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 REPLY BRIEF ON THE MERITS

CASE NO.: 95,740

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

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CERTIFICATE OF FONT SIZE

Arial 14 Point proportional

Counsel certifies that the foregoing font size conforms with Florida Rule of Appellate Procedure 9.210. The font does not have more than 10 characters per inch and there are less than 27 lines per page.

TABLE OF CITATIONS

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. The Record designations are from the Record prepared for Case No. 98-01548. The lower court prepared only one Record for these two appeals.

ARGUMENT

POINT I

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

This Court has already determined that the decision of the Fourth District expressly and directly conflicts with decisions of this Court and decisions of other District Courts of Appeal when this Court granted discretionary review. BRUNER fully addressed this issue in its opposition to the Petitioner's Jurisdictional Brief.

The District Court's opinion expressly and directly conflicts with Silvestrone v. Edell, 721 So. 2d 1173 (Fla. 1998), Peat, Marwick, Mitchell & Co. v. Lane, 565 So. 2d 1323 (Fla. 1990), 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). 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 Silvestrone, this Court held that a cause of action for legal negligence does not accrue until there is a final judgment finally adjudicating the underlying action because there is only potential harm as opposed to actual

harm. As this Court stated: "a malpractice claim is hypothetical and damages are speculative until the underlying action is concluded with an adverse outcome to the client." In this matter, until such time as there was an adverse outcome in the underlying litigation relating to whether or not there was insurance coverage, the claim against the insurance agent was hypothetical and damages were speculative. Accordingly, the District Court's decision directly conflicts with Silvestrone.

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, Marwick, this Court held that an action against an accountant for malpractice did not accrue 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 Kellermeyer, the First District explained that a cause of action "does not accrue until the last element constituting the cause of action occurs. . ." 427 So. 2d at 345; 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 Sign 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 Defendant's negligence. Until such time as the Plaintiff was damaged by a termination of the contract, the negligence claim did not accrue.

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. 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 Silvestrone, Peat, Marwick, Kellermeyer, and Airport Sign Corp.

POINT II

THE STATUTE OF LIMITATIONS DID NOT BEGIN TO RUN UNTIL BLUMBERG'S BREACH OF CONTRACT CLAIM AGAINST THE INSURANCE COMPANY WAS DISMISSED.

BLUMBERG was not able to bring an action against BRUNER until there was a determination that the insurance policy did not provide coverage. BRUNER incorrectly bases its position on Russell v. Furman, 629 So. 2d 297 (Fla. 4th DCA 1993), which is inapplicable to the factual situation that occurred herein.

Russell involved a matter in which there was a clear gap in insurance coverage. The court found that the plaintiff could have alternatively pled the existence of a gap in insurance while simultaneously bringing an action against the insurance agent for negligence. Since Russell was decided in 1993, the court did not have the benefit of this Court's Silvestrone decision which establishes that a cause of action for negligence does not accrue until such time as there is a final adjudication that establishes damages. Thus, Silvestrone clearly overrules the decision in Russell. In addition, in Russell, the court distinguished Durbin Paper Stock Co. v. Watson-David Ins. Co., 167 So. 2d 34 (Fla. 3d DCA 1964).

In Durbin Paper, the issue involved an agent's failure to obtain insurance. When a directed verdict was entered finding that the agent's actions bound the insurance company, a directed verdict was properly granted on the agent's behalf because: "Neither the court nor the jury could find that a contract of insurance existed and at the same time find that the agent had been negligent in failing to obtain insurance. You cannot recover from a man for failing to perform an act, and similarly, reap the benefits for the performance of that act." Id. at 36 (emphasis in original).

In the St. Paul action, in January, 1993, St. Paul filed a Motion for Final Summary Judgment claiming that although BLUMBERG maintained insurance on the 5200 Property, since BLUMBERG moved to a different property, the 5200 Property was no longer the "residence premises" and there was therefore no coverage. (See St. Paul's Motion for Final Summary Judgment attached hereto at App. A)[1]. St. Paul also sought summary judgment claiming that the property at issue was business property and subject to an exclusion under the same St. Paul policy (App. A at 8-9).

[1]The trial court took judicial notice of the entire court file in the St. Paul matter when entering summary judgment. For this Court's convenience, certain relevant documents are attached hereto.

In opposition to St. Paul's Motion for Final Summary Judgment, BLUMBERG served an extensive Memorandum of Law which addressed the coverage issues. (App. B.). BLUMBERG also filed the Affidavit of CRAIG BRUNER. (App. C) On or about March 18, 1993, the court in the St. Paul action denied St. Paul's Motion for Final Summary Judgment. (App. D). During trial in the St. Paul action, the policy issues were again addressed and BLUMBERG filed an extensive Memorandum of Law. (App. E). Thus, the issues in the St. Paul matter were not as simple as BRUNER would have this Court believe. The issue of whether or not the 5200 Property was the "residence premises" for purposes of the St. Paul policy was not readily apparent because the St. Paul policy had been in effect for years. BLUMBERG paid premiums for the St. Paul policy and the policy was renewed after BLUMBERG moved away from the 5200 Property. Therefore, it was BLUMBERG's position, which BRUNER agreed with, that the 5200 Property had to be the "residence premises" because the policy did not insure any other premises. This issue is not analogous to the obvious gap in coverage that occurred in Russell.

