045

IN THE SUPREME COURT OF FLORIDA

RICHARD BLUMBERG,

Petitioner,

v.

THE BRUNER INSURANCE AGENCY,

Respondent.

PETITIONER'S JURISDICTIONAL BRIEF

CASE NO.: 95,740

ON REVIEW FROM THE DISTRICT COURT
OF APPEAL, FOURTH DISTRICT
STATE OF FLORIDA

CASE NO.: 98-01549

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PREFACE

Petitioner RICHARD BLUMBERG will be referred to as BLUMBERG.

Respondent 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.

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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. The St. Paul policy was obtained by BLUMBERE through BRUNER. The property insured under the St. Paul policy was located at 5200 N.E. 32nd Avenue, Ft. Lauderdale, Florida (the "5200 Property"). 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"). In an effort to obtain insurance on the 3020 Property, BLUMBERG contacted BRUNER and requested that St. Paul insure the 3020 Property. 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.

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. The premium for the insurance due St. Paul dropped from approximately $3,500.00 down to approximately $1,500.00. 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.

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On November 4, 1989, BLUMBERG telephoned BRUNER to advise that he was storing a collection of sports cards at the 5200 Property and to verify that he had insurance coverage for the cards. 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 see if there was coverage. BLUMBERG was advised that the other insurance policies did not provide coverage. Accordingly, on November 6, 1989, BLUMBERG sent a letter via facsimile to BRUNER informing BRUNER that he expected St. Paul to provide coverage. 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.

The 5200 Property was burglarized and virtually all the sports cards were stolen. BLUMBERG made a claim with St. Paul for the theft of the sports cards. St. Paul did not initially deny the claim, but disagreed as to the value of the sports cards. St. Paul made a number of settlement offers in order to resolve the claim relating to the theft. Since St. Paul's settlement offers were unacceptable, in March, 1992, BLUMBERG filed a Complaint against St. Paul.

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

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for the theft, 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. In August, 1996, the St. Paul matter went to trial. 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. 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.

Since BRUNER knew that BLUMBERG and his family had moved away from the 5200 Property, BLUMBERG believes 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. Until such time as the court granted St. Paul's Motion for Directed Verdict, BLUMBERG believed that there was coverage under the St. Paul policy. 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. Within months of the directed verdict, BLUMBERG instituted an action

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against BRUNER. In the St. Paul matter, a Final Judgment was entered against BLUMBERG and he received nothing from St. Paul.

On or about April 3, 1998, the Circuit Court granted BRUNER's Motion for Summary Judgment finding, as a matter of law, that the statute of limitations had run on BLUMBERG's negligence claim against BRUNER. The Fourth District Court of Appeal ("District Court") affirmed the Circuit Court's Final Summary Judgment.' The District Court held that the statute of limitations began to run when St. Paul denied BLUMBERG's claim. BLUMBERG's Motion for rehearing was denied on April 29, 1999 and BLUMBERG 's Notice to Invoke the Discretionary Jurisdiction of this Court was timely filed on May 26, 1999.

SUMMARY OF ARGUMENT

In this case, the District Court held that a cause of action for negligence against an insurance agent begins to accrue when an insurance company denies coverage for a loss. 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). Until the court in the St. Paul action granted a directed verdict finding that the St. Paul policy did not

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'A true and correct copy of the decision Blumbera v. USAA Casualty Ins. Co., 729 So. 2d 460 (Fla. 4th DCA 1999) is attached hereto as Appendix "A".

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provide coverage, BLUMBERG did not know or believe that he was damaged by BRUNER's negligence. The issue of when a cause of action accrues against an insurance agent in a situation where an insurer denies coverage is a broad issue that affects nearly every resident in Florida and is an issue that should be resolved by this Court. The District Court's decision expressly and directly conflicts with this Court's decisions and with decisions of other district courts. Therefore, this Court should exercise its discretionary jurisdiction to review this matter.

JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review a decision of a District Court of Appeal that expressly and directly conflicts with a decision of the Supreme Court or a decision of another District Court of Appeal on the same point of law. Art. V § 3(b)(3) Fla. Const. (1980); Fla. R. App. P. 9.030(a)(2)(A)(iv).

