this case, BLUMBERG'S damages were suffered at the time St. Paul denied coverage and were not speculative and hypothetical.

Alternatively, this Court may sustain the Fourth District's affirmance of the trial court's summary judgment on the grounds that BLUMBERG is equitably estopped from suing BRUNER. In his suit against St. Paul, BLUMBERG successfully maintained the position that he had coverage, albeit by estoppel. He is therefore estopped from asserting in this lawsuit that he had no coverage. BLUMBERG'S argument that since his verdict in the St. Paul litigation was never reduced to judgment form his coverage position was not "successfully maintained" is groundless, in light of the undisputed fact that BLUMBERG voluntarily chose to forego a judgment in his favor in exchange for St. Paul's agreement not to proceed against him on its claim for attorneys' fees. The Fourth District's opinion should be approved and the summary judgment affirmed.

ARGUMENT

I. This Court has no jurisdiction to consider this case because the Fourth District's opinion is not in express and direct conflict with Peat, Marwick and its progeny but is instead both factually and legally distinguishable on the merits.

In order for this Court to have jurisdiction on the basis of an asserted conflict between this decision and decisions of the Supreme Court or other District Courts of Appeal, the asserted conflict "must stem from divergent decisions on the same point of law by separate courts within the appellate jurisdictional system." Kyle v. Kyle, 139 So. 2d 885 (Fla. 1962). Where the cases alleged to be conflicting are distinguishable on either the facts or the law to be applied, there is no conflict vesting this Court with jurisdiction. Id. at 887. See also, In re Interest of M. P., 472 So. 2d 732 (Fla. 1985).

This Court improvidently accepted jurisdiction to consider this case because this case is both factually and legally distinguishable from all of the cases asserted to be in express and direct conflict. In Peat, Marwick, Mitchell & Co. v. Lane, 565 So. 2d 1323 (Fla. 1990), for example, the Plaintiffs hired the accounting firm to provide them tax advice. The Plaintiffs received a notice of deficiency from the IRS and proceeded with legal action challenging that deficiency. After the IRS ruled against them in tax court proceedings, the Plaintiffs brought suit against the

accountants, who raised the statute of limitations as a defense. This Court found that the Plaintiffs' cause of action against the accountants did not accrue until they actually sustained damages, which, in that case, was not until the tax court entered a judgment against them. This Court found that "the basic principles for all professional malpractice actions should be the same absent a clear legislative intent to distinguish certain professionals in the application of the limitations period." Id. at 1325.

This case does not involve a professional malpractice action, as this Court has definitively held that an insurance agent is not a professional for statute of limitations purposes. Pierce v. AALL Ins. Inc., 531 So. 2d 84 (Fla. 1988). Therefore, the Fourth District's opinion in this case is completely distinguishable since there is nothing in Peat, Marwick that indicates that this Court intended that its opinion apply to cases other than professional malpractice cases. There is simply no express and directly conflict between this case and Peat, Marwick.

Similarly, there is no conflict at all between this case and Kellermeyer v. Miller, 427 So. 2d 343 (Fla. 1st DCA 1983) and Airport Sign Corp. v. Dade County, 400 So. 2d 828 (Fla. 3d DCA 1981). Those cases merely hold that the statute of limitations in any case can not begin to run until such time as the putative plaintiff

has sustained damages. Neither of these cases address when damages occur in a negligent procurement case against an insurance agent and in fact, the Fourth District's opinion in this case is consistent with the **only** case addressing that issue. In Hardy Equipment Co., Inc. v. Travis Cosby & Assoc., 530 So. 2d 521 (Fla. 1st DCA 1988), the First District Court of Appeal found that the statute of limitations in an action against an insurance agent for negligent procurement began to run at the time the insurer denied coverage. The Fourth District's opinion in this case found that the statute began to run when BLUMBERG brought suit against St. Paul because "at that point, Blumberg knew that coverage had been denied." Blumberg, 729 So. 2d at 462. Since the Fourth District's opinion in this case is completely consistent with the only case on point and not at all inconsistent with Kellermeyer or Airport Sign, there is no express and direct conflict among the District Courts of Appeal that supports this Court's exercise of its discretionary jurisdiction to resolve conflicting decisions. This Court should dismiss this Petition for Writ of Certiorari.