In Russell, the court found that there was a distinction with a substantial difference where the client was being advised in Peat, Marwick, but that the

insurance agent was not representing the insured in Russell. In this case, the record demonstrates that BRUNER not only took the position that he had procured coverage for BLUMBERG, but he also took an active role in assisting BLUMBERG and advising BLUMBERG regarding his belief that he had procured coverage for BLUMBERG. BRUNER testified in his deposition, which was used at trial, that he had procured the proper insurance for BLUMBERG and that the loss at issue in the St. Paul action was covered under the St. Paul policy. Accordingly, Silvestrone and Peat, Marwick should be applied in this matter and it is clear that the statute of limitations did not accrue until such time as a determination was made that the insurance policy at issue did not provide coverage.

BRUNER erroneously attempts to distinguish Silvestrone and Peat, Marwick on the basis that these cases involved professional malpractice. In Silvestrone and Peat, Marwick, this Court clarified the long-standing principal under Florida law that a cause of action for negligence does not accrue until actual damages are incurred. Until such time as there was a final judgment in Silvestrone, there was a possibility that the attorneys' malpractice would not have caused damage. Until such time as there was a final determination by the tax court in Peat, Marwick, there was the possibility that the accountant's

advice was correct. This Court clarified that damages in negligence cases does not occur when there is potential harm, but only when there is actual harm. This principle is not based upon the fact that the claims in Silvestrone and Peat, Marwick were malpractice claims against lawyers and accountants, respectively. The principle can easily be applied in a situation such as the one in this matter where an insurance agent is negligent in procuring an insurance policy.

When the trial courts of this state determine the statute of limitations issue, this Court has provided a bright line rule for such a determination. There is no reason why this bright line rule should only apply in cases of professional malpractice. The bright line rule was not established because the professionals continued to provide advice to their clients, but was established so that there would be an easy way to determinate when damages were actually incurred. It would be inconsistent if a trial court had a bright line rule in a professional malpractice case which provides that the statute of limitations does not begin to run until a final judgment or finial determination is made, but in the context of insurance agent negligence the court cannot apply such a bright line rule but would need to make a determination as to when the insured became aware that there may have

been negligence by the insurance agent. This is precisely what this Court rejected in Silvestrone. Applying a bright line rule in the insurance agent context is simple to apply and consistent with this Court's holdings in Silvestrone and Peat, Marwick.

In recently applying the bright line rule set forth in Silvestrone, the Third District reversed a summary judgment where the trial court failed to utilize the date of a denial of certiorari review by this Court as the date of when the statute of limitations began to accrue. Watkins v. Gilbride, Heller & Brown, P.A., 2000 WL 256327 (Fla. 3rd DCA March 8, 2000). In a concurring opinion, Justice Sorondo summarized why the bright line rule is inherently fair. The concurring opinion is applicable in this case relating to insurance agent negligence. As stated:

> This case presents an additional, compelling reason which supports the majority's decision. The plaintiff in the present case is the allegedly aggrieved client in this legal malpractice action. The client was unsuccessful in this Court in the case wherein he now claims his attorneys were negligent at the trial level. His decision to seek review in the Florida Supreme Court, in an effort to review this Court's decision could only inure to the benefit of those attorneys. Had the client been successful in the Supreme Court, those attorneys might have been off the hook. . . .

Id. (emphasis added). BLUMBERG's action against St. Paul and his effort to establish that there was insurance coverage could only inure to the benefit of

his insurance agent, BRUNER. Had BLUMBERG been successful in establishing insurance coverage, BRUNER might have been off the hook. Since BLUMBERG was unsuccessful, the cause of action for negligence against BRUNER did not accrue until such time as there was a determination that there was no coverage.

POINT III

BLUMBERG WAS NOT JUDICIALLY ESTOPPED FROM ASSERTING A CLAIM AGAINST BRUNER.

There was never a determination that there was an insurance policy in effect providing coverage for BLUMBERG's claim. BRUNER's argument with regard to judicial estoppel demonstrates that the trial court erred in granting summary judgment on not only the judicial estoppel argument, but also on the statute of limitations issue. In arguing that the statute of limitations bars this action, BRUNER asserts that the cause of action accrued when the insurance company denied coverage and BLUMBERG should have instituted an action against BRUNER within four (4) years of that date. In arguing that BLUMBERG is judicially estopped from bringing this action, BRUNER argues that BLUMBERG has taken completely inconsistent positions which provide him with an unfair advantage. BLUMBERG's positions are entirely consistent and judicial estoppel does not bar BLUMBERG's claims.

