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IN THE SUPREME COURT OF FLORIDA
CASE NO. SC00-1552
4TH DCA Case No.: 98-04032
Florida Bar No. 229644

EUGENE FRANCIS CLARKE and PHYLLIS CLARKE, his wife,

Petitioners,

vs.

UNITED SERVICES AUTOMOBILE ASSOCIATION, a reciprocal inter-insurance exchange,

Respondent.

RESPONDENT'S BRIEF ON JURISDICTION

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CERTIFICATE OF TYPE SIZE AND STYLE

Respondent hereby certifies that the type size and style of Respondent's Brief on Jurisdiction is Times New Roman 14t.

TABLE OF CONTENTS

PAGE

CERTIFICATE OF TYPE SIZE AND STYLE i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE AND FACTS 1

SUMMARY OF THE ARGUMENT 4

POINT ON DISCRETIONARY REVIEW 6

THE DECISION OF THE FOURTH DISTRICT DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH *BROWN V. ESTATE OF A.P. STUCKEY; CONNER V. CONNER, SHAW V. SHAW; MARCOUX V. MARCOUX* OR *JOHNSON V. LIFE INS. CO. OF GEORGIA* 6

ARGUMENT 6

A. THE LAW ON JURISDICTION 6

B. THE PRESENT DECISION DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE FOUR CASES CITED BY PETITIONER 6

CONCLUSION 10

CERTIFICATE OF SERVICE 10, 11

TABLE OF AUTHORITIES

PAGE

CASES

Brown v. Estate of A. P. Stuckey, 749 So.2d 490 (Fla. 1999) 6, 7

Connor v. Conner, 439 So.2d 887 (Fla. 1983) 6, 7

Johnson v. Life Inc. of Georgia, 52 So. 2d 813 (Fla. 1951) 2, 3, 5, 6, 9

Marcoux v. Marcoux, 475 S.2d 972 (Fla. 4th DCA 1985 . . . . . 6, 7

Nielsen v. City of Sarasota, 117 So. 2d 731 (Fla. 1960) 6

STATUTES

§627.409, Fla. Stat. (1999) 2, 4, 5, 7

STATEMENT OF THE CASE AND FACTS[1]

Respondent, UNITED SERVICES AUTOMOBILE ASSOCIATION [USAA], elects to file its own Statement of the Case and Facts. Petitioners' statement is incomplete, and respondent disagrees with part of the petitioners' statement of facts which might give a false impression of the specific facts discussed in the opinion.

Petitioner "applied for insurance from USAA in May, 1988." (A. 1). During the application process, petitioner Clarke represented that he was commissioned on August 1, 1955 and was discharged as a Captain." (A. 1). As the Fourth District opinion notes, "[b]ased on these representations USAA issued an automobile insurance policy to Clarke." (A. 1). The evidence presented showed that USAA's data on Clarke's birth and commission dates was provided by Clarke to a senior sales representative who put the information on two different computer screens. The two dates were not displayed next to each other. (A. 2-3).

Petitioners' brief omits some of the key facts. The trial court found that "Clarke was never a commissioned officer in the military and... he misrepresented his military status in obtaining insurance coverage from USAA." (A. 2). Based on substantial testimony discussed in the opinion, the trial court made a finding that

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[1] The symbol "A" stand for Petitioners' Appendix.

petitioner Clarke's misrepresentation was material. (A.2, 6 paragraph 15). The trial court found: "Mr. Clarke would only have been eligible to become a USAA member based on his status as a former commissioned officer." (A. 6. paragraph 16).

Petitioner Clarke was involved in an accident in September, 1988 and sued USAA for uninsured motorist coverage. (A. 1). Once USAA found out that Clarke made a material representation in applying for insurance, it filed the underlying declaratory judgment action. In the action, USAA sought to void the policy pursuant to section 627.409, Florida Statutes on the ground that petitioner made a material misrepresentation in applying for insurance. (A. 1).

As discussed above, the trial court found there was a material misrepresentation by petitioner in applying for insurance. (A. 1). Relying on *Johnson v. Life Inc. of Georgia*, 52 So. 2d 813 (Fla. 1951), the trial court legally concluded that USAA waived forfeiture of the policy based on USAA's constructive knowledge of the misrepresentation. (A. 2, 9.). The trial court concluded that because USAA had Clarke's date of birth of 8/4/37 and his date of commission as 8/1/55 in its computer that it was "glaringly apparent" that the date would have made Clarke a commissioned officer at age 17. (A. 9).