II. The Fourth District correctly affirmed the trial court's summary judgment on statute of limitations grounds given the undisputed fact that BLUMBERG filed suit over 4 years from St. Paul's denial of coverage and the date BLUMBERG filed suit against the carrier.

In the event that this Court finds sufficient conflict to maintain jurisdiction over this case, the Court should approve the Fourth District's opinion affirming the trial court's summary judgment on statute of limitations grounds because the undisputed facts reveal that BLUMBERG filed his Complaint against BRUNER more than four (4) years after his cause of action accrued.[1] BLUMBERG'S primary argument is that the statute of limitations did not begin to run until such time as the trial court granted St. Paul's motion for directed verdict on his breach of contract action. Until that time, BLUMBERG argues, he "thought" he had coverage for his loss and that he had no damages. This argument is specious for two reasons.

First, BLUMBERG'S own St. Paul pleadings demonstrate that he recognized that there was a least the possibility that there was no coverage under the express terms of the St. Paul policy. Otherwise, he would not have plead a claim for

[1] BLUMBERG acknowledges that the applicable statute of limitations in a negligent procurement case is four years. See, Pierce, 531 So. 2d 84; Hardy, 530 So. 2d 521.

promissory estoppel, a claim which is only viable if there is no coverage under the express terms of the policy. Certainly, if BLUMBERG knew there might be no coverage under the policy terms, he also knew or should have known that BRUNER might have been negligent in failing to procure that coverage.

Second, BLUMBERG'S damages accrued at the time St. Paul denied coverage and, as the Fourth District correctly found, he knew or should have known of this fact no later than when he filed suit against the carrier. BLUMBERG relies heavily on Peat, Marwick, an accounting malpractice case, and Silvestrone v. Edell, 721 So. 2d 1173 (Fla. 1998), a legal malpractice case, for the proposition that his claim against BRUNER did not accrue, for lack of redressable harm, until such time as the trial court entered a directed verdict against him on his breach of contract count against St. Paul.

Peat, Marwick and Silvestrone have no application here. Both cases hold that, in certain professional malpractice cases, the statute of limitations will not begin to run until such time as the underlying litigation has been finally concluded. In Peat, Marwick, this Court's rationale was that, until the tax court issued its ruling that the Plaintiffs owed money to the IRS, the Plaintiffs did not have any actual damages and had no reason to know that they were damaged because, **in**

that case, the Plaintiffs continued to be represented by their accountant, who continued to insist that the IRS' deficiency notice was error. The Plaintiffs had no reason to know that their accountant had been negligent until the tax court told them so, especially since the accountant continued to represent the Plaintiffs and advised them throughout the tax court proceedings.

As was set forth previously, Peat, Marwick is distinguishable because this is not a professional negligence case and the principles espoused in that case clearly only apply in a professional negligence context. In addition, Peat, Marwick does not stand for the proposition that in every case in which there is underlying or related litigation, the claimant has no reason to know of his or her claim against another until such time as that underlying litigation has been concluded. Rather, Peat, Marwick was to some extent limited by its facts, specifically the fact that in that case, the Plaintiffs continued to be represented by the allegedly negligent accountant throughout the underlying proceedings. In that regard, the Fourth District's opinion in Russell v. Frank H. Furman, Inc., 629 So. 2d 297 (Fla. 4th DCA 1993), a negligent procurement case against an insurance agent, correctly and cogently distinguished Peat, Marwick when it observed:

> First, appellant in this case had reason to know that the agent had acted negligently long before the final disposition of the case by this

> court in 1988. Unlike in Peat, Marwick, the court's ruling here did not make the injury apparent to the appellants for the first time, but rather confirmed what the appellants had reason to know previously – that there was a gap in the coverage.
>
> Second, in Peat, Marwick the plaintiffs were the defendant's clients, and were being advised by defendant on how to challenge an IRS determination. The clients took the defendant's advice and challenged the IRS determination in the tax court, unsuccessfully. It was not until the determination by the tax court that it became apparent that the accountants were negligent. **Here, the appellee insurance agent was not representing the insureds and advising them regarding this very dispute. To us, this is a distinction with a substantial difference.**

Id. at 298-299 (emphasis added). As the Fourth District recognized, this Court's decision in Peat, Marwick was in large part determined by the fact that the accountant represented the Plaintiffs until the conclusion of the tax court proceedings and specifically advised them that the IRS was incorrect and that he was not negligent in his advice.[2] Here, on the other hand, BRUNER was not