BLUMBERG did not maintain a position in the original litigation which is inconsistent from the position he has maintained herein and BRUNER has not demonstrated that he was prejudiced in any way by BLUMBERG's position in the prior action. In order to maintain that BLUMBERG is estopped from bringing this action, BRUNER is required to establish that BLUMBERG has maintained inconsistent positions and that BRUNER has been prejudiced by the foregoing. Dimino v. Farina, 572 So. 2d 552 (Fla. 4th DCA 1990); Palm Beach Co. v. Palm Beach Estates, 148 So. 544 (Fla. 1933); Lambert v. Nationwide Mut. Fire Ins. Co., 456 So. 2d 517 (Fla. 1st DCA 1984); Grauer v. Occidental Life Ins. Co., 366 So. 2d 583 (Fla. 1st DCA 1978).

BLUMBERG did not prevail on the question of coverage in the St. Paul action. The trial court entered a directed verdict against BLUMBERG finding that there was no coverage under the insurance policy. BLUMBERG was then faced with the heavy burden of establishing by clear and convincing evidence that the doctrine of promissory estoppel applied and that, based upon St. Paul's actions, it would have been inequitable for BLUMBERG to not receive anything for his loss. Crown Life Ins. Co. v. McBride, 517 So. 2d 660 (Fla. 1987); Emanuel v. United States Fidelity and Guaranty, Co., 583 So. 2d 1092 (Fla. 3d DCA 1991). A finding by a jury that BLUMBERG established

by clear and convincing evidence that promissory estoppel should apply does not mean that BLUMBERG successfully maintained a claim for coverage.

Due to BRUNER's negligence, the insurance policy did not provide coverage. If the insurance policy had provided coverage, BLUMBERG would have merely had to demonstrate the amount of his damages by a preponderance of the evidence. Instead, BLUMBERG was faced with the heavy burden of establishing that the insurance company's actions were inequitable and was required to establish the amount of his damages by clear and convincing evidence. BLUMBERG's promissory estoppel action was based upon the insurance company's inequitable conduct. The promissory estoppel action was not based upon BRUNER's inequitable conduct. Thus, BRUNER's assertion that BLUMBERG prevailed on the insurance coverage question is entirely misplaced.

BRUNER's equitable argument is entirely misplaced. BLUMBERG's claim in the St. Paul action was for in excess of $100,000.00. BRUNER asserted, under oath, in the St. Paul action that he procured the insurance policy and that it was his position that the St. Paul policy provided coverage. Due to the lengthy litigation process, in 1996, almost five (5) years after the loss, the trial court directed a verdict in favor of St. Paul finding that the

insurance policy BRUNER had procured did not provide coverage for the loss at issue because BLUMBERG no longer resided at the 5200 Property. BLUMBERG then was faced with the heavy burden of establishing a promissory estoppel claim by clear and convincing evidence. BLUMBERG partially prevailed on his promissory estoppel claim.

Had BRUNER procured the proper policy or advised BLUMBERG that the St. Paul policy did not provide coverage after BLUMBERG moved, not only would there have been no litigation regarding the coverage issue, but BLUMBERG would have been compensated for his loss. BLUMBERG expended considerable funds in litigating against St. Paul and was not fully compensated for his loss. Because BLUMBERG was unable to prove by clear and convincing evidence the full extent of his damages, the verdict was insufficient to defeat St. Paul's previous offer of judgment. Accordingly, BLUMBERG was forced to resolve those issues with St. Paul by dismissing his promissory estoppel claim, a judgment was entered against BLUMBERG, and he received nothing.

The equities involved establish that BRUNER was negligent in failing to comply with a specific request to have specific property covered by an insurance policy. Having failed to do his job and having caused BLUMBERG

to incur extensive attorneys' fees in litigating the coverage issue, BRUNER cannot now claim that the equities are in his favor. The St. Paul litigation and this litigation were the result of BRUNER's negligence. BLUMBERG's position has been entirely consistent throughout both matters. BLUMBERG, in reliance upon BRUNER, maintained that there was insurance coverage. When the court in the St. Paul action determined that there was no coverage, it then, and only then, became obvious that the loss was caused by BRUNER's negligence. The equities establish that the party who suffered substantial losses because of BRUNER's negligence must not be estopped from asserting a negligence claim as a matter of law. At worst, the estoppel issue is a factual issue that must be decided by a jury.

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, 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 **31th day of March, 2000,** upon: HINDA KLEIN, ESQ., Conroy, Simberg & Lewis, P.A., 3440 Hollywood Boulevard, Second Floor, Hollywood, Florida 33021.

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ERIC LEE