IN THE SUPREME COURT OF FLORIDA
CASE NO.: SC00-1552

EUGENE FRANCIS CLARKE and PHYLLIS CLARKE, his wife,

Petitioners,

v.

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

Respondent.

AMENDED
ANSWER BRIEF OF RESPONDENT ON THE MERITS

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STATEMENT OF THE CASE AND FACTS[1]

In this discretionary proceeding petitioners Eugene and Phyllis Clarke,[2] seek to quash the underlying Fourth District decision which reversed a Final Declaratory Judgment entered in favor of petitioners Clarke. After a non-jury trial, the trial court determined that petitioners Clarke were entitled to uninsured motorist insurance coverage even though the trial court made the specific factual finding that Eugene Clarke made a material misrepresentation in applying for insurance[3].

Petitioners assert this is "an appeal from a **non-jury** trial, where the appellate court accepted half the fact findings of the judge, and then substituted its own fact findings for the other half of the case and reversed the judge." (BP 1). With all due respect, the underlying Fourth District decision accepted the trial court's material

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[1]In this brief, the parties will be referred to by name and respondent will be referred to as USAA. The parties will alternately be referred to as they stand before this court. The letter "R" will stand for the record on appeal, and cites to the record include the specific volume of the record followed by a hyphen and the page number reference (i.e., R. III- 120-21). Cites to the trial transcript will include the volume of the transcript designated "T" in addition to the record volume (i.e., R.VIII-T.I-1. Petitioner's Brief on the Merits will be referenced as "BP" followed by the page number. Cites to the Petitioners' Appendix will be referred to as "AP." Cites to the Respondent's Appendix will be referred to as "AR".

[2]References to Clarke or respondent in the singular refer only to Eugene Clarke.

[3]*See* section 627.409, Fla. Stat. (1995); See pages 14- 15 of this brief for wording of the statute.

findings of facts and followed established law when that Court disagreed with the trial court's conclusion of law. Therefore, respondent USAA disagrees with petitioners' statement that the Fourth District failed to apply the correct legal standard of review. For this same reason, USAA reasserts that there is no direct and express conflict between the underlying decision and decisions of this Court which state that it is not a function of the appellate court to determine an issue of fact, but rather its function is to determine issues of law. *Brown v. Estate of Stuckey*, 749 So.2d 490 (Fla. 1999); *Conner v. Conner*, 439 So. 2d 887 (Fla. 1983); *Shaw v. Shaw*, 334 So. 2d 13 (Fla. 1976).

THE CASE

Petitioners Clarke initially filed a lawsuit against the alleged tortfeasors and USAA, their uninsured motorist ("UM") coverage insurer for injuries arising from an automobile accident. USAA later filed a separate declaratory judgment action against its members (insureds),[4] the Clarkes, seeking to void the USAA policy *ab initio* as a result of a material misrepresentation made by Clarke in his application for insurance. The two cases were consolidated. By stipulation, all parties agreed to try the declaratory judgment action first. (R.I-4-5).

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[4]USAA is a reciprocal inter-insurance exchange. That means that each member of the exchange agrees to insure all of the other members. (R.VIII-TI-154-55; X-T. III-397-98).

At the conclusion of the non-jury trial, the court made 35 distinct findings of fact and from these, drew several conclusions of law. (R.V- 829-835). The court entered the Final Declaratory Judgment in favor of the purported member and against USAA. (R.VI-886-888). Based on substantial testimony and the findings of fact, the trial court legally concluded that the insured made a material misrepresentation in applying for insurance. As described below, the trial court also legally concluded the doctrine of estoppel or waiver applied as a matter of law, and USAA owed UM coverage to plaintiffs despite the material misrepresentation made by Clarke.

In the appeal below, USAA asserted: (1) respondent Clarke made a material misrepresentation in applying for insurance (the trial judge drew this legal conclusion from her findings of fact), and therefore the USAA policy was void pursuant to section 627.409, Florida Statute (1995); (2) USAA had no knowledge, constructive or actual, of Clarke's misrepresentation, and the doctrines of waiver and/or equitable estoppel did not apply as a matter of law to this case. The Fourth District agreed with USAA's position and reversed with instructions to the trial court to enter a Judgment for USAA.

For the same reasons argued by USAA below, this Court should approve the Fourth District decision.

THE FACTS

Respondent elects to file its own Statement of the Case and Facts. Petitioners' statement contains misstatements, is argumentative and includes facts which have no relevance to the appeal. The evidence underlying the court's conclusion that there was a material misrepresentation must be viewed in a light favorable to the trial court's finding. (R.V-834). Although petitioners purport to present the facts underlying this issue in a light most favorable to the court's conclusion, even a cursory review of their statement shows that petitioners have misstated the record and reargued findings of fact adverse to their position which they did not appeal. (See, e.g., BP 1-4,8-10). Many of these misstatements are addressed further below in petitioners' Statement of the Facts. (R.V- 834).

Petitioners spend a great deal of the brief to present "facts" and arguments that Clarke did not make a material misrepresentation in applying for insurance. However, neither petitioners nor respondent disputed this in the district court appeal; petitioners did not file a cross-appeal. Therefore, petitioners' extensive argumentative statements attacking the court's finding that there was a material misrepresentation by Clarke of his military status are irrelevant to the issues here.

Throughout, petitioners harp on irrelevant information which obfuscates the issues. For example, petitioners spend four pages summarizing the closing arguments

of both sides. (BP 12-16). Since closing argument is not evidence, its relevancy here is questionable. *See* Fla. Std. Jury Instr. (Civil) 1.1. Further, petitioners highlight the purported inequity that USAA received premiums and then denied coverage. (BP 11, 18, 19). This argument overlooks the fact that before USAA became aware of the misrepresentation, USAA paid hundreds of thousands of dollars in five previous claims submitted by Clarke. (BP 43; R.VIII-T.I-173). USAA was ready and willing to return all of the premiums from the inception of the policy after a set off for dollars paid in previous claims, but plaintiff did not want the premiums back. (R.VIII-T.I-174-175). The premiums paid for the insurance were, of course, far lower than the hundreds of thousands of dollars paid by USAA in petitioners' previous claims.(BP 43; R.VIII-T.I-173). These claims were paid when USAA was unaware of the misrepresentation and illustrate that there was in fact no inequity to the Clarkes. (R.X-III-432).