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ARGUMENT

THE DECISION OF THE FOURTH DISTRICT EXPRESSLY AND DIRECTLY CONFLICTS WITH A DECISION OF THIS COURT AND DECISIONS OF OTHER DISTRICT COURTS OF APPEAL

The District Court held that BLUMBERG's negligence claim against his insurance agent began to accrue when BLUMBERG's insurance company denied his claim. The District Court's opinion expressly and directly conflicts with Peat, Marwick, Kellermever v. Miller, 427 So. 2d 343 (Fla. 1 st DCA 1983), and Airport Sian Corp. v. Dade County, 400 So. 2d 828 (Fla. 3d DCA 1981). Thus, discretionary review is necessary to insure uniformity in decisions by the District Courts of Appeal and to insure that this Court's decisions are followed by the District Courts of Appeal.

In Peat, Marwick 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, Mar-wick, this Court held that an action against an accountant for malpractice did not accrue at the time the negligent advice was rendered, nor even when the IRS notified the taxpayers of its conclusive determination that the taxpayers owed the government a deficiency. This Court held that the cause of action did not even accrue when litigation ensued in tax court over the delinquency nor, indeed, 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 reasoned that the taxpayers suffered no

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actual damage until all their appeals in the tax court were exhausted. Id. at 1326. Thus, there is a critical difference under Florida law between discovery of potential damage and discovery of actual damage.

In Kellermever, the First District 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.

(emphasis added) (citations omitted); see also Town of Miami Springs v. Lawrence, 102 So. 2d 143,145 (Fla. 1958) ("the statute does not begin to run until actual harm is inflicted"); 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.")

In Airport Sian Corp., the Third District held: "Until damages are actually incurred, a party cannot state a cause of action and the statute of limitations does not begin to run." Although the Defendant's act of negligence occurred in 1973, Plaintiff was not damaged until 1978 when a contract was terminated due to the

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Defendant's negligence. Until such time as the Plaintiff was damaged by a termination of the contract, the negligence claim did not accrue.

The District Court's decision creates a "Catch-22" situation for any plaintiff who is damaged by an insurance agent's negligence. If an insured institutes an action while the issue of coverage has not been adjudicated, an agent will assert "no harm, no foul," and the case would surely be dismissed as untimely for lack of damages. In addition, an insured is unable to being a claim against an agent for negligently failing to obtain an insurance policy if the insurance company fortuitously paid a claim. No harm would be suffered, and thus no recovery could be had. The cause of action, under Florida law, is not complete. Finally, if an insured prevails in an action against its insurance company on a coverage issue, there would be no claim against an insurance agent. The insured would be entitled to fully recover its insured loss, prejudgment interest, and attorneys' fees pursuant to Section 627.428, Florida Statutes.

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. BRUNER maintained throughout the St. Paul matter that there was coverage in effect. This case presents the same issue addressed by the Florida Supreme Court in Peat, Marwick. The cause of action for negligence against BRUNER did not accrue when BRUNER failed to obtain a proper insurance

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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. The cause of action accrued when BLUMBERG was actually damaged.

Had BLUMBERG not suffered a loss, there would not have been a claim against BRUNER even though he failed to obtain the proper insurance policy. Had St. Paul timely paid the claim, BLUMBERG would not have been able to assert a negligence claim against BRUNER. Had BLUMBERG prevailed in his breach of contract action against St. Paul, he would not have been able to maintain a negligence claim against BRUNER. BLUMBERG was actually damaged when the Court in the St. Paul action found that the policy did not provide coverage. Up until the time that there was a determination that the St. Paul policy did not provide coverage, there was merely the potential for damages. Accordingly, the District Court's decision directly conflicts with Peat Marwick, Kellermever, and Airport Sign Corp.

CONCLUSION

This Court, the First District and the Third District have correctly interpreted the applicable Statute of Limitations under Florida Law. A cause of action for negligence does not accrue until all elements of a negligence claim have occurred. The issues raised by the District Court's opinion transcend the rights of the immediate parties to this case. The accrual of a cause of action against an

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insurance agent is a broad issue that potentially affects all residents of the State of Florida. This Court should reaffirm its interpretation of the application of the Statute of Limitations in a negligence case by accepting discretionary review and questioning the contrary decision of the District Court below.

For all the reasons set forth herein, Petitioner RICHARD BLUMBERG respectfully submits that this Court has discretionary jurisdiction to review the decision below and that this Court should exercise that jurisdiction to consider the merits of Petitioner's argument.

Respectfully submitted,

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By: _____
ERIC LEE
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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 28th day of May, 1999, upon: HINDA KLEIN, ESQ., Conroy, Simberg & Lewis, P.A., 3440 Hollywood Blvd., Second Floor, Hollywood, FL 33021.

ERIC LEE

ATLAS, PEARLMAN, TROP & BORKSON, P.A.

