98-8488

ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CASE NO: ~~95,470~~ 740

RICHARD BLUMBERG,

Petitioner,

vs.

THE BRUNER INSURANCE AGENCY,

Respondent.

RESPONDENT'SJURISDICTIONALBRIEF

ON REVIEW FROM THE FOURTH DISTRICT COURT OF APPEAL
CASE NO.: 98-01549

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PREFACE

In this Brief, the Petitioner will be referred to as BLUMBERG. The Respondent will be referred to as BRUNER.

CERTIFICATE OF TYPE SIZE

This Brief was prepared using 14-point Times Roman type.

STATEMENT OF THE CASE AND FACTS

The relevant facts are those set forth in the Fourth District's opinion in this case. BLUMBERG filed suit against his insurer St. Paul after the insurer denied coverage for his theft claim. BLUMBERG sued St. Paul on the dual theories of Breach of Contract and Promissory Estoppel. In the St. Paul pleadings, BLUMBERG alleged that he detrimentally relied on agent BRUNER' S representation that he had coverage for the cards and that BRUNER had failed to obtain the requested coverage as was represented.

In the St. Paul case, the insurer obtained a directed verdict on the breach of contract count. The estoppel count was submitted to the jury and resulted in a verdict in BLUJMBERG'S favor for $25,000. Before judgment was rendered in his favor, BLUMBERG dismissed his claim with prejudice.

Thereafter, BLUMBERG sued BRUNER for negligently failing to procure coverage. BLUMBERG alleged that he believed there was coverage for the loss until such time as the trial court directed a verdict on his breach of contract claim. BRUNER answered, raising the statute of limitations as an afiirmative defense. On BRUNER'S motion for summary judgment, the trial court found that BLUMBERG'S claim against BRUNER was barred by the statute of limitations and by estoppel by judgment, in light of the verdict in his favor in the St. Paul litigation.

BLUMBERG appealed this judgment to the Fourth District Court of Appeal.

The appellate court affirmed the trial court's decision on the statute of limitations. The appellate court explicitly distinguished this case from this court's decision in Peat, Marwick, Mitchell & Co. v. Lane, 565 So. 2d 1323 (Fla. 1990), on the basis that while in Peat. Marwick, the claimants had no reason to know of the accounting malpractice until such time as the tax court entered a judgment against them, in this case, BLUMBERG' S own pleadings revealed that he had actual knowledge that BRUNER may have failed to obtain the requested coverage. Accordingly, the appellate court concluded that:

> [I]n 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.
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> . . .
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> 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.

After the Fourth District denied BLUMBERG' S motion for rehearing, BLUMBERG filed his Notice to Invoke this Court's jurisdiction on the basis of asserted conflict with a decision of this Court and/or a decision of another district court of appeal. This brief on jurisdiction follows.

SUMMARY OF ARGUMENT

The Fourth District's opinion in this case does not conflict with precedent from other jurisdictions for the simple reason is that none of the cases assertedly in conflict with this one involve negligence claims against insurance agents. The Peat, Marwick line of cases applies only to malpractice claims against attorneys and accountants and therefore, they are legally distinguishable and not in express and direct conflict.

ARGUMENT

I. THE FOURTH DISTRICT' S OPINION DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH ANY OF THE DECISIONS CITED BY BLUMBERG BECAUSE NONE OF THOSE CASES INVOLVE NEGLIGENCE CLAIMS AGAINSTINSURANCEAGENTS.

In this case addressing the accrual of a cause of action for negligence against an insurance agent, BLUMBERG has failed to demonstrate the requisite express and direct conflict with other decisions because there are no Supreme Court or District Court cases holding that an insured whose claim is denied by the carrier for lack of coverage has not sustained a compensable injury until such time as the insured loses a breach of contract claim against the carrier. Nor are there any cases in Florida that have held that an insured has no reason to know of a potential claim against his agent until such time as the case against the carrier has been lost.

The cases cited by BLUMBERG as conflicting are all factually and legally distinguishable from the present case. In Peat. Mar-wick. Mitchell & Co. v. Lane, 565 So. 2d 1323 (Fla. 1990), for example, the Lanes received a ninety-day letter from the IRS indicating that they owed back taxes due to certain claimed deductions. Peat, Marwick advised the Lanes that the IRS was incorrect and they challenged the assessment in the tax court and lost. The Lanes sued Peat, Marwick for malpractice and the accountants raised the statute of limitations as a defense.

Peat, Mar-wick argued that the limitations period began to run at the time that the Lanes received the ninety-day letter and the Lanes argued that the limitations period began to run when they lost their appeal from the tax court's decision, This court agreed with the Lanes, analogizing the case to legal malpractice cases that held that the limitations period begins to run at the time appellate review of the underlying proceedings has been completed because, until that time, it could not be determined whether there was any actionable error on the part of the attorney.' Peat. Marwick does not apply to any and all negligence cases; that case, by its own terms, applies only to accounting and legal malpractice.

In this case, the appellate court found that in the St. Paul litigation, BLUMBERG specifically plead that BRUNER had misrepresented that he had insurance coverage when he did not. Thus, BRUNER' S own pleadings reflect his actual knowledge of BRUNER'S alleged negligence at least as far back as when he brought suit against the carrier. The Fourth District implicitly recognized that where an insurance carrier denies coverage for a claim, an insured knows or has reason to know that its agent may be at fault for failing to obtain the requested or required

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[1] Significantly, this Court was also persuaded by the fact that in Peat, Marwick, the accountants denied any malpractice and, in fact, continued to represent the Lanes through the appeal process, thereby precluding the Lanes from obtaining the knowledge that the accountants may have been negligent until such time as their negligence was confirmed by the appellate court.

Coverage. No other court in this state has held to the contrary.

Peat. Marwick and its progeny have never been applied to a negligence case against an insurance agent. In fact, the only post-Peat. Marwick negligent procurement case, Russell v. Furman, 629 So. 2d 297 (Fla. 4th DCA 1994), expressly hold that that line of cases did not apply to negligence claims against insurance agents. In Russell, the Fourth District reasoned:

> Appellants' contention that appellee/insurance agent should not be treated any differently than the defendant/accounting firm in Peat. Marwick does not stand up for two reasons. First, appellants in this case had reason to know that the agent had acted negligently long before the final disposition of the case [against the carrier]. Unlike in Peat. Marwick, the court's ruling here did not make the injury apparent to appellants for the first time, but rather confirmed what the appellants had reason to know previously – that there was a gap in the coverage.

Id. at 298. In this case, the Fourth District reaffirmed its holding in Russell and reiterated why Peat. Mar-wick is inapplicable in negligent procurement cases. Since Russell is the only other Florida case addressing the accrual of the statute of limitations in such cases and it is consistent with the same appellate court's opinion in this case (as well as in the same district), BLUMBERG has failed to demonstrate the requisite express and direct conflict between the Fourth District's opinion and the opinion of another District Court or the Supreme Court on the same point of law.

CONCLUSION

This Court has no jurisdiction to consider this case as BLUMBERG has failed to demonstrate the requisite express and direct conflict with decisions of other courts in this state.

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CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished, by mail, this 10th day of June, 1999, to: Eric Lee, Esquire, ATLAS, PEARLMAN, TROP & BORKSON, P.A., Attorneys for Petitioner, 200 East Las Olas Boulevard, Suite 1900, Ft. Lauderdale, Fla. 33302-4610.

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