Petitioners provide a blow by blow account of Carol Glatsby's testimony which is improperly discussed in a light most favorable to petitioners. Plaintiffs state: "[S]he Carol Glatsby admitted that there was not a single USAA document **written** by her, that in any way indicated that Clarke had ever given her information that he was a captain, or that he was in the Air Force." (Emphasis added). (BP 5;R.VIII-T.I 88-90). However, the record shows all of the eligibility and application information was input

by Glatsby into the computer. (R.VIII-T.I-51,54-55,88). The information was not contained in a writing, but rather was memorialized in the computer entries. (BP 4-5; R.VIII-T.I-54-57). Petitioners further misstate Glatsby's testimony when they conclude that Glatsby would not have believed Clarke if he had called up and announced he was commissioned at age 17. Petitioners also recount many times that Clarke testified that he had not made a material misrepresentation that he was a captain in the military except possibly to his postman. (BP 8-9). However, petitioners fail to address the fact that Clarke clarified that he was not certain as to whether or not he ever misrepresented to USAA or someone else that he was a captain in the military. (R.IX-T.III-324-25).

Petitioner also states an example using an "**alleged** misrepresentation in the alleged oral information...." (Emphasis added) (PB 24). This is the position that was rejected by the trial court and a position that is not a part of this review. (AR-3 para. 15-20, 6). Since appellees did not file a cross-appeal and seek only an affirmance of the lower court's judgment, the conclusions in favor of respondent are deemed accepted by petitioners[5]. Thus, for purposes of this review and, indeed, for any

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[5]Because of the number of misstatements and volume of irrelevant argument, it is impossible for respondent to reply to each and every discrepancy. Due to page limitations, only the most egregious portions are dealt w

purpose whatsoever, Clarke misrepresented the facts to the USAA agent on the phone. However, so that the statement of petitioners does not go unrebutted and the case is put in its proper context, in part A of the facts, respondent addresses the facts underlying the trial court's finding that there was a material misrepresentation by Clarke when he applied for insurance. Part B addresses the undisputed facts from which the trial court legally concluded, albeit in error, that USAA "waived its right to rescind the policy because USAA had constructive knowledge of the misrepresentation." *United Services Automobile Association v. Clarke*, 757 So. 2d 554, 555 (Fla. 4th DCA 2000).

Petitioners persist in stating and arguing that USAA "never obtained a written **application** although its procedures required it to..." (BP 19, 18, 6, 24, 26). USAA's procedures did not require it to obtain a written application. Rather, USAA's procedures were to mail and obtain an eligibility certificate and power of attorney. USAA was unsure why they did not receive these documents back from the insured or whether they were ever sent or received by the insured. (R.V-833).

Petitioners state several times that the record shows that the trial judge found that USAA would have discovered the misrepresentation had it followed its own procedures. (See e.g.BP1, para 1; 24 para 3;). The trial court did not make such a finding! Rather, as the Fourth District decision points out, the trial court found that

"USAA failed to follow its own internal procedures in verifying Clarke's military status; it did not receive an eligibility certificate and power of attorney from Clarke and did not cancel the policy after failing to obtain these documents. (R.V-834; AR 6-7). **The trial court simply did not make a finding that USAA would have discovered the misrepresentation had it followed its own internal procedures.** Indeed such a statement is inconsistent with the findings reached by the trial court. As stated above, the court found Clarke knew he had never been a commissioned officer in the United States Military, and, further, that Clarke "misrepresented to USAA that he was an officer in the Air Force... ." (R.V-831,834; R.X-T.III-324; AR 3,6). For this reason, petitioners are incorrect when they presume the fraudulent information would have been "immediately clarified." There is no indication anywhere in the record that Clark's fraud would have been immediately clarified. All the evidence showed Clarke was intent on perpetuating the fraud as long as possible. In the personal injury suit below, Clarke attested incorrectly in sworn discovery responses he had been a buck sergeant. (R.VII-1158; Pet. Ex. #15). He lied under oath a second time when in response to a request for admissions he denied that he was not an officer. (Pet. Ex. #14).

A. The Material Misrepresentation

On this issue, the trial judge made the following relevant findings:

> [1] Eugene Francis Clarke **misrepresented** to USAA that he was an officer. [AR-6]
> [2] "At all times relevant to this action, MR. CLARK knew his military rank and knew he had never been a commissioned officer in the United States Military." [AR-3, para 19; R.X-T.III-324]
> [3] "MR. CLARKE's military status was material to USAA." [AR-3. para 17]
> [4] "In 1998 and 1989 Mr. CLARKE did not qualify for membership in USAA in any capacity pursuant to USAA Eligibility Guidelines."[AR-3, para. 20]
> [5] "Had USAA known that MR, CLARKE was not a former commissioned officer in the military, he would not have been issued insurance." [AR-3, para 18].

Thus, the trial court's findings of fact determined there was a knowing misrepresentation by Clarke which was material to the risk.

The evidence presented showed respondent Clarke applied for insurance from USAA in May 1988. (R.V-832; VIII-T.I-49). As the Fourth District opinion points out, USAA caters to and limits membership to a particular market and is a preferred insurer. (R.VIII-T.I-157, 183; Petitioners' Tr. Ex. #10). USAA was created in 1922 by Colonel Garrison to insure officers returning from World War I who could not get insurance because they were considered transient. (R.VIII-T.I-154). The officers came together and agreed to insure other officers because in part they had been through the war together and felt a commitment, a bond and a trust to each other. (R.VIII-T.I-155). This loyalty to the services, the country and to the company ensures that all members are good risks for the reciprocal inter-exchange to insure. (R.VIII-T.I-160-62). USAA

is not profit centered, so that amounts in excess of 3% profit are returned to the members in the form of a dividend. (R.III-T.I-155-56).

In Florida, **a prospective member must be a former or active commissioned officer in the Armed Forces to be eligible to be insured by USAA**. (R.VIII-T.I-113-114, 157-60). The trial court found based on undisputed evidence that respondent was not then and has **never** been a commissioned officer in the United States Armed Forces. (AR-2, para 3,4). As such, he would not have been eligible for membership in USAA (AR-2,para 7; R.V-830; VIII-T.I-183;XI-T.IV-440).

Eugene Clarke applied for insurance by telephone. (R.VIII-T.I-54-55,66-67). There is a two-step process when a prospective applicant applies for insurance from USAA. First eligibility information is requested by the USSA representative. (VIII-T.I-51). Sales representative Glatsby went "on line" and entered the following eligibility information on the application: name, social security number, rank, branch of service, commissioning date, and the source of commission. (VIII-T.I-54). This is the normal customary procedure she follows with every caller. (VIII-T.I-55). At that point, she hit "enter" on the computer, she obtained a member number for the applicant, and she then continued with the application process using a separate screen. (VIII-T.I-54). Subsequently, the sales representative took information to complete the application such as spouse's name, VIN numbers for the vehicles, date of birth, the

bank and lien holder from the applicant--all information that could not have come from anyone except the petitioner. (R.VIII-T.I-61-64)**. At no time during this registration procedure did Ms. Glatsby ever have Clarke's date of birth adjacent to his date of commission**. (R.VIII0-T.I-57 Once eligibility is established, other information is input on a different computer screen; the two dates are not positioned next to each other, and **were never input on the same computer screen** (R.VIII-T.I-57).