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Richard L. BLUMBERG, Appellant,
v.
USAA CASUALTY INSURANCE COMPANY, Federal Insurance Company, and The Bruner Insurance Agency, Appellees.

No. 98-1549

District Court of Appeal of Florida, Fourth District.

March 17, 1999.

Rehearing Denied April 29, 1999.

Insured brought action against agent for negligent failure to procure coverage. The Seventeenth Judicial Circuit Court, Broward County, George A. Brescher, J., entered summary judgment in favor of agent. Insured appealed. The District Court of Appeal, Warner, J., held that statute of limitations barred claim.

Affirmed.

LIMITATION OF ACTIONS ⚿55(2)
241k55(2)
Statute of limitations on insured's claim against agent for negligent failure to procure coverage began to run when insured filed suit against insurer for denying coverage, not when the trial court directed verdict in favor of insurer.

Eric Lee of Atlas, Pearlman, Trop & Borkson, P.A., Fort Lauderdale, for appellant.

Hinda Klein of Conroy, Simberg & Ganon, P.A., Hollywood, for Appellee-The Bruner Insurance Agency.

WARNER, J.

*1 This is an appeal from a summary judgment in favor of appellee Bruner, an insurance agent, in appellant Blumberg's suit against him for negligent failure to procure coverage. The trial court determined that the statute of limitations ran from the day that Blumberg filed a previous suit against his insurance company for denying coverage for his loss and not from the date when the trial court granted a directed verdict to the company. Under the facts of this case, we affirm the trial court's ruling.

Blumberg's residence was insured for a number of years through St. Paul Insurance Company ("St. Paul"). In December 1989, he bought a new home and contacted Bruner, his insurance agent, to request that St. Paul insure the new property. St. Paul, however, would not insure beach front property. Nevertheless, St. Paul continued to insure the old residence, which Blumberg rented out. Bruner reduced the insurance coverage at the old property to reflect the transfer of Blumberg's possessions to the new home and the premiums were accordingly reduced.

Blumberg had an interest in a sports card store, which proved to be unsuccessful. The store was closed in November 1991, and the inventory of cards, allegedly worth over $100,000, was turned over to Blumberg. He stored the cards in his old residence, which was still insured by St. Paul. As soon as the cards were brought to the old home, Blumberg called Bruner to verify that he had insurance coverage for the cards at that home. He also contacted the insurer of his new home who advised him that he could obtain coverage under his new policy for the cards if not covered under his existing policy. However, Bruner contacted Blumberg on November 9, 1991, and informed him that he had spoken to St. Paul and confirmed that the policy provided the necessary coverage.

On the same day that Bruner called Blumberg to confirm coverage, the old home was broken into and all of the cards were stolen. Blumberg made a claim with St. Paul, but coverage was denied. In the end of 1992, Blumberg filed suit for breach of contract and for promissory estoppel. In the complaint, Blumberg alleged that Bruner was the agent of St. Paul and, as an agent had represented to him that coverage was available under the policy. In the alternative, Blumberg alleged that, acting in reliance on St. Paul's representation of coverage, Bruner failed to secure for him other insurance on the cards. The case went to trial in August of 1996 and resulted in a directed verdict in favor of St. Paul on the breach of contract count because the trial court found that the policy did not cover the loss of the

cards. The promissory cstoppel count went to the jury who found in favor of Blumberg but awarded only $25,000 in damages. Before judgment was entered, Blumberg dismissed his claim with prejudice.

Blumberg then filed suit against Bruner, now alleging that Bruner was his agent for the procurement of insurance coverage, and Bruner negligently failed to procure insurance to cover the loss of the sports cards. Blumberg alleged that he believed that there was coverage until the trial court ruled adversely to him in the prior suit despite his alternative position in the previous complaint that Bruner did not obtain the requisite additional insurance on the cards, Therefore, he alleged that he was not damaged by Bruner's negligence until August of 1996,

*2 Bruner answered the complaint and raised the statute of limitations, contending that the statute began to run when St. Paul denied coverage, or at least when it denied coverage in its answer to Blumberg's suit. On Bruner's motion for summary judgment, the trial court agreed and granted the motion. From this order, Blumberg appeals.