[2] In Peat, Marwick, this Court expressly recognized the significance of the unique facts of that case when it distinguished the case from Sawyer v. Earle, 541 So. 2d 1232 (Fla. 2d DCA), cause dismissed, 545 So. 2d 1368 (Fla. 1989), where the client dismissed his allegedly negligent counsel and obtained new representation before the underlying Florida Bar proceedings had been concluded and Edwards v. Ford, 279 So. 2d 851 (Fla. 1978), in which the negligent attorney admitted his error and the clients were advised that the contract that he had drafted was usurious. Peat, Marwick, 565 So. 2d at 1326-1327. This Court recognized that in Sawyer and Edwards, unlike in Peat, Marwick, the Plaintiffs actually knew of the attorneys' malpractice and their injury on a date certain.

representing BLUMBERG in his suit against St. Paul and was not advising BLUMBERG as to his legal rights. As the Fourth District concluded in Furman, "this is a distinction with a substantial difference." Id. at 299.

Another distinction between this case and Peat, Marwick is that in Peat, Marwick as well as in most litigational malpractice cases including Silvestrone, the damages are speculative until such time as the underlying litigation has been concluded and appealed. As this Court stated in Silvestrone, "a malpractice claim is hypothetical and damages are speculative until the underlying action is concluded with an adverse outcome to the client" because, absent an adverse outcome, the client has not been damaged. Silvestrone, 721 So. 2d at 1174-1175.

Here, on the other hand, BLUMBERG sustained his damage at the time St. Paul denied coverage.[3] Otherwise, he would have had no claim against St. Paul.

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[3] The measure of damages recoverable against an agent for negligent procurement are the damages that would have been recovered against the insurer had the agent properly procured the requested coverage. See, Commercial Ins. v. Frenz Enterprises, 696 So. 2d 871 (Fla. 5th DCA 1997). Those damages necessarily accrue at the time the carrier denies coverage whether suit is ultimately brought against the carrier, the agent or both. For that reason, the "Catch-22" situation hypothesized by BLUMBERG on page 15 of his Answer Brief would not have occurred because it is well established that the insured may bring suit against **both** the carrier and the agent at the same time. See, Russell, 629 So. 2d at 298; Durbin Paper Stock Co. v. Watson-David Ins. Co., 167 So. 2d 34 (Fla. 3d DCA 1964).

Neither Peat, Marwick nor Silvestrone stand for the proposition that the limitations period does not begin to run until the Plaintiff knows **who** is responsible for the damages; these cases only stand for the proposition that the Plaintiff must have been actually, and not hypothetically, damaged before the cause of action accrues.

There is simply no justification for expanding this Court's Silvestrone "bright-line" rule currently applicable only to professional malpractice cases. Such a rule would only serve to unnecessarily multiply proceedings at the expense of judicial economy by requiring the Plaintiff to try two separate lawsuits when only one is necessary. By the same token, the agent would be prejudiced by virtue of his having to defend him or herself against a claim that could be up to eight (8) years old by the time suit is filed against the agent. In addition, the agent might be stymied in his or her defense if he or she is precluded from litigating the issue of coverage by virtue of res judicata or collateral estoppel.

BLUMBERG has not only failed to establish a conflict between this case and Peat, Marwick and Silvestrone, but has also failed to demonstrate that the Fourth District's opinion was incorrect in any way. This Court should approve the Fourth District's decision and affirm the summary judgment in BRUNER'S favor.

III. The Fourth District could have affirmed the trial court's summary judgment in favor of BRUNER on the grounds that BLUMBERG was estopped from claiming that he had no coverage for his loss by virtue of the St. Paul jury verdict finding that BLUMBERG was entitled to coverage by estoppel.