On appeal the Fourth District disagreed with the legal conclusion reached

by the trial court and held that "there were no circumstances which sufficiently put USAA on notice of the true facts such that it should be charged with knowledge of those facts." (A. 2). The Fourth District distinguished the facts in *Johnson* and stated:

> Here, there was no "deliberate disregard of information sufficient to excite attention and call for inquiry as to the existence of facts by reasons of which a forfeiture could be declared." *Id.* The evidence showed that USAA's information on Clarke's birth and commission dates was provided over the phone to USAA's senior sales representative. She, in turn, input the information on different computer screens that did not display the two dates next to each other. Thus, the age discrepancy was not readily apparent and did not call attention to any situation leading to further inquiry. USAA first discovered the misrepresentation when it was conducting discovery in a civil suit initiated by Clarke years later. (A. 2-3).

Petitioners stress the absence of a written application. However, this issue was not the basis of the trial court's decision and is not discussed in the Fourth District decision.

Petitioners claim in their brief on jurisdiction that the Court of Appeal did not apply the correct test of "whether there was competent substantial evidence"--the rule of law announced in the four cases on which they rely. On the other hand, respondent asserts that there is no conflict because the Fourth District did not substitute its judgment for the trial court on factual issues, but disagreed with the trial court's legal conclusion.

SUMMARY OF THE ARGUMENT

There is no express and direct conflict between the present Fourth District decision and the five cited cases. Petitioners Clarke assert that the Fourth District "applied the wrong test in reversing the finding of fact after a non-jury trial, since it did not apply the test of whether the judgment was supported by competent evidence." Brief of petitioners, page 4. Contrary to petitioners' argument, the Fourth District did not reverse a finding of fact. The Fourth District merely applied the legal test for determining whether the trial court erred in concluding the doctrine of waiver applied to prevent USAA from voiding a policy issued as a result of a material misrepresentation by petitioner. The Fourth District held in the present decision that the trial court erred in applying the doctrine of waiver to the case. The decision had nothing to do with the issue of whether competent substantial evidence supported the final judgment.

Petitioners further assert that the absence of a written application for insurance required affirmance in this case. However, petitioners do not present any case law which requires a written application in order to apply section 627.409(1), Florida Statutes which provides for forfeiture of a policy if there is a material misrepresentation in the application or negotiations for an insurance policy. Furthermore, the Fourth District decision did not announce any rule of law

which addresses whether or not written applications are required to invoke the provisions of section 427.409.

Finally, none of the cases cited by petitioners involve an application of law to produce a different result in a case involving substantially the same controlling facts. The *Johnson* case which is discussed in the brief does not address the issue raised in petitioners' point on jurisdiction. In any event, the case is distinguishable simply because, unlike this case, the insurer had actual knowledge of the insured's tubercular condition two months after the policy was issued, but continued to accept premiums until the insured died. Here, USAA did not have knowledge, constructive or actual, of petitioners' material misrepresentation until after a claim was made by petitioner.

There is no direct and express conflict between the Fourth District decision and the cases relied on by petitioners.

POINT ON DISCRETIONARY REVIEW

THE DECISION OF THE FOURTH DISTRICT DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH *BROWN V. ESTATE OF A.P. STUCKEY; CONNER V. CONNER, SHAW V SHAW; MARCOUX V. MARCOUX;* OR *JOHNSON V. LIFE INS. CO. OF GEORGIA.*

ARGUMENT

A. THE LAW ON JURISDICTION

The principal circumstances justifying the invocation of the supreme court's discretionary jurisdiction to review district court of appeal decisions because of conflicts are: the announcement of a rule of law which expressly and directly conflicts with a rule previously announced by this Court or another district court of appeal; or (2) the application of a rule of law to produce a different result in a case involving substantially the same controlling facts as a prior case disposed of by this Court or another district court of appeal. *See, e.g., Nielsen v. City of Sarasota*, 117 So. 2d 731 (Fla. 1960).