Blurnberg relies on Peat, Marwick, Mitchell & Co. v. Lane, 565 So.2d 1323 (Fla.1990), in which the supreme court held that in a professional malpractice case, parties who had hired Peat Marwick as their accountants to provide tax advice did not suffer redressable harm until the tax court actually entered a judgment against them rather than with receipt of the IRS deficiency notice. Until the underlying legal proceeding had been completed, both Peat Marwick and its clients thought that the accounting advice was correct. The court found that to accept the position that the cause of action against the accountants accrued at the time the IRS first notified the clients of a deficiency would mean that the clients:

> would have had to have filed their accounting malpractice action during the same time that they were challenging the IRS's deficiency notice in their tax court appeal. Such a course would have placed them in the wholly untenable position of having to take directly contrary positions in these two actions. In the tax court, the Lanes would be asserting that the deduction Peat Marwick advised them to take was proper, while they would simultaneously argue in a circuit court malpractice action that the deduction was unlawful and that Peat Marwick's advice was malpractice.

Id. at 1326.

The court distinguished its facts from Sawyer v. Earle, 541 So.2d 1232 (Fla. 2d DCA 1989), where Sawyer hired Earle, a lawyer, to represent him in a bar disciplinary proceeding in which a referee recommended an 18 month suspension. Sawyer discharged Earle and replaced him with other counsel. Sawyer was subsequently disciplined in accordance with the referee's recommendations. More than two years after Earle's discharge, but within two years from the final disciplinary action, Sawyer filed a malpractice action against Earle. The second district affirmed the trial court's ruling that the action was barred by the statute of limitations. The second district stated that the cause of action had accrued when Sawyer discharged Earle because, at that point, Sawyer believed his representation had not been proper. By contrast, in Peat, Mar-wick, the clients believed that the accounting advice was correct and proceeded on that advice to challenge the deficiency notice from the IRS.

We find that the instant case is more similar to Sawyer than to Peat, Mar-wick. In the instant case, Blumberg alleged in his complaint against St. Paul that Bruner had advised him of coverage when there was none and that Bruner had failed to obtain other coverage. While Blumberg alleged that Bruner was acting as agent of St. Paul, this makes no difference in our analysis. Blumberg alleged that Bruner failed to notify him that coverage for the cards was excluded from the policy. Based on these allegations, we fail to see how Blumberg can contend that he continued to believe Bruner's advice that there was coverage until the trial court entered the directed verdict.

*3 We dealt with an analogous circumstance in Russell v. Frank H. Furman, Inc., 629 So.2d 297 (Fla. 4th DCA 1993). In Russell, an insurance company issued two insurance policies covering a vehicle involved in an accident in which appellant was injured and her husband was killed. Unfortunately, there was a gap in coverage of $500,000 between the primary policy and the umbrella policy, which resulted in the appellant's suit against the insurance company. That litigation resulted in an ultimate ruling by this court determining that the gap in coverage existed, After this court's decision, appellant filed suit against the

insurance agent for negligently creating a gap in the insurance coverage. The trial court granted the agent's motion for summary judgment on the basis that the four year statute of limitations had run. On appeal, this court affirmed, distinguishing Peat, Marwick and asserting:

> [f]irst, appellants 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 that 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 298-99 (emphasis supplied).

Our court determined that the appellants could have alternatively pled that the gap existed and was the negligence of the insurance agent when they learned of its existence. See id. at 298. Similarly, in the instant case, Blumberg alleged in the first count of his complaint against St. Paul that coverage existed and that St. Paul had breached its contract by failing to provide coverage. The second count alleged that Bruner represented that coverage existed, when it did not, and that he failed to secure additional insurance as promised if the existing insurance failed to cover the cards. Thus, Blumberg simply alleged alternative theories of recovery, but failed to join Bruner as a named defendant in the suit.

Blumberg also points to the affidavit of Bruner as proof that he reasonably believed that he had coverage until the trial court ruled against him. However, the affidavit signed by Bruner states only that prior to November 9, 1991, Bruner believed the cards were covered under the policy. The inference that can be made from the affidavit is that after St. Paul denied Blumberg's claim, Bruner no longer thought the cards were covered, and therefore Blumberg could not reasonably believe it either.

*4 We conclude that the statute of limitations began to run when Blumberg filed its action against St. Paul. At that point, Blumberg knew that coverage had been denied, and there was significant reason to believe that the policy did not cover the cards, which is why he alleged an action for promissory estoppel. He could have brought a claim against Bruner for his damages in the same suit. However, he failed to do so. By the time he actually filed the complaint against Bruner, the statute of limitations had run, and the trial court correctly entered judgment in Bruner's favor.

Because of our affirmance of the trial court on the statute of limitations, we do not need to address the remaining point on appeal.

Affirmed.

TAYLOR, J., and SCHACK, LARRY, Associate Judge, concur.

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