IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-1552

Florida Bar No. 184170

EUGENE FRANCIS CLARKE and PHYLLIS CLARKE, his wife,

Petitioners,

vs.

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

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE FOURTH DISTRICT COURT OF APPEAL

BRIEF OF PETITIONERS ON THE MERITS

EUGENE FRANCIS CLARKE and
PHYLLIS CLARKE, his wife

(With Appendix)

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CERTIFICATION OF TYPE

It is hereby certified that the size and type used in this Brief is 12 point Courier, a font that is not proportionately spaced.

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STATEMENT OF THE FACTS AND CASE

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. United Services Automobile Association v. Clarke, 757 So. 2d 554 (Fla. 4th DCA 2000). The Fourth District found no waiver of the right to deny coverage, ignoring the undisputed facts found by the judge that USAA stipulated that it did not follow its own procedures, which would have verified the verbal information given by Clarke to USAA; that such procedures were not followed on three separate occasions; and if the procedures had been followed, the erroneous military information contained in USAA's computer data would have been immediately clarified (T 17-19; R 829-835). The judge found that notice of the discrepancies was "glaringly apparent" in the Record; another fact finding rejected by the appellate panel. Clarke, 556. Because the Fourth District failed to apply the correct legal standard of review, this Court granted jurisdiction to resolve the conflict between Clarke and the other appellate decisions setting out the right standard of review. Conner; Shaw; Marcoux; Brown, infra. The Petitioner presents the facts in the light most favorable to the trial judge's fact-finding, as required by the Rules of Appellate Procedure.

The first witness called to the stand by USAA was Carol Ann Glatsby at (T 43), who changed her testimony from her deposition testimony. She had been a sales representative with USAA since

1986; in 1988 she was a new member sales representative (T 45-46). In 1987 she sold approximately 900 to 1,000 USAA policies (T 47). In viewing the application she filled out, in her hand writing with her signature, she said she knew that she spoke with Eugene Clarke, but had no specific memory of the conversation (T 47). She testified that on May 4, 1988, Clarke called and was transferred to her by a USAA operator (T 48-51). Contrary to her deposition, she now said she gave him a new member number, while she had him on the phone (T 49-52). She was shown Plaintiff's Exhibit #9, which was the USAA computer sheet with Clarke's information (T 52-53). She took the eligibility information such as name, rank, social security number, date of commission, etc., typed it on the computer, as she spoke to Clarke on the phone since the system had been computerized. She testified that USAA was concerned about eligibility because the carrier was not open to the public because it was a private organization for military officers (T 55-56). She said that Plaintiff's Exhibit #9 was not actually the two computer screens that she would see, when she was taking the information (T 56-57).

Glatsby testified that to be eligible for membership in USAA, the applicant would have to be an active, or retired, officer commissioned in the military and the information that Clarke gave was that he had been a commissioned officer through officer's candidate school and he was no longer in the military (T 57-59). Clarke provided information regarding the two cars he was insuring; she took all this information down while she was talking to him on the phone (T 61-62). Glatsby testified the

only way to have the application completely filled out was to have the potential insured give the information over the telephone, but she did not type in the information regarding Clarke's occupation or education (T 62-63). She did not know who took that information, as she took the military information (T 63-64). Glatsby testified that even after the information was received over the phone, an insured still needed to establish eligibility; Clarke had called her back and the records indicated that she spoke to him a second time (T 65-67). Glatsby said that the information on the computer sheet showed that Clarke was an ex-officer, he was a captain no longer in the military, he went through officer's candidate school, he was married; and once the information was typed in on the computer screens, Glatsby would hit "enter" and Exhibit #9, a composite, would be produced (T 68-70). The printout was given to a technician, who typed in the rest of the information on papers with carbons and one of those copies is removed and is supposed to be sent to the insured, along with a power of attorney and an eligibility certification form, to verify the information (T 70-71). It was not part of her job to send out those papers (T 71). She testified that she accepted the information as true and there was no reason to investigate (T 72). She said that she would not even investigate, even though the sheet showed, according to the information she took that Clarke would have been 17, when he was a commissioned officer (T 72).

She testified that regarding states where USAA insures all types of applicants, Clarke may not have been eligible in those

states either, because he lived in Florida, which was not a "take all comers" state (T 73-74). She took applications from people in these "take all comers" states, because they are required by law to do so; she never memorized the ranks; as who could be eligible and what type of rank was provided to them (T 75-76). She then identified four other attempted phone conversations with Clarke, regarding his homeowner's policy; but she never discussed eligibility with him (T 78-79).

Cross-examination began with Glatsby admitting that in her deposition she had testified she had relayed all Clarke's information to the eligibility specialist and it was the eligibility specialist who put the information in the computer; but now she was changing her testimony at trial to say she did it (T 80-81). She testified she did not know exactly what day she was on-line with the information (T 81). She was next impeached with the fact that in her deposition she admitted she was given training in eligibility and the various ranks in the military and what ages they were obtainable (T 82). She testified that if someone called up and said they had been through officer's candidate school and became a commissioned officer at the age of 17, she would not believe that information (T 82). She admitted that it was USAA's policy to make sure that all the correct information was obtained from the applicant by sending the mandatory follow-up forms, even though the person giving the information was an officer and gentleman (T 84-85). She verified that USAA required a signed certificate, certifying the information for the applicant to be eligible for its insurance;

and these written, signed documents had to be obtained before there was a determination that the applicant was eligible and would be issued a policy (T 85).