B. THE PRESENT DECISION DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE CASES CITED BY PETITIONERS

Petitioners assert that the Fourth District "applied the wrong test in reversing

the finding of fact after non-jury trial, since it did not apply the test of 'whether the judgment was supported by competent evidence.'" *Brown v. Estate of A. P. Stuckey*, 749 So.2d 490 (Fla. 1999); *Connor v. Conner*, 439 So.2d 887 (Fla. 1983); *Shaw v. Shaw*, 334 So.2d 13 (Fla. 1976); and *Marcoux v. Marcoux*, 475 S.2d 972 (Fla. 4th DCA 1985) Brief of Petitioners on Jurisdiction, page 7. Petitioners further argue that USAA never received a written application, as required by its procedures, and it could not avoid coverage "on alleged erroneous information taken over the phone by a salesman for USAA ..." Petitioners then conclude: "... so there clearly is 'competent evidence' to support the Judgment. No Florida case has ever allowed coverage to be avoided for misrepresentation in an application where there was no written application... ." Brief of Petitioners, pages 7-8.

With all due respect, petitioners' position is confusing and without merit. First, as discussed below, the Fourth District did not "reverse a finding of fact." Second, there is nothing in the trial court's findings of fact or the Fourth District's decision which supports the statement that USAA required written applications. (A. 1-10). Furthermore, section 627.409(1), Florida statutes (1997), clearly contemplates that oral misrepresentations can be sufficient to void an insurance policy. The statute provides, in part:

(1) Any statement or description made by or on behalf of an insured or

> annuitant in an application for an insurance policy or annuity contract, or in negotiations for a policy or contract, is a representation and is not a warranty.
>
> * * *

The statute contemplates that statements made during "negotiations" are representations. There is nothing in the cited statute which suggests that representations are required to be in writing. Likewise, there is nothing in the statute which suggests that written applications for insurance are required to invoke the statute. Furthermore, although petitioners argue strenuously for the need of a written application to void an insurance policy, they do not cite to any case law which supports that statement. More important, the subject Fourth District decision does not address the propriety of a written contract. There is no conflict in this case. For that same reason that there is no conflict, all of petitioners' "parade of horribles," which allegedly would result from oral applications for insurance, have no relevance to this proceeding.

Petitioners apparently argue that was a factual issue as to whether USAA had constructive knowledge of the misrepresentation, and the Fourth District improperly reweighed the evidence in reversing the final judgment. However, the Fourth District, in its opinion noted that the "evidence showed that USAA's information on Clarke's birth and commission dates was provided over the phone to

USAA's senior salesperson; she in turn input the information on different computer screens that did not display the two dates next to each other." There was no dispute about that evidence.

All the Fourth District did was to apply the legal test for determining if there had been a waiver of an insurer's right to forfeit a policy-- whether there was a "deliberate disregard of information sufficient to excite attention and call for inquiry as to the existence of facts by reasons of which a forfeiture could be declared"-- to the facts of this case. See *Johnson v. Life Inc. of Georgia*, 52 So. 2d 813, 815 (Fla. 1951) (wherein supreme court sets forth the quoted test for determining if an insurer has waived his right to void the policy). In its decision, the Fourth District merely opined that the trial court's reliance on *Johnson* in support of its legal finding of waiver was error. As the Fourth District decision notes, the trial court record demonstrates that the age discrepancy of the applicant was not readily apparent because the dates were not displayed next to each other but were on separate computer screens. The Fourth district merely disagreed with the trial court's legal conclusion as to whether the doctrine of waiver should be applied.

The Fourth District decision has nothing to do with the "competent substantial evidence" rule. Therefore, there is no conflict between the present decision and the decisions relied on by petitioners. The *Johnson* decision is fully

distinguishable, because as the Fourth district, noted "the age discrepancy was not readily apparent and did not call attention to any situation leading to further inquiry."

It is respectfully submitted that there is no express and direct conflict between this case and the cases cited by petitioners. By knowingly misrepresenting his military rank to USAA, Clarke acted at his own peril. It makes no sense that Clarke, who knowingly committed a fraud, should be entitled to obtain substantial coverage, just because USAA did not discover his fraud sooner. To do otherwise under the circumstances of the case would be to sanction insurance fraud in a state which is committed to prosecuting insurance fraud.

CONCLUSION

Based on the foregoing argument it is apparent that there is no express and direct conflict between the Fourth District decision and the cases relied on by petitioners. This court is respectfully requested to decline to accept jurisdiction in this case.

CERTIFICATE OF SERVICE

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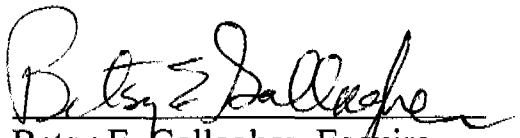

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