Petitioner makes a big deal out of differences in Glatsby's deposition testimony and trial testimony as to the application procedure used with Mr. Clarke. (BP, pages 4-5). However, at the earlier deposition, Glatsby assumed that the company was not yet "on line" in 1988; she subsequently became aware that the company was on line at the time of the application. (R.VIII-T.I-54-55).

In applying for insurance with USAA, petitioner Clarke misrepresented to Carol Glatsby, the Senior Sales Representative that he was commissioned as a captain but was no longer in the military. (R.VIII-T.I-68-69). In applying for insurance, Eugene Clarke also misrepresented to Glatsby he was commissioned through Officer Training School on August 1, 1955, and left the United States Air Force a captain. (R.VIII-T.I-69). On this issue, petitioners state: "Clarke testified he never represented to anyone, whether it be USAA, or anyone else that he was a captain in the military,

except perhaps to his postman" when he received the Reserve Officers' Association magazine which was addressed to Captain E.F. Clarke[6]. (BP, page 8). The actual testimony given at the record cite provided states:

> "QUESTION [to Clarke]: Have you ever represented to anyone whether it be U.S.A.A. or anyone for that matter that you were a captain in the military?
> "ANSWER [by Clarke]: No.
> "QUESTION: You are certain of that?
> "ANSWER: No, I am not certain of that."

(R. IX-T.324-325). Therefore, while petitioners state that Clarke testified that he never represented to USAA that he was a captain in the military, he clarified his testimony to state that he was not certain whether or not he ever represented himself as a captain in the military to USAA or anyone. (R.IX-T.II-324-325).

To further bolster this USAA's position that Clarke misrepresented his military status at the time he applied for insurance, USAA presented the records custodian for the Reserve Officers Association [hereinafter "ROA"]. Petitioner Clarke was a member of this organization and the organization's publication always came to him addressed "Captain E. Clarke. (R. IX-T. III-327).Ms. Keaton testified that only those with a Federal Commission could become a member of the ROA. (R.XI-T.I-643).

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[6]The court's order reflects a finding that Clarke received an honorable discharge, but Clarke's concession at deposition and the military records reflect that Clarke received only a general discharge. (R.IX-T.II-324, 396, Pet. Ex.#1).

Despite Clarke's testimony that he was unsure if he ever told anyone he was a cap-tain in the military, he was registered as a member of the ROA as a captain in the Air Force. While a buck sergeant or airman is not eligible for the ROA, a captain in the Air Force was eligible for membership in the association. (R.X-T.III-673-74).

The ROA record custodian testified that in order to become a member of the ROA, Clarke would have had to submit an application and he would have had to fill out the application himself. (R.X-III-679-83). Since Clarke is identified as a captain in the records of the ROA, that information came from his application. (R.X-675). The ROA magazine has an address label that has his name and rank on it. (R.X-T. III 317-18, R.III- 696-97; (Pet. Ex. #21). That information would have come from his application. (R.III-675). Likewise, renewal notices also have the respondent's name and grade. (R. IV-723). In Clarke's case the label on the magazine and renewal notices read Captain E.F. Clarke. (R.XIT. III-696-97, 317-18; Pet. Ex #21).

Based on the misrepresentations that Clarke was a commissioned officer in the Air Force, USAA issued an automobile insurance policy to him. (R.VIII-TI-67). USAA paid multiple claims under the policy. (R.VIII-T.I-173-74; BP 43)**.** After the initiation of the underlying lawsuit, and discovery therein, USAA first discovered Clarke had never been an officer in the military. (R.X.-T. III-432).

In September 1989, Eugene Clarke was involved in an accident with Patsy

Trayner. (R.IX-T.II-213-14). The Clarkes filed suit against the alleged negligent driver, Trayner, and her husband as owner of the vehicle. In the suit, the Clarkes also sought uninsured motorist benefits (UM) from USAA. USAA investigated the assets of the Trayners and determined that they had none. (R.XI-T.IV-443). During the pendency of the personal injury litigation, the Trayners tendered their $15,000.00 policy limits. (R.X-T.III-359-611; XI-T.IV-443-44. **At Clarke's request,** USAA waived its subrogation rights and agreed to allow the Clarkes to accept the $15,000.00. (R.X.-T.III-359-61; XI-T. III-443). Thereafter, the Clarkes accepted the tortfeasor's limits and released the Trayners. (R.X-T.III-361-62).

Later, in December 1995, USAA found out that Clarke was not a commissioned officer as a result of his discovery responses. (R.X-T.III-432). This conflicted with his initial sworn discovery responses wherein he attested, incorrectly, that he had been a buck sergeant. (R.VII-1158; Pet. Ex. #15). He lied under oath a second time when in response to a request for admissions he denied that he was not an officer. (Pet. Ex. #14). He lied under oath a third time when he testified during deposition that his discharge was honorable. (R.X-T.III-326). In truth, he was never a buck sergeant, he was never an officer, he never got past airman basic, and his discharge was not honorable. (R.X-T.III-324, 396; Pet. Ex. #1). All of these lies were engendered by the initial lie to USAA's sales's representative when he was applying for insurance that

he was a commissioned officer (captain) when he left the service. (R.VIII-T.I-69).

Under USAA's policy language and section 627.409, Florida Statutes (1987) governing misrepresentations in applications or negotiations for an insurance policy, USAA filed the declaratory judgment action to determine its right to void the policy as a result of Clarke's material misrepresentation. (R.I-1-3). Florida Statute section 627.409[7], provides that misrepresentations preclude recovery under the policy when the misrepresentations are either fraudulent, material to the insurer, or would have prevented issuance of the policy. Part F[8] of USAA's insurance policy provides that

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[7] Fla. Stat. §627.409(1) provides as follows:

"A misrepresentation, omission, concealment of fact, or incorrect statement may prevent recovery under the contract or policy only if any of the following apply:

(a) The misrepresentation, omission, concealment, or statement is fraudulent or is material either to the acceptance of the risk or to the hazard assumed by the insurer.

(b) If the true facts had been known to the insurer pursuant to a policy requirement or other requirement, the insurer in good faith would not have issued the policy or contract, would not have issued it at the same premium rate, would not have issued a policy or contract in as large an amount, or would not have provided coverage with respect to the hazard resulting in the loss . . . ."