Once again, Glatsby testified that she had absolutely no recollection of speaking to Clarke whatsoever and she had no recollection of the conversation even from looking at the documents provided (T 86). She testified that even though there were spaces on the application for rank and branch of service, she did not type those in (T 86-87). 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 (T 88-90).

Glatsby was again impeached with her deposition testimony stating that USAA required the eligibility certificate to be signed and returned to it and that if it did not receive the certificate back with a written power of attorney, the policy would be cancelled (T 91-93). Glatsby continued to hedge about why Clarke's policy was not cancelled, when these certificates were not received back; and she was impeached with her deposition testimony that it would be logical to assume that either Clarke had returned the certificates; or USAA simply did not follow its own procedure; so the policy was still in effect two years after it was issued (T 94). She testified that she was a person who decided to place Clarke as an insured USAA member (T 95). Glatsby stated that USAA, in 1988, did not take information from Reserve Officer's Association magazines to solicit new members (T 97). Finally, Glatsby testified that the eligibility

certificate and the power of attorney and the application were all normally sent out in the same shipment to the potential insured and that was USAA's procedure (T 99).

The next witness called by USAA was Elaine Riding, who did marketing analysis and eligibility for USAA, who testified that in 1988 USAA did not do telephone solicitations, but did mail solicitations to people that were eligible, but other persons could be responding to USAA advertisements in military publications (T 111). She identified material sent to Clarke, after he had became a USAA insured, soliciting additional coverage, hurricane coverage, umbrella coverage, etc. (T 121-123). USAA did not consider this a solicitation, but rather informational new pieces (T 124).

On cross-examination, Riding testified that she was satisfied that in spite of the 114 page deposition testimony of Carol Glatsby where she testified was not directly on-line with Clarke; Riding was convinced Glatsby was on the computer (T 136). She admitted that in none of the documentation sent to Mr. Clarke was there ever anything that said if you are not eligible, contact us and let USAA know (T 135).

Next to testify was Marry Ibarra, an attorney for USAA (T 151-152). She gave the history of USAA, how each member shares in the profits and losses of the company and how they decided to insure military officers, because they would take care of each other where other insurance companies would not (T 154-155). She testified that the bylaws required membership in the organization to be limited to officers, retired officers, reserve

officers and some other limited groups; the reciprocal operates through an attorney-in fact relationship; and that when the pool of military personnel began downsizing in the '90s, additional groups were added, but not to this association (T 157-158). She testified it was absolutely material to know that the insured was a commissioned officer when applying, but admitted that USAA insured Japanese airline people (T 166-167); and she also described that in five or six states, that had "take all comers" requirements, USAA had to insure other people than its normal military market niche (T 167).

On cross-examination Ibarra testified that the Clarke case was her case and that the attorney who representing USAA at this trial reported to her (T 191), and she admitted the stipulation was true that USAA had not followed its own procedures in terms of sending out a follow-up verification of eligibility letter and a power of attorney, at the 30-day and 60-day cycle; and these procedures were not followed (T 191). Further questions were asked of Ibarra regarding USAA procedures, again the attorney for USAA stipulated that there was a procedure in place and had it been followed, an eligibility certificate would have been sent out, would have been returned and over time Clarke would have been cancelled according to USAA's routine procedure (T 195). Ibarra identified USAA documents showing different military ranks and the ages that went with them; the documents included a category for Japanese airlines, which covered their pilots; and she then said that USAA was denying coverage to Clarke under provision F of his policy (T 206-210). That provision allows for

cancellation under the condition that Clarke knowingly concealed or misrepresented a material fact (T 210). She identified the Complaint in the DEC action, noting that the date of the accident was September 25, 1989; and she testified that USAA insured Audie Murphy and George Bush at a time when they were a little more than 18 years old and were officers (T 213-216).

Next, the Plaintiff put on the deposition testimony of Eugene Clarke. His military record showed he was not suitable to remain in the military; and he did not know if the Reserve Officers' Association magazine always listed him as a captain and he did recall calling them to tell them to correct that (T 297-298). Clarke did not recall getting any welcome information package from USAA, nor he did recall talking to an operator about eligibility (T 299-300). He testified a copy of the Reserve Officers' Association magazine was sent to him as Captain E.F. Clarke and a solicitation letter for money (T 317). He used E. Francis Clarke on credit cards and that is how the magazine must have gotten that name (T 318-319). He testified he met someone named Mike Clark, who said he might submit his name and the next thing he knew he got literature in the mail to pay $20 to join the Reserve Officers' Association (T 320-321). After he had been accepted to join ROA, when he got the literature in the mail; he does not know how they got the information that he was Captain E. Francis Clarke (T 323).