In the unlikely event that this Court finds that the Fourth District's opinion was incorrect with respect to the statute of limitations issue, the Court should nevertheless affirm summary judgment in BRUNER'S favor on alternative grounds raised in that court. Although the Fourth District did not address BRUNER'S estoppel argument in its opinion, if this Court accepts jurisdiction in this cause, it is free to review the entire case on appeal. Ocean Trail Unit Owners Assoc., Inc., 650 So. 2d 4 (Fla. 1994); Savoie v. State, 422 So. 2d 308 (Fla. 1982)

On summary judgment, BRUNER argued that since BLUMBERG prevailed before a jury on his promissory estoppel claim against St. Paul, thereby obtaining a determination that there was coverage for his claim, he is estopped from asserting in this litigation that he had no such coverage. BLUMBERG claims that since he voluntarily relinquished that verdict by dismissing his promissory estoppel claim after verdict, he did not actually "prevail" on the coverage issue such that he is barred from suing BRUNER for negligent procurement.

The doctrine of "judicial" or "equitable" estoppel is well-entrenched in

Florida jurisprudence and has as its core the concept that a litigant may not manipulate the process by taking completely inconsistent positions where the litigant prevailed on the first and where, by doing so, the litigant obtains an unfair advantage in the second. See, Lambert v. Nationwide Mutual, 456 So. 2d 517 (Fla. 1st DCA 1984); Dimino v. Farina, 552 So. 2d 572 (Fla. 4th DCA 1990); Federated Mutual Implement & Hardware Ins. Co. v. Griffin, 237 So. 2d 38 (Fla. 1st DCA 1970). BLUMBERG argues on appeal that the doctrine has no application because a final judgment was not rendered in his favor in the St. Paul litigation. As might be expected, there is a dearth of case law involving instances in which a party wins a verdict, is awarded damages and then voluntarily dismisses its claim. However, there is authority for the proposition that a final judgment is not a prerequisite to application of judicial estoppel; it is only required that the legal position be "successfully maintained". See, Lambert v. Nationwide Mutual, 456 So. 2d 517 (Fla. 1st DCA 1984)(where claimant took a legal position in prior litigation and received a favorable settlement from defendant, claimant would be estopped from asserting an inconsistent position in later litigation); Grauer v. Occidental Life Ins. Co., 363 So. 2d 583, 585 (Fla. 1st DCA 1978), cert. denied, 372 So. 2d 468 (Fla. 1979)("[t]o successfully assume a position to the prejudice of an

adversary does not require that a party estopped must prevail in obtaining a successful result by way of a judgment against his adversary") . Obtaining a verdict in one's favor is proof positive that BLUMBERG'S position that there **was** insurance coverage for his loss was "successfully maintained". Cf., Dimino, 552 So. 2d at 556-557 (citing, Palm Beach Co. v. Palm Beach Estates, 148 So. 544, 549 (Fla. 1933).

This case presents a fitting factual scenario for application of the doctrine. BLUMBERG litigated, and prevailed, on the question of coverage. He voluntarily dismissed his claim against St. Paul after obtaining a verdict in his favor and sought to recover the same damages from BRUNER. By doing so, BLUMBERG obtained an unfair advantage against BRUNER as BRUNER is not now in a position to bring a third-party action against St. Paul, alleging that there was coverage under the policy as St. Paul could assert the defenses of res judicata or collateral estoppel as a bar to the claim.

BLUMBERG has studiously avoided addressing the equities involved here. The record reflects that BLUMBERG took the position that there was coverage for his claim either under the contract or by promissory estoppel. He obtained a verdict on his estoppel claim. Because that verdict was insufficient to "beat" St.

Paul's offer of judgment, BLUMBERG agreed to forego a judgment that was rightfully his, in exchange for St. Paul's not pursuing its fee claim. In return for Craig Bruner's favorable testimony which assisted him in obtaining his verdict against St. Paul, BLUMBERG sued BRUNER for allegedly failing to obtain the coverage to which the jury had already found him entitled. It is difficult to envision a scenario more appropriate for application of the doctrine of judicial estoppel. The judgment in BRUNER'S favor should be affirmed.

CONCLUSION

For the foregoing reasons, the Respondent, THE BRUNER INSURANCE AGENCY, respectfully requests that this dismiss this case for lack of jurisdiction or, in the alternative, approve the Fourth District's decision in this case and affirm the trial court's summary judgment in its favor.

Respectfully submitted,

_____

HINDA KLEIN, ESQUIRE

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed/hand-delivered this ___ day of _____, 1998, to: Eric Lee, Esq., ATLAS, PEARLMAN, TROP & BORKSON, P.A., P.O. Box 14610, Ft. Lauderdale, Fla. 33302-4610.

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