[8] PART F - GENERAL PROVISIONS - added:

MISREPRESENTATION

We do not provide coverage for any person who has knowingly concealed or misrepresented any material fact or circumstances relating to this insurance:

1. at the time application was made; or
2. at any time during the policy period; or

USAA does not provide coverage for any person who has knowingly concealed or misrepresented any material fact or circumstance relating to this issuance at the time application was made. (R.VII-1104-05; Pet. Ex. #11). At the conclusion of trial the court found petitioner USAA did not meet its burden in proving its case and determined the USAA policy remained in force and provided UM coverage. (AR- 7; R.V-835).

The order, however, specifies multiple factual findings enumerated below which support USAA's position. (R.V-829-35; App. tab 1, pp. 1-7). The trial court's conclusion of law from those facts was that USAA waived forfeiture of the policy based on constructive knowledge of the misrepresentation gained from the "glaringly apparent" age discrepancy. (R.V-834; App. tab 1, p. 6).

B. The Facts Raised on the Waiver and Estoppel Issue

The trial court concluded that it was glaringly apparent on the computer data submitted by USAA that Clarke's misrepresentation would have made him an officer at age 17, and USAA therefore had constructive knowledge that Clarke was too young to be an officer in the military. Importantly, no evidence was produced which showed that a 17-year old could not be an officer in the military in 1955. In other words,

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3. in connection with the presentation or settlement of a claim.

Clarke never established that it is impossible for a 17-year old to become an officer, or that USAA eligibility requirements prevent a 17-year old officer from being a member.[9] Contrary to petitioners' statements, Ms. Glatsby testified that she did not know how old you have to be to be a captain in the Air Force in 1955. (BP 13; R. VIII-T. I-76).

The evidence presented showed as a matter of law that Clarke's age was not glaringly apparent to USAA at the time the application was made or at any other time. As the Fourth District decision points out, USAA's senior sales representative was provided information by Clarke as to his dates of birth (8/4/37) and alleged commission (8/1/55) which were put on two different computer screens that did not display the two dates next to each other. *Clarke* 757 at 555-56.(R.VIII-T. 55-56). The age seventeen or 17 does not appear anywhere on the two computer screens. Since the undisputed facts showed the two dates were not input on the same screen, the Fourth District concluded that "the age discrepancy was not readily apparent and did not call attention to any situation leading to further inquiry." *Clarke* at 556.

USAA first discovered the misrepresentation when it was conducting discovery in a civil suit initiated by Clarke years later. (R.X-T.III-432). While the use of a

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[9]10 U.S.C. § 505 (1988) provides that a person can enter the military at age 17. It is possible, and was back in 1955, for a male to enlist even younger. *See generally U.S. v. Harrison,* 3 M.J. 1020 (NCMR 1977) *aff'd* 5 M.J. 476 (CMA 1978).

calculator after the fact reveals his age at the time of the alleged commission, the age was not glaringly apparent "and did not call attention to any situation leading to further inquiry."

Petitioner relies on exhibit #9 which is a composite of the two screens which was first produced solely for litigation. (BP page 3).(R.VIII-T. I-56-57). Page three of the petitioners' brief seems to at least infer that the document created for litigation was printed and given to a technician at the time Clarke applied for insurance. USAA employees testified, however, that this composite screen had **never** been viewed by anyone and had been produced solely for litigation. (R.VIII-T.I-56-57, 70). Petitioners make other references on page 11 of their brief to the composite screen as if it existed at the time the eligibility requirements were reviewed and the "sheet showed" that Clarke was commissioned at 17. Again, the composite screen was not viewed or used during the application process, and neither the word "seventeen" nor the number "17" appear anywhere on a computer screen.

Ms. Glatsby further testified that she did not know how old you had to be to be a captain in the military in 1955. (R.VIII-T.I-76). Sales representatives were never trained to memorize ranks, years, and ages but instead relied on the veracity of potential members. (R.VIII-T.I-73,76,85). Clarke introduced some evidence attempting to show that a prospective member could not be commissioned under 22

years of age. (R.IX-T.II-206). Specifically, the exhibit dealt with the age parameters of Officer Inactive Reserves and National Guard, not active duty officers. Clarke did not fall into either category and the exhibit was admitted in error. The document did not identify ranks and ages for officers commissioned in the military in 1955.

SUMMARY OF THE ARGUMENT

The Fourth District accepted the findings of fact of the trial court. In so doing the Fourth District accepted the trial court's findings that Clarke made material misrepresentations that he was formerly a captain in the Air Force and was commissioned in 1955. The evidence conclusively demonstrated that USAA would not have issued a policy of insurance to Clarke but for the misrepresentations. Although there are other categories of insureds, none applicable here, USAA insures officers or former officers of the military.

Section 627.409, Florida Statutes provides that misrepresentations preclude recovery under a policy when misrepresentations made during the negotiations or application are either fraudulent, material to the insurer, or would have prevented issuance of the policy.

The trial court found that USAA had constructive knowledge of the misrepresentation because it was "glaringly apparent" during the application process that Clarke would have been 17 years old at the time he was allegedly commissioned.

The court reasoned that since USAA had the date of Clarke's birth and the alleged date of his commission, albeit on two different computer screens, that it was tantamount from that information alone that Clarke claimed to be an officer when he was days short of being 18.

However the undisputed evidence showed that the dates of Clarke's birth (1937)and the date of his alleged commission (1955) were never placed adjacent to each other in the computer generated application; the two dates were on separate computer screens. The senior sales person who input the application information did not ask for the dates sequentially. The number 17 or "seventeen" did not appear anywhere on the two separate data sheets prepared by the USAA sales person. In 1955, the law allowed 17 years to be in the military, and the evidence presented showed that at least two persons have been officers at the age of 18. No evidence was presented that you could not be a member of the military at age 17 in 1955.

Petitioners make the following statement in their Summary of the Argument:

> This is the only case ever in Florida in which an insurance carrier never obtained a written application for the policy, but nonetheless was able to avoid coverage for allegedly incorrect information given over the telephone to a salesman, who did not follow his company's procedure which required him to obtain a written application [BP 18] .

This statement is misleading. First, the Florida statute which allows insurers to disclaim coverage does not require the misrepresentation to be in writing. In fact

the statute specifically references misrepresentations during negotiations, so oral misrepresentations were contemplated and are within the purview of the statue. Second, petitioners refer to "allegedly incorrect information." Based on substantial, competent evidence the trial court found Clarke made a material misrepresentation in the application for insurance ,and he had made the same representation that he was formerly the captain in the military when he applied to be a member of an armed services related organization for officers or former officers. Third, although some internal procedures may not have been followed by the sales person, **none of those procedures required the salesperson to obtain a written application from the petitioner**. USAA's procedures were to mail and obtain an eligibility certificate and power of attorney from the member and cancel the policy if the documents were not returned. USAA was unsure why they did not receive these documents back from the insured or whether they were ever sent or received by the insured. However, USAA's mistake in their after application procedures was purely innocent as compared to petitioner's knowing misrepresentation.

Petitioners state many times that USAA would have discovered the misrepresentation had it followed its own procedures. There is absolutely no support in the record for that statement. The court found Clarke knew he had never been a commissioned officer in the United States Military and further that he misrepresented

to USAA that he was an officer in the Air Force. Petitioners are incorrect when they presume the fraudulent information would have been clarified if the procedures had been followed. There is no indication anywhere in the record that Clarke's fraud would have been immediately clarified. All of the evidence showed Clarke was intent on perpetuating the fraud as long as possible. For example, in the personal injury lawsuit below, Clarke attested incorrectly in discovery responses his position in the military.

Petitioners assert that USAA should be estopped from denying coverage because they accepted premiums for six years before filing the declaratory judgment action. However, based on Mr. Clarke's misrepresentations USAA had already paid multiple claims on the policy and those payments far exceeded the premiums charged to Clarke. USAA had no knowledge of the misrepresentations until well after the initiation of the underlying personal injury lawsuit as a result of Clarke's discovery responses. (R.X-T.III-432). Clarke even misrepresented his status in the air force during earlier discovery. He first attested incorrectly that he was a buck sergeant. He then lied again a second time when in response to a request for admissions he denied that he was not an officer. (Pet. Ex. #14).

The Fourth District correctly concluded based on the trial court findings that there was no waiver or estoppel and that USAA was entitled to void the policy.

Petitioners' argument is merely semantics, wherein they try to characterize a conclusion of law as a finding of fact and then assert that this contravenes case law established by this Court. There is no conflict with any case law. The Fourth District correctly reviewed the trial court's conclusions and determined that there could be no estoppel or waiver. In essence, the trial court's conclusion that USAA was estopped or waived the material misrepresentation conflict with established law on constructive notice and waiver.

Equitable public policy mandates that Clarke, who falsely and intentionally held himself out to be a commissioned officer, should not be permitted to benefit any more than he already has. It is bad public policy to reward fraud. A judgment in Clarke's favor rewards those who are untruthful. Clarke is the party here with unclean hands. If there was any mistake or inadvertencies on the part of USAA to follow its own internal procedure, it was an innocent mistake. Clarke cannot say the same.

There is no conflict between the underlying decision and any decisions of this Court or another district court of appeal. Jurisdiction of this case should be denied and the Fourth District decision should be approved.

STANDARD OF REVIEW

The trial court's findings of fact come to the district court of appeal clothed

with a presumption of correctness; such findings of fact will not be disturbed upon appellate review absent a showing that they are clearly erroneous or totally without any substantial evidentiary support. *In re Estate of Donner v. Anton,* 364 So. 2d 742, 748 (Fla. 3d DCA 1978). More germane to this appeal, however, is the principle that a district court of appeal is not bound by a trial court's legal conclusions when those conclusions conflict with established law. *Holland v. Gross,* 89 So. 2d 255, 258 (Fla. 1956). In *Holland,* this Court stated:

> A finding which rests on conclusions drawn from undisputed evidence, rather than on conflicts in the testimony, does not carry with it the same conclusiveness as a finding resting on probative disputed facts, but is rather in the nature of a legal conclusion . . . . When the appellate court is convinced that the trial court has misapplied the law to the established facts, than the decision is "clearly erroneous" and the appellate court will reverse because the trial court has 'failed to give legal effect to the evidence' in its entirety.

The issue of whether estoppel or waiver applies is a question of law for the court, especially here where the facts are undisputed, admitted and clearly reflected in the record. *Anderman v. Miller,* 359 So. 2d 472, 474 (Fla. 3d DCA 1978)(trial court finding of no estoppel upheld where record showed as a matter of law that estoppel was not established); *Tollius v. Dutch Inns of America, Inc.,* 244 So. 2d 467, 470-71 (Fla. 3d DCA 1970). *See also Camp v. Moseley,* 2 Fla. 171 (1848)(the issue of whether the doctrine of estoppel applies is an issue of law for the court).

It must also be noted that petitioners incorrectly state here, as they did in the

court below, the standard for finding fraud. They argue that the Final judgment should be affirmed relying on a "clear and convincing"standard. (BP 31). The "clear and convincing" standard does not apply to findings of fraud or any other issues in this appeal. *See, e.g., Wieczoreck v. H & H Builders, Inc.,* 475 So. 2d 227(Fla. 1985).

POINT ON DISCRETIONARY REVIEW

WHETHER THE FOURTH DISTRICT DECISION SHOULD BE AFFIRMED; WHETHER THE FOURTH DISTRICT ACCEPTED THE TRIAL COURT'S FINDINGS OF FACT AND FOLLOWED ESTABLISHED LAW IN DISAGREEING WITH THE TRIAL COURT'S CONCLUSIONS OF LAW.

ARGUMENT

THE FOURTH DISTRICT'S DECISION SHOULD BE APPROVED; THE COURT ACCEPTED THE TRIAL COURT'S FINDINGS OF FACT AND FOLLOWED ESTABLISHED LAW IN DISAGREEING WITH THE TRIAL COURT'S CONCLUSIONS OF LAW.

Petitioners argue that the Fourth District reversed the trial court's finding of fact. (BP 21-29). Specifically, petitioners argue that the Fourth District did not believe that the misrepresentation was "glaringly apparent" and therefore, the court "de novo substituted its own view of the evidence." (BP 21). Petitioners presume that this is a finding of fact in an attempt to give the statement more weight. In reality, the trial

court drew a legal conclusion that the misrepresentation was glaringly apparent. In other words, there was no finding of fact. After reviewing the fact findings, the trial court concluded there was a material misrepresentation; the misrepresentation should have been apparent to USAA; and therefore USAA has waived or was estopped from asserting misrepresentation. The Fourth District reviewed the findings of fact and came to a different legal conclusion.

The Fourth District emphasized the trial court's findings that Clarke had told USAA he was an officer, that he misrepresented this fact and that his status was material in determining eligibility. *Clarke,* 757 at 556. The Fourth District also pointed out: "[B]ut for the misrepresentation, USAA would not have issued the policy." The Fourth District noted that the trial court "found USAA waived its military right to rescind the policy because USAA had constructive knowledge of the misrepresentation." *Id.* Then, the Fourth District distinguished the case on which the trial court relied--*Johnson v. Life Ins. Co. of Georgia,* 52 So. 2d 813 (Fla. 1951)--and held that USAA was entitled to void the policy pursuant to F.S. 627.409 (a) and (b)[10].

As the Fourth District decision states, *Johnson* involved a situation where the insurance agent had "actual knowledge of the insured's tubercular condition after the policy was issued, yet the company continued to accept premiums until the insured's

[10] See footnote 7, page 15 for the language of the statute.

death." *Id*. The Fourth District pointed out that unlike the facts in *Johnson* "in this case no insurance agent had actual knowledge of the false information furnished by the insured and 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."[11] *Clarke,* 757 at 556. The Fourth District continued, "[h]ere, 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 forfeiture could be declared.'" *citing Johnson* at 815. The court based its conclusion of law on the evidence which 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." *Clarke* at 556. "USAA's sole allegation of misrepresentation was not "based on a single computer printout called a customer profile screen" as petitioners incorrectly state several times. (BP 31, 3,10,40). The information was provided on two different screens as described above and in the Statement of the Facts. (R.VIII-T.I- 56-57).

[11]Petitioners misrepresent the Fourth Districts's decision by stating that the Fourth District requires **actual knowledge** of the misrepresentation by the insurer to apply the doctrine of waiver. BP 25. The Fourth District found that USAA did not have constructive knowledge because "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." *Clarke* at 556.

On this evidence the Fourth District held that the age discrepancy was "not readily apparent and did not call attention to any situation leading to further inquiry." The Fourth District held that the trial court erroneously applied *Johnson* to the facts of this case. The Fourth District reviewed the findings of fact and concluded that there was no waiver or estoppel. The case was reversed with instructions for a judgment to be entered in favor of USAA[12].

The doctrine of estoppel is an equitable doctrine. *Lennar Homes, Inc v. Gabb Const. Services, Inc.,* 654So.2d 649 (Fla. 3d DCA 1995). The elements of waiver are the existence of a right that can be waived, actual or constructive knowledge of the right and the intent to relinquish the right. *Leonardo v. State Farm Fire and Casualty Co.,* 675 So. 2d 176,178 (Fla. 4th DCA 1996).

Constructive knowledge has been defined as a "deliberate disregard of suspicious information. . . ." *Johnson v. Life Ins. Co. of Georgia*, 52 So.2d 813 (Fla. 1951). Information is "suspicious" when a party "has actual knowledge of facts and circumstances that would lead a reasonable person to inquire and discover the fact in question or infer its existence." *Dadeland Dodge, Inc. v. American Vehicle Ins. Co.*, 698 So.2d 929, 931 (Fla. 3d DCA 1997). However, in order to constitute constructive

[12]In this regard, it is puzzling why petitioner addresses a directed verdict, since that issue is not before this Court. BP 29-31.

knowledge, the facts must "border on actual knowledge." *Vega v. Independent Fire Ins. Co.*, 651 So.2d 743, 745 (Fla. 5th DCA 1995). Here, there was no knowledge, actual or constructive, concerning respondent's misrepresentation about his military service.

First and foremost, USAA had no knowledge, direct of otherwise that Clarke was not an officer. Respondents did not introduce any evidence that USAA knew or should have known Clarke was not an officer. Instead, the only evidence is that USAA had his date of birth and date of commission.

USAA had no actual knowledge and no direct constructive knowledge that the respondent might be too young to be an officer. No evidence was ever presented that age 17 was too young to be an officer[13]. *See supra* note 11. USAA never reviewed the computer information with Clarke's date of birth near his date of commission introduced at trial. (R.VIII-T.I-57). The testimony was that this screen, while it existed within the computer, was not something that was displayed by an operator. (R.VIII-T.I-57). Indeed, this is not how USAA discovered the misrepresentation; it was uncovered through discovery in the civil suit initiated by Clarke. (R.X-T.III-432). The senior sales representative who took the information never saw the date of Clarke's

[13]The only evidence that comes close on this issue had prospective application. (*See* Pet. Ex. #6).

purported commission next to his date of birth. (R.VIII-T.I-57). Further, the screen itself does not make it "glaringly apparent" that Clarke was nearly 18 when commissioned. In fact, the composite screen is segregated into eligibility information and background information.

The case law on constructive knowledge of a material misrepresentation is divided between cases involving representations that should immediately excite the curiosity of the insurer and representations of a more pedestrian variety. Those misrepresentations that should excite curiosity require a further investigation by the insurer. Chronic life threatening illnesses fall in this category. *Johnson v. Life Insurance Co. of Georgia*, 52 at 815, relied on by the trial court, and *Cox v. American Pioneer Life Ins. Co.*, 626 So.2d 243 (Fla. 5th DCA 1993) - involving tuberculosis and tachycardia respectively fall in this first category. Pedestrian representations that do not excite curiosity do not mandate any further investigation by the insurer. Physical appearance, background information or personal data have been categorized in this manner. *Cox v. American Pioneer Life Ins. Co.,* 626 at 243; *Independent Fire Insurance Co. v. Arvidson*, 604 So. 2d 854, 856 (Fla. 4th DCA 1992), *North Miami General Hospital v. Central National Life Ins. Co.*, 419 So.2d 800 (Fla. 3d DCA 1982), *Highway Ins. Co. v Peterson*, 186 So.2d 48 (Fla. 1st DCA 1966) and the instant case fall in this latter category.

As discussed above, the trial court relied on *Johnson* to find that there was waiver. In *Johnson*, plaintiff beneficiary filed suit to recover benefits, and defendant insurer answered, in part, alleging misrepresentation. *Johnson*, 52 So.2d at 814. The facts of that case showed that two months after the policy was issued, defendant's agent learned that the insured had gone to the tuberculosis sanitarium for 90 days but the agent "'thought he was all right.'" *Id*. The agent continued to collect premiums until the insured died from tuberculosis. *Id*. It was uncontroverted that the insured lied on the application and that the insurer had **actual** knowledge of the tuberculosis two months after the policy issued. *Id*.

The *Johnson* court did **not** automatically determine that this information, learned by the agent constituted waiver. *Id*. at 815. Instead, the court looked at the nature of the illness - tuberculosis - which should have excited attention and called for more investigation. *Id*. The insurer was given a piece of information that should have immediately raised suspicion - notification that the insured might have a life threatening incurable illness. In *Johnson*, the Court considered the fact that the company knew that plaintiff made a material representation and continued to accept premiums as an unequivocal act equaling waiver. The insurer deliberately disregarded this actual knowledge. Likewise, in *Cox*, the insured's tachycardia put the insurer on notice mandating further investigation. *Cox*, 626 So.2d at 246.

Conversely, in *Arvidson*, as in this case, the information did not excite curiosity and did not mandate a further investigation. In *Arvidson*, the insurer rescinded the policy based on a material misrepresentation of the number of drivers living in the household. *Arvidson*, 604 So.2d at 856-7. There, the insured told her insurance agent that she was married but was the only driver. *Id*. at 855-56. She did not, however, tell the insurance agent that she had been living with her fiancé at the time she filled out the insurance application, nor did she tell the agent that she had erroneously answered the application question concerning the number of drivers in the household. *Id*. at 856. There were actually three drivers in the household. *Id*. Both sides argued the significance of a phone call from the insured wherein she told the agent she had bought a new car and was married. *Id*. at 856-57. That court held that the insurer had no constructive knowledge of the misrepresentation notwithstanding this direct contact by the insured. *Id*. at 857. In short, the phone call did not excite the curiosity of the insurer and required no further investigation.

Likewise, in the instant case, the only direct information USAA had was when the information was provided over the phone to USAA's senior sales representative who input the information on different computer screens. Rather than information that would excite suspicion, this is information that falls into the pedestrian category. There was no glaring statement concerning the misrepresentation of his date of

commission.

In *North Miami General Hospital v. Central National Life Ins. Co.*, 419 at 800 (Fla. 3d DCA 1982), the physical appearance of the insured was not enough to put the company on constructive notice that further inquiry was necessary. In that case, the insured was hunched over yet denied any back problems. The court held that his physical appearance did not put the carrier on notice of his physical problem. *Id*. at 801. Again, this information falls in the second category of personal information that does not immediately raise suspicion.

Analogously, here the proximity of his date of commission and date of birth taken over the phone at different times would not put USAA on notice. This information is much closer to the personal data category than to the life threatening illness category. Knowledge of possible TB or heart arrhythmia is a qualitatively different type of information than dates and years provided to Carol Glatsby who put the information on two different screens in a computer, and never used that information again. The member's date of birth is not collected to catch the untruths of an applicant. The date of commission is collected for the purpose of determining eligibility. Thus, there was no actual or constructive knowledge on the part of USAA. The only person who had actual knowledge was respondent himself.

Finally on this issue, in *Highway Ins. Co. v. Peterson*, the insurance company

brought a declaratory judgment action based on material misrepresentations concerning ages of drivers. The application specified that there were no drivers under 25 years who ever drove the vehicles. *Peterson,* 186 at 49. In reality, one of the cars was regularly operated by a person under 25 years old. *Id*. The insured argued that a prior accident involving the same underage driver put the company on notice. *Id*.

That court found that the prior accident did not "directly or indirectly" alert the insurer to the misrepresentation. *Id*. at 51. Likewise here, the dates provided to USAA at the time of application did not alert USAA to Clarke's misrepresentation. The *Peterson* court declined to find waiver stressing that insurers should be able to rely on representations of the insured. *Id*. at 51. Any other result would "necessarily saddle the industry with substantial expense requiring greater premiums for coverage . . ." *Id*.

Likewise, here, USAA has the right to rely on the date of commission provided by respondent and his representation that he was a commissioned officer. Extensive research into every little detail provided by the insured would increase the expense and increase the commensurate premiums charged to all USAA insureds. *See id*; *see also* R.VIII-T.I-183. his result, ensuing from a fraudulent insured's misrepresentation, is hardly the result dictated by public policy. *See* discussion *infra* p.38-39. It is respectfully submitted that the other grounds on which the trial court may have relied

to find waiver are erroneous. The fact that USAA did not follow its procedure by sending out follow-up paperwork is irrelevant to the waiver determination. The rule referenced in *Peterson* is that an insurer has the right to "rely on an applicant's representations in an application for insurance and is under no duty to inquire further." *North Miami*, 419 So.2d at 802. There is no requirement, statutory or otherwise, that USAA send out follow-up paperwork. The insurer is entitled as a matter of law to rely upon the accuracy of the information contained in the application and has "no duty to make additional inquiry." *Independent Fire Insurance Co. v. Arvidson*, 604 So.2d 854, 856 (Fla. 4th DCA 1992) (*citing New York Life Ins. Co. v. Nespereira,* 366 So. 2d 859 (Fla. 3d DCA 1979*)*; *Talley v. National Std. Life Ins. Co.*, 178 So.2d 624 (Fla. DCA 1965); *see also GEICO v. Decheona,* 610 So.2d 480 (Fla. 3d DCA 1992). USAA received the verbal application from the respondent and relied on Clarke's misrepresented information to issue the policy. USAA is entitled to rely on this information provided by the respondent. In the analogous case of *New York Life Ins. Co. v. Kay*, 251 So.2d 544 (Fla. 3d DCA 1971) the application misrepresented the insured's age as 53 when he was actually 63 years old. Some 16 years later, the insured was declared incompetent and his wife notified the agent that she was "suspicious of the age given on the policy and that her husband was probably 10 years older" than that. *Id*. at 545. The agent told her the misrepresentation would reduce the

payout and neither party took further action. *Id*. Following the insured's death, the company denied coverage under a similar statute based on the misrepresentation[14]. *Id*. at 546. There, the insured's wife argued that the company was estopped from denying benefits because the representative of the company did not make a full investigation about the insured's age. *Id*.

The *Kay* court held there was no requirement that the company must make an investigation. "The initial misrepresentation is charged to the insured. Upon the discovery of [the] misrepresentation, any action that must be taken is charged to the insured." *Id*. at 547. The court relied on Fla. Stat. 627.0205 which "is not predicated by an investigation by the insurance company." *Id*. Likewise, the statutory requirements for voiding a policy here are not predicated on any investigation by the company.

Further, it should be noted that Part F of the USAA policy rescinds coverage for misrepresentations "at the time application was made." (R.VII-1104-52; App. tab 2; *supra* note 5). Thus, the initial issue is when was the misrepresentation made. Here, the misrepresentation was made simultaneously with the application or else there would have been **no eligibility**. Thus, what happened afterwards is irrelevant.

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[14] Pursuant to Florida Statute 627.0205, the policy period was recalculated using his real age and deducting the amount paid from the new higher premiums leaving a balance of zero.

Finally on this point, it must be noted that the trial court's reliance on USAA's failure to follow its procedure presumes that the end result would have been different if USAA had sent out the eligibility certificate. Specifically, the trial court's reliance presumes that Clarke would have changed the misrepresentation upon receipt of the eligibility certificate. In other words, the underpinnings of this argument assume that the misrepresentation was innocent, or that upon notification, Clarke would have rectified the error. The evidence does not support this assumption. Specifically, the misrepresentation here was not innocent.

Florida courts should apply the principle "with great caution." *Pelican Island Property Owners Ass'n v. Murphy,* 554 So. 2d 1179 (Fla. 2d DCA 1989). The doctrine should only be applied "where to refuse its application would be virtually to sanction a fraud." *Lennar Homes, Inc., supra; Pelican Island Property Owners Ass'n, Inc., supra.*

Here, the only fraud that might be sanctioned would be granting the petitioner coverage following his material misrepresentations. Further, estoppel is not applied when the party seeking estoppel has "equal knowledge of... the truth of what has been represented." *Lennar Homes, Inc.* 654 So. 2d at 653. Here, petitioner had greater knowledge of the falsity of what had been represented, and cannot now complain that USAA should be estopped. The doctrine of estoppel is not applicable to transactions

which are contrary to public policy. *Travelers Insurance Co. v. Spencer,* 397 So. 2d 358, 361 (Fla. 1st DCA 1981)**.** Sanctioning petitioner's material misrepresentation would in effect be sanctioning a lie on an insurance application. Petitioner asserts that the Fourth District's decision is bad public policy. (BP 19). In reality, it would be bad public policy to encourage misrepresentations like those in the instant case. Finally, a contract which is taken in violation of the law is void ab initio, and the doctrine of estoppel simply does not apply.

Petitioners also argue as another basis for estoppel the fact that USAA did not inform Clarke that it was seeking to void the policy until after USAA waived its own subrogation rights **at Clarke's request.** The fact that USAA waived its subrogation rights against the Trayners prior to rescinding the policy is of no moment. Foremost, when USAA waived its own subrogation rights, USAA did not have knowledge, constructive or actual, that the policy was void ab initio as a result of a material misrepresentation. There can be not waiver unless the insurer acts "with full knowledge of the facts." *Mutual of Omaha Ins. Co. v. Eakins,* 337 So. 2d 418, 419 (Fla. 2d DCA 1976).

Further, USAA waived its own subrogation rights at petitioners Clarkes' request. Petitioners accepted the tortfeasor's policy limits and released the tortfeasors of their own volition. Petitioner Clarke knowingly made the misrepresentation and

acted at his own peril.

For the foregoing reasons, the Fourth District was correct in holding the *Johnson* case inapplicable, and declining to apply the doctrine of waiver; USAA was entitled to void the policy under section 627.409(a)&(b), Florida Statutes. *Clarke* at 566.

Petitioners argue alternatively an argument which was not addressed by the Fourth District's decision--that the subject USAA policy provides a stricter burden of proof on behalf of USAA than the statute, which was not met.[15] (BP-31-34). Conspicuously absent is any discussion of the specific provisions on which petitioners rely. The relevant part of the insurance policy provides:

> We do not provide coverage for any person who has **knowingly concealed or misrepresented any material fact or circumstance** related to this insurance:
>
> 1. At the time application was made. . .

The trial court's findings, which were not challenged by petitioners in a cross-appeal, determined that Clarke knowingly misrepresented that he was an officer and that status was material to USAA because it was the only way Clarke would be eligible for USAA coverage. (See page 9 of this brief for the germane fact findings).

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[15]Because this issue was not addressed by the Fourth District and is not the basis of the "conflict" jurisdiction, this Court is not required to address this issue. *See Clampitt v. D. J. Spencer Sales,* 26 Fla. L. Weekly S309 (Fla. May 10, 2001).

Petitioners argue that contract construction mandates that appellant show that Clarke knowingly misrepresented a fact which was in turn known by Clarke to be material. This argument defies grammatical interpretation. "Knowingly" is an adverb, and adverbs modify verbs. "Concealed" or "misrepresented" are verbs which the adverb "knowingly" modifies. "Material" is an adjective which modifies the nouns "facts" or "circumstances." The word "knowingly" does not modify the phrase "material fact." Petitioners interpretation ignores the basic rule of grammar that "modifiers in a sentence should be placed, whenever possible, next to the word they are intended to modify." *Southwestern Life Ins. Co. v. US,* 560 F.2d 627, 638 (5th Cir. 1977).Thus, "knowingly" does not modify "material facts." There is no proximity as required by grammar rules. *Id*. *See also Atlantic Coastline RR Co. v. Boyd,* 102 So. 2d 709 (Fla. 1958)(typically, modifiers precede the word that they modify). It would have been a simple matter to insert the word "known" to modify material" if USAA so intended. *See In re Puff 'n Stuff of Winter Park,* 183 BR. 959, 962 (M.D. Fla. 1995). There is no ambiguity in the contract language because under proper grammar rules there is only one construction of the contract, and that construction favors respondent, USAA.

Even if the perspective as to which facts or circumstances are material is that of the insured, as urged by Clarke below, there can be no founded argument that

Clarke did not know his rank was material. The first information obtained from Clarke was his rank, current status and source of commission. (R.VIII-T.I-68-70).The mere fact that Clarke misrepresented the information is some indication that he knew his rank was important to USAA. Furthermore, while an insured might not think military rank is material to Allstate or State Farm, Clarke cannot plausibly assert that rank is not material to USAA, a company founded by officers, run by officers solely for the benefit of officers and their families. (R.VIII-T.I-155). It cannot be reasonably argued that Clarke did not know his rank was material. Petitioners' alternate argument is without merit which may be the reason why the Fourth District did not address it in its opinion.

Finally, equitable public policy mandates that Clarke, who falsely and intentionally held himself out to be a commissioned officer should not be permitted to benefit any more than he already has. It is bad public policy to reward fraud. A judgment in Clarke's favor rewards those who brazenly lie. Clarke is the party here who has unclean hands. If there was any mistake or inadvertencies on the part of USAA to follow procedure, it was an innocent mistake. Clarke cannot say the same. Further, USAA, and its members--officers who served this country –should not be punished for something was not aware of and did not start.

There is no conflict in this case. Jurisdiction should be denied or alternatively

the Fourth District's decision should be approved.

CONCLUSION

Based on the foregoing argument and citations, this court is requested to deny jurisdiction because there is no direct and express conflict between the underlying decision and this Court's decisions in *Brown, Conner and Shaw, supra*. The District Court of Appeal did not re-weigh the evidence but disagreed with the application of the law of estoppel and waiver to the undisputed findings of fact of the trial court. In the alternative, this Court is respectfully requested to approve the decision below. 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 the fraud earlier. To do otherwise under the circumstances of this case would be to sanction insurance fraud in a state which is committed to prosecuting insurance fraud.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished on June 28, 2001 to: Richard A. Sherman, Esq., and Rosemary B. Wilder, Esq., RICHARD A. SHERMAN, P.A., 1777 South Andrews Avenue, Ste. 302, Fort Lauderdale, Florida 33316; Wilton L. Strickland, Esq., Law Offices of WILTON L. STRICKLAND, Victoria Park Centre, Ste. 303, 1401 East Broward Boulevard, Fort

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the above brief was prepared using Times New Roman 14pt font in compliance with Rule 9.100(1), Florida Rules of Appellate Procedure.

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