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 got the ROA magazine

(T 324-325). USAA then rested and Clarke moved for an involuntary dismissal (directed verdict) since this was a non-jury trial (T 333-354). The judge ruled the case was going forward and Clarke could present his side (T 354).

The insurance expert witness called by Clarke was James Marshall, whose deposition was taken by USAA (T 369). Marshall testified that he thought there were factual disputes whether Clarke misrepresented his military status; as he did not see anything that would conclusively show that Clarke had done this (T 380-381). Marshall testified that forms attached to the policy, explained that what happened when information on the application was incorrect; and it stated that if that was the case, USAA would charge an additional premium to the insured (T 385-387). It also provided for cancellation, not for just misrepresentations, but for knowingly concealing or misrepresenting material facts or circumstances (T 387-388). He said this language should be interpreted as a material misrepresentation from the standpoint of the insured and whether he knew it was material (T 389). The provisions were ambiguous, because in one section of the policy it stated that if there was incorrect information USAA will charge an additional premium based on the corrected information; and in another section it said if there was a knowing misrepresentation the policy can be cancelled (T 390). He also found that the policy was more liberal than Florida statutes regarding misrepresentations, because under the statute the misrepresentation can be unknowing; but the USAA policy had a knowing misrepresentation standard

before the insurance could be cancelled (T 391-394). He testified that USAA advertising suggested that it went after military officers, which could be considered an elite group so officer status was material, but Clarke would not know that (T 398-399). It was his opinion that in order for USAA to be able to cancel the policy, according to the policy, there had to be a knowing misrepresentation of the material facts, so that the insured would have to know that the answer he gave was false and he would have to know that this was material to underwriters and they would not issue the policy if you had not given them this information (T 402).

USAA had a document in its files showing that Clarke was a captain at age 17, which would have been a clearly wrong answer and all the company had to do was compare it to its own standards for confirming eligibility; if USAA had done this, they would have been able to cancel or terminate the coverage prospectively, but they did not and therefore they waived their right, or were estopped, from denying coverage (T 406). Regarding coverage by estoppel, Marshall testified that to even get to that theory, you first had to assume there was no coverage; and he was not of the opinion there was no coverage, because he had not seen anything that conclusively showed that Clarke knew he was making a material misrepresentation (T 408). There was not even anything that showed that Clarke gave USAA the information they had; Clarke simply misunderstood the questions; or the application was typed by somebody else and not the person who took the information; but assuming *arguendo* there was a misrepresentation

of the type required in the insurance policy to void it, USAA still had an obligation with the incorrect information in their system, to void the policy prospectively (T 408-409). This company was in a win-win situation, where USAA got to hold the premium money, then if there was a loss, they can simply argue no coverage (T 409). He explained that the information on the application is for the insurer to use for the purpose of giving coverage or to deny coverage. Once the application was done, the customary practice was to notify the insured with a copy of it; and requesting follow-up information. The Court should be skeptical if the company did not follow their own procedures, if they did not get the correct information and the documents signed, to write the policy (T 414-415).

Portions of the deposition of Diane Moore, the senior adjuster for USAA were next read into the Record (T 429). As a corporate representative of USAA, she was denying coverage under a 1995 reservation of rights letter, because information came to the company that indicated that Clarke may not be a military officer in the service; through Answers to Interrogatories (T 432-435). Plaintiff's Exhibit #9 was a computed sheet; but she did not know when the computer system was integrated between underwriting and claims (T 440-441). In other words, when a USAA phone representative would be able to simultaneously put the information directly into the computer; as Glatsby said she had not done in her depo, but said she had done at trial; Moore had never searched a computer sheet before, nor pulled one up before; she did not know what the codes on the sheet meant; and she did

not know why USAA produced one copy of this data screen three times on the same piece of paper (T 440-442). She admitted that USAA authorized Clarke to settle with the tortfeasor for $15,000 (T 443-444). She admitted that once these policy limits were accepted by the Plaintiff, he had no more rights to go back against that particular Defendant (T 445-446).

The deposition of Maria Garcia Francis was read, who testified that she had never heard of an officer being commissioned before age 22 (T 465-481).

A Motion for Directed Verdict/Closing Argument was commenced by the attorney for USAA at (T 482). He argued that for equitable estoppel there has to be the representation as to a material fact contrary to a later asserted position and change in position detrimental to the party claiming estoppel; but argued here there was no evidence or change to position as a result of Clarke relying on anything USAA did (T 483).

Counsel argued that to have a waiver you have to know you have that right and you have to intentionally waive that right, but USAA did not know at the time Clarke was not a military officer, so they did not waive the right (T 483-484). He said the Independent Fire v. Arvidson, infra, case, says the insurer is entitled to rely on information obtained in an application; so there was no waiver because they did not waive a non-right. He argued that another case said the statute precluding an insurer from disclaiming coverage unless it gives a reservation rights in 30 days, does not create or extend non-existent coverage, and therefore argued there is no duty to deny coverage at all (T 482-

485); that the policy has never been in effect because there was a material misrepresentation in the application under the claims administration statute.

Counsel for Clarke responded at (T 490), by arguing that USAA's policy calls for an intentional misrepresentation and there was nothing presented which showed an intentional misrepresentation. Counsel said it was unrebutted that USAA did not follow its own procedures; there was no evidence of intentional misrepresentation; USAA failed to verify the coverage in accordance to its procedure; and it is clear if USAA takes everything over the phone there can be miscommunication (T 490-491).

Counsel said that they do not know how many telephone calls Ms. Glatsby handled each day, how many people she signed up on that day; and the information could have been changed on the computer screen. USAA knew the date of Clarke's birth and the information defied their own internal regulations and schedules; since there are no 17-year old captains, or 17-year old commissioned officers (T 490-492). They also have ranks that correspond with the age. USAA said there was no reliance by the insureds; but USAA accepted the premiums for years; and USAA claims there is no harm in telling the insured to settle with and release a tortfeasor (T 491-492). Besett v. Basnett, 389 So. 2d 995 (Fla. 1980), stated that the recipient of a fraudulent misrepresentation is not justified in relying on it, if he knows it is false, or the falsity is obvious to him (T 493).

Counsel continued that if indeed false information were

given, the first red flag was Clarke's date of birth eligibility and his commission date; the second red flag was that USAA never sent out the first mailing; or the second; or the third to confirm eligibility; which is required because each member has to also execute a power of attorney, or certificate to protect the others; and if you do not execute these two documents, you do not have USAA coverage as the policy is automatically cancelled (T 492-495).

USAA continued its closing at (T 498), by stating that Ms. Glatsby took the application and was credible, because she admitted she totally changed her testimony after her deposition and she explained why (T 499-501). Counsel said that this was not such an obvious misrepresentation that USAA should have seen it, as Clarke's position suggested (T 501-502); someone taking an application is not supposed to analyze the information and Glatsby did not catch Clarke's misrepresentation; and that the insurance statute does not distinguish between knowing and unknowing misrepresentations. He said Clarke paid $295 to be a life member of the Reserve Officers' Association (T 502-508). USAA admitted it willingly insured other people, who were not officers; and Clarke's first clue should have been that the name of the company is United Services Automobile Association. The insurance carrier had no duty to investigate and follow-up to get the mandatory power of attorney. Elaine Riding testified there was no solicitation on a one-on-one basis and Mr. Clarke never tried to get the information right, despite the fact that the magazine sent him publication after publication calling him

captain. Counsel argued that Rose Aleman said she was not aware of an officer this young, but she would not have investigated this. George Bush and Audie Murphy are two examples of very young officers in the U.S. military (T 508-517).

Clarke continued closing and said the testimony was that a friend signed Clarke up and there is no evidence he misrepresented he was an officer in the ROA (T 518-520). He said USAA was supposed to follow-up by sending out the eligibility certificate and power of attorney to sign; with the obvious purpose to find misrepresentation and they did not do it; that Ms. Glatsby was trained to follow-up when things did not match and had other situations where the rank did not match the age and she checked it out; that she was trained and had guidelines and the procedure was not followed; as there were red flags all over the place to show USAA maybe should investigate (T 520-524).

He said Mary Ibarra, who is a very smart lawyer, admitted that USAA likes to insure officers, but they also insure Japanese airline pilots, insure some college students if they are in the ROTC program and there were no actuarial tables put on to show these status standard were related to the risk of bad drivers (T 524-525).

Counsel argued that Carol Glatsby admitted that she has no recall of talking to Mr. Clarke; she daily took down pages and pages of information; and she could have cleared it up by writing CPT USAF and rank and branch on the application, but she did not do it; there is no written application, just the information in the computer (T 525).

He continued that Ethel Keaton testified that Mr. Clarke's version could have been entirely accurate, that someone signed Clarke up for ROA membership using his credit card and since there is no written application, USAA was just piling inference on inference (T 525-526); USAA has no record to show they ever sent Clarke a power of attorney, if so, they would not be in the court room (T 526-527); that the cases USAA relies on are life policies and health policies and if you do not report you have tuberculosis, those cases apply (T 527); that Besett v. Basnett, supra, applies and says that you would have a right to rely on representation, unless its true or its falsity is obvious (T 525-528). He said USAA cannot prove that misrepresentation ever occurred to start with, this would be the only case in Florida in which a misrepresentation was not based on some type of writing. If he had been making up information, he would have done something better than saying he was a 17-year old officer; if you are going to lie or misrepresent, you would do better than that. He said something went "screwy" in USAA's system and they did not follow their guidelines to correct it, and USAA simply has not shouldered its burden of proof (T 525-531).

The trial court asked for a USAA power of attorney form to review (T 531). It said on the bottom that the eligibility certificate, which then was on the back of the power of attorney, must be signed, dated and returned (T 532-535).

The finding of fact and conclusions of law are contained in the Final Judgment, which is in the Appendix to this Brief, and in the Record at (R 829-835).

USAA filed a lengthy Motion for Rehearing, arguing that the judge's Finding of Facts and Conclusions of Law were wrong and relied on new computer screen printouts, which USAA supplemented to the Record (R 889-893; 894-903; 904-930; 934-960). USAA's Motion for Rehearing and/or New Trial was denied and it appealed (R 969; 970-971). The Fourth District reversed, finding no waiver and ordered a judgment to be entered for USAA. Clarke, 556.

SUMMARY OF ARGUMENT

This case involved a non-jury trial with several days of testimony in which the trial court issued 34 paragraphs of findings of fact, and held there was coverage.

There is clear and explicit conflict with Florida law, that after non-jury trial the test for affirmance is "whether there was competent evidence" to support the findings of fact.

For instance, the trial court who heard the evidence made a fact finding that certain information on the computer screen application was "glaringly apparent." However, the Court of Appeal weighed the evidence and ruled that this information "...was not readily apparent...". Therefore, this is as clear as can be that the Court of Appeal substituted its view of the evidence for that of the trial judge. It conducted a de novo review of the trial court's fact findings and expressly disagreed with the fact findings, which is in direct conflict with Florida law.*

It should also be pointed out that the carrier received insurance premiums for six years before denying coverage.

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.

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* The findings of fact are in the Appendix to this Brief.

Since USAA never obtained a written application although its procedures required it to, there certainly was "competent evidence" for the trial court to enter the Final Judgment finding there was coverage.

The facts as stated in the Opinion are that in 1988 Eugene Clark applied for insurance with USAA. USAA not only insured military officers, but also insured numerous other classes of people. A salesman of USAA took the application over the telephone and filled in certain information on the computer screen, but never obtained a written application from Mr. Clarke. The evidence was undisputed that USAA was supposed to obtain a written application and if not to cancel the policy, but nonetheless, it is undisputed that USAA never obtained a written application. Nonetheless, after paying premiums for six years, when Mr. Clarke made a UM claim, USAA filed suit for declaratory judgment seeking to void the policy ab initio alleging material misrepresentation in his application for insurance, even though there was no written application for insurance.

It should be pointed out that it is bad public policy to hold that an insurer can avoid coverage in the present situation for allegedly incorrect information given over the telephone to a salesperson, when it stipulated it did not follow its own procedures and did not obtain a signed, written application and verification of insurability.

The decision in the present case conflicts with the cases of Conner; Shaw; Marcoux; and Brown, infra, which hold that after a non-jury trial, the test of whether the findings of fact and

Judgment shall be affirmed is whether there is "competent evidence" to support the fact findings and Final Judgment; and that after trial on the merits, the Court of Appeal is not allowed to substitute its fact finding for that of the trier of fact. The Court of Appeal, in this case, did not apply the test of "whether there is competent evidence;" this creating express and direct conflict. Instead, it conducted a de novo review of the trial court's fact finding and expressly disagreed with the fact findings. The direct conflict must be resolved by this Court, as no de novo review exists of a trial court's express fact finding. The Opinion below must be quashed and the Final Judgment for the insured reinstated.

ARGUMENT

THE DECISION IN THE PRESENT CASE IS IN EXPRESS AND DIRECT CONFLICT WITH FLORIDA CASES HOLDING THAT THE STANDARD OF REVIEW OF A NON-JURY TRIAL IS WHETHER THE JUDGMENT IS "SUPPORTED BY COMPETENT EVIDENCE;" BUT THE COURT OF APPEAL APPLIED A DE NOVO REVIEW INSTEAD AND EXPRESSLY SUBSTITUTED ITS OWN VIEW OF THE EVIDENCE; THE FINAL JUDGMENT MUST BE REINSTATED.

Florida law is clear that the only time a Court of Appeal should reverse a fact finding by the trial judge after trial on the merits, is if it finds the Judgment of the trial court is not "supported by competent evidence." The Court of Appeal, in the present case, made no finding that the decision of the trial court was not "supported by competent evidence," but simply, de novo, substituted its own view of the evidence for that of the trial court. Therefore, there is express and direct conflict between the decision in the present case and the Supreme Court's decision in Shaw v. Shaw, 334 So. 2d 13 (Fla. 1976); and Conner v. Conner 439 So. 2d 887 (Fla. 1983). See also Marcoux v. Marcoux, 475 So. 2d 972 (Fla. 4th DCA 1985).

The decision of the Fourth District is in express and direct conflict with this Supreme Court's decision in Shaw, where there was a non-jury trial and the trial judge made findings of fact and entered a final judgment. On appeal, the Third District reversed part of the trial judge's final judgment, and on review, this Court reversed, with instructions to reinstate the judgment and fact findings of the trial court. The Florida Supreme Court held that the test for reviewing and reversing the fact findings

and judgment of the trial judge, after trial on the merits, is "whether the judgment of the trial court is supported by competent evidence." Shaw, 16. An appellate court can not substitute its judgment for that of the trial court and is not permitted to re-evaluate the testimony and evidence in the record on appeal. Shaw, 16. That is exactly what the Fourth District did in Clarke. Therefore, the Clarke decision is in direct conflict with Shaw.

In Conner, once again, the court of appeal weighed the facts and reversed the judgment by the trial judge. This Court held that the question was an issue of fact, and therefore, in reversing the trial judge, the court of appeal "exceeded the scope of appellate review." Conner, 887. The Fourth District, like the appellate courts in Shaw and Conner, did not apply the correct test and "exceeded its authority" in reweighing the facts, and therefore, there is express and direct conflict and like those cases Clarke must be quashed and the Final Judgment reinstated.

The Fourth District ignored its own case law, which had previously recognized that in reviewing a non-jury trial, the limited scope of appellate review is whether there was evidence to support the trial judge's finding, and therefore, since there was evidence it could not reverse:

> ...So long as there is evidence to support the trial court's finding, appellate courts cannot act as new fact finders in the stead of the trial judge. *Shaw v. Shaw,* 334 So.2d 13, 16 (Fla.1976). As our supreme court points out in *Marcoux,* the error in *Conner* was that the district court acted as a *fact*

finder:

> If a reviewing court finds that there is competent substantial evidence in the record to support a particular award, then there is logic and justification for the result and it is unlikely that no reasonable person would adopt the view taken by the trial court. Under these circumstances, there is no abuse of discretion.
>
> *Marcoux,* 464 So.2d at 544.
>
> In reviewing the record in light of the above, we find that the trial court, as the fact finder, had before it competent and substantial evidence upon which to base its award. Accordingly, we affirm.
>
> Marcoux, 972.

In the present case, the judge wrote an Order several pages long with 34 paragraphs of fact finding, as well as additional rulings in the Order (A 1-3). The Court of Appeal simply substituted its own view of the facts for that of the trial judge, in express and direct conflict with these cases.

When a judge enters a judgment based on competent evidence, there is no abuse of discretion. The abuse of discretion standard also applies to a judge's ruling denying a new trial or rehearing, like the trial judge did below. The Fourth District did not find an abuse of discretion either and Clarke is in effect in conflict with the Supreme Court's recent landmark decision in Brown v. Estate of A.P. Stuckey, 749 So. 2d 490 (Fla. 1999). Brown makes clear the judicial philosophy of the Supreme Court, that the trial judge is present at trial, hears the evidence, observes the demeanor of the witnesses, and is the one

who is supposed to determine matters of sufficiency of evidence. In the present case, the trial judge entered 34 paragraphs of fact findings, and there was no finding by the appellate court that there was no "competent evidence" to support them.

The Clarke decision is in direct conflict with the judicial philosophy of Brown in that the trial judge was present at the non-jury trial and heard the evidence, saw the demeanor of the witnesses, etc., and the court of appeal can not substitute its view of the evidence for that of the trial judge.

The trial judge found that USAA was estopped from asserting misrepresentation because it should have known of the apparent age discrepancy, and that USAA would have discovered the information if it followed its own verification procedures. The court of appeal did not find that there was no competent evidence to support this estoppel, but impermissibly reweighed the evidence.

The danger in allowing Clarke to go uncorrected is that now an insurance salesperson can take information over the phone, never verify or look at any of the information on its computer screens, never send a copy of the information or a written application to the insured, never ask an insured to sign an application, accept premiums for years; and then when an accident occurs, the carrier can go back and try to find some alleged misrepresentation in the alleged oral information given over the phone to the salesperson and never verified by the insured, to cancel the policy ab initio.

To date, there is no case in Florida that has found a

material misrepresentation made over the phone to a salesperson, never verified by the insurance company, and never signed by the insured, can form the basis of voiding a policy. More importantly, no case in Florida has required actual knowledge on the part of a commissioned insurance salesperson in order to avoid the application of the doctrine of waiver or estoppel, when the insurer later claims that the policy was void ab initio. Clarke is in direct and express conflict with Florida law and public policy; it has made bad law; and the Opinion must be quashed and the Final Judgment reinstated.

The proper appellate standard is that if there is competent evidence to support the Final Judgment after trial on the merits, it must be affirmed. The evidence which supported the Final Judgment was:

1. USAA does not only insure officers. It insures taxi drivers; construction workers; high school dropouts; janitors; window washers; dishwashers; secretaries; bartenders; shoe salesmen; waitresses; cashiers; farmers; cooks; factory workers; gas station attendants; college students; tire changers; in short, every type of people in the country.

2. USAA also insures employees of Japanese airlines.

3. USAA insures the family of officers, including ex-wives and grown children, even though they were not in the military, and regardless of the type of work they do. In "take all comers" states they insure everyone who applies, like other insurance companies.

4. There was never any application signed by the Mr. Clarke.

5. USAA did not follow its own procedures which forbids writing a policy without getting a signed application, so it cannot deny coverage for misrepresentation in a non-existent application.

6. USAA's policy does not require a "misrepresentation" to cancel, but requires a "knowing" misrepresentation. There was absolutely no evidence presented that any alleged misrepresentation was "knowing." USAA simply ignored this requirement in its policy.

7. There was absolutely no evidence that Mr. Clarke knew USAA's guidelines for Florida.

8. The evidence was undisputed that USAA did not tell Mr. Clarke USAA's guidelines for Florida.

9. It was undisputed that Mr. Clarke never saw the information on the USAA computer screens in Texas.

10. USAA did not even know who put the information on the computer screens in Texas. In her deposition, a USAA employee, Carol Glatsby, said that the information was put on the computer screens by an eligibility specialist. However, at trial, she reversed her testimony and said she put the information on the computer screens. Then on Motion for New Trial, USAA filed new computer screens into the record that had never been produced before. Therefore, this contradictory testimony by USAA is certainly evidence to support the Judgment for Mr. Clarke after trial on the merits.

11. The trier of fact found that there was evidence on the computer screens by which USAA could have easily determined the Mr. Clarke was not an officer. The information on the USAA computer screen in Texas said that Mr. Clarke was an officer at 17 years old, which was impossible. Therefore, this was also evidence to support the Judgment after the trial on the merits.

12. Carol Glatsby, the USAA employee, testified that she had been given training to evaluate the information on the computer screens.

13. Carol Glatsby testified she knew someone could not be a commissioned officer at age 17.

14. The trial court found that the USAA guidelines provided the earliest someone could be a commissioned officer was age 22.

15. USAA stipulated that its guidelines required it to send a written application to the insured to sign; and after 30 days if it was not received to send a follow-up; and after 60 days to send a second follow-up; and after 90 days to cancel if a signed application was not received.

16. USAA could not show it sent the above letters.

17. It was undisputed that USAA did not receive a signed application, and did not follow its own guidelines, and did not cancel the policy.

18. USAA's guidelines also required that it have an executed Power of Attorney by the insured, or the policy would be cancelled. It is undisputed that USAA did not have one, and did not follow its own guidelines; and did not cancel the policy.

19. In this UM case, USAA gave Mr. Clarke permission to

settle with the tortfeasor, and later denied coverage to Clarke, after he had settled and lost the right to proceed against the tortfeasor, so there was estoppel.

In summary, there was abundant evidence to support the Final Judgment after the trial on the merits and there was no abuse of discretion in finding for Clarke or denying a new trial. The appellate court should have affirmed the Final Judgment, nor substituted its own Judgment.

Any misrepresentation of officer status was clear and obvious on the face of USAA's own computer screen, and USAA did nothing to verify Clarke's eligibility, rather it accepted Clarke's premiums for six years and paid other claims. The trial court found that USAA, in allowing Clarke to settle with the tortfeasor/Trayner, had cut off any future recovery by Clarke. If, in fact, he misrepresented that he was an officer in the Air Force, this was "glaringly apparent" in the computer data and the evidence inferred a deliberate disregard of the information by USAA, sufficient to put USAA on legal notice of the misrepresentation. Based on these facts, the court found that USAA had not sustained its burden of proving that its policy was violated, therefore coverage was available for Clarke. The Fourth District disagreed, but did not find the trial judge's fact finding clearly erroneous or unsupported by competent evidence.

A trial judge sitting without a jury is responsible for reconciling inconsistent and conflicting evidence and her findings thereon will not be disturbed by the appellate court

unless clearly erroneous. Mori v. Matsushita Electric Corporation of America, 380 So. 2d 461 (Fla. 3d DCA 1980); Pokress v. Josephart, 152 So. 2d 756 (Fla. 3d DCA 1963); Hill v. Coplan Pipe & Supply Co., Inc., 296 So. 2d 567 (Fla. 3d DCA 1974); Marsh v. Marsh, 419 So. 2d 629 (Fla. 1982); Strawgate v. Turner, 339 So. 2d 1112 (Fla. 1976); Trace v. Nicosia, 265 So. 2d 88 (Fla. 2d DCA 1972). Further, where a case is tried before a trial judge without intervention of a jury, an appellate court will ordinarily refuse to consider a finding of fact made by the trial judge again, unless it is shown to be clearly erroneous. Vail v. State, 205 So. 2d 536 (Fla. 3d DCA 1968). The Vail court further elaborated on this principle by stating that in testing the accuracy of such conclusions, the appellate court should interpret the evidence and all reasonable inferences and deductions capable of being drawn therefrom in the light most favorable to sustain those conclusions. Vail, supra.

USAA never showed that the trial court's fact findings and rulings were clearly erroneous, or not supported by competent evidence, the standards for reversal and the Final Judgment must be reinstated.

A. USAA not Entitled to Directed Verdict

USAA was wrong in its claim that it was entitled to dismissal or a directed verdict; since the three day trial produced ample evidence to support Clarke's position, especially that USAA was estopped from denying coverage.

In order to grant a motion for a directed verdict, the trial court must determine that there is no evidence to support a

finding for the party against whom the verdict is sought. Marcano v. Puhalovich, 362 So. 2d 439 (Fla 4th DCA 1978); Ranger v. Avis Rent-A-Car System, Inc., 336 So. 2d 467 (Fla. 3d DCA 1976). A directed verdict should not be granted unless, as a matter of law, no reasonable inferences can be drawn from the evidence in favor of the non-moving party. Marcano, 441; See also, Sears, Roebuck & Co. v. McKenzie, 502 So. 2d 940 (Fla. 3d DCA 1987)(directed verdict proper only when record conclusively shows absence of facts or inferences from facts to support a jury verdict, viewing evidence in light most favorable to non-moving party); Alvarez v. Dade County School Board, 482 So. 2d 542 (Fla. 3d DCA 1986)(directed verdict appropriate only when evidence and all reasonable inferences therefrom fail to prove party's case); R.A. Jones & Sons, Inc. v. Holman, 470 So. 2d 60 (Fla. 3d DCA 1985).

The Supreme Court has long held that even where evidence is not conflicting, but permits different reasonable inferences, which will justify a judgment for either party, it is improper to direct a verdict for either party. Bruce Construction Corp. v. The State Exchange Bank, 102 So. 2d 288 (Fla. 1958). Even where the reasonable inferences from the evidence are conflicting, so that such inferences would support a verdict for either party, it is for the fact finder to determine which inferences to accept. Voelker v. Combined Ins. Co. of America, 73 So. 2d 403 (Fla. 1954).

In summary, the trial court could not grant a directed verdict, or new trial, unless there was no evidence to support

the court's fact findings. Therefore, the trial court was correct in denying the Motion for Involuntary Dismissal and the Motion for New Trial, where there were four pages of evidence relied on by the trial judge, in entering a Judgment for Clarke (A 1-3). The Fourth District was not free to simply disagree and reverse the trial judge.

B. No Knowing Material Misrepresentation

The trial judge at the conclusion of the three day trial did not find there was a knowing misrepresentation of a material fact by Clarke. It is important to remember that USAA voluntarily shouldered and requested the burden of proof in this matter, by filing the declaratory relief action, alleging an intentional misrepresentation and fraud. USAA's policy only provided for cancellation when a knowing material misrepresentation is made. A party asserting such fraud must prove its case by clear and convincing evidence. Century Properties, Inc. v. Machtinger, 448 So. 2d 570 (Fla. 2d DCA 1984); Thor Bear, Inc. v. Crocker Mizner Park, Inc., 648 So. 2d 168 (Fla. 4th DCA 1994).

It is important to remember that USAA's sole allegation of any misrepresentation was based on a computer printout called a customer profile screen. It was undisputed that there was no written application or anything in writing from Clarke making this misrepresentation. Rather, the misrepresentation found was based on Carol Glatsby's testimony that the information on Clarke could only have come from Clarke, even though she had no recollection of the conversation and was not even sure she was the person who had typed in the information on the computer

screen.

USAA's policy required that any misrepresentation made by Clarke had to be knowing and material on his part. The "knowing" misrepresentation standard is provided in the USAA policy, which controls over Florida law, which is not as restrictive as the policy. An insurance carrier cannot have a less lenient clause in its policy, and then turn around and attempt to use the more liberal misrepresentation standard contained in § 627.409. Strickland Imports, Inc. v. Underwriters at Lloyds, London, 668 So. 2d 251 (Fla. 1st DCA 1996). Strickland is directly on point and holds that where terms of an insurance policy would void a contract only for intentional misrepresentations, these terms of the insurance policy control over § 627.409, which provides that any misrepresentations even unknowing, innocent, or unintentional would invalidate the contract. Strickland was a case of first impression, but relied on established foreign law to hold that the insurance policy itself controls over what constitutes a basis for cancellation. In the present case, the trial court did not find any knowing misrepresentation of a material fact by Clarke; which is the exact standard required by USAA's own policy; and any argument that any type of misrepresentation would be sufficient for USAA to cancel its policy, is not only factually incorrect, but legally incorrect. Therefore, regardless of all of USAA's lawyer argument on this issue, and this does not change the clear, unambiguous language contained in USAA's policy. It must be applied as the legal standard to determine whether USAA was entitled to cancel coverage.

Strickland, supra.

Furthermore, USAA's provision could be construed to mean either that the insured subjectively knows that his misrepresentation is material to the insurer, or that the insured knows the representation is being made, but not that the representation is objectively material to the insurer. Since USAA's provision is at best susceptible of two reasonable interpretations, the ambiguity in its own policy has to be construed in favor of the insured as a matter of completely established Florida law. National Automobile Insurance Association v. Brumit, 98 So. 2d 330 (Fla. 1957); Ceron v. Paxton National Insurance Company, 537 So. 2d 1090 (Fla. 3d DCA 1989); Petersen v. State Farm Fire and Casualty Company, 615 So. 2d 181 (Fla. 3d DCA 1993); Frontier Insurance Company v. Pinecrest Preparatory School Inc., 658 So. 2d 601 (Fla. 4th DCA 1995).

There was no evidence that he knew that USAA only insured commissioned officers, nor that he intentionally misrepresented this, which under USAA's policy required that the Final Judgment be reinstated.

C. Materiality of Military Status Does not Change the Verdict for Clarke

USAA argued on appeal that since officer status was material, even an unintentional misrepresentations could void coverage, so somehow USAA was entitled to a directed verdict or judgment in its favor. Again, conspicuously absent from this discussion was the fact that USAA's policy only allows cancellation of coverage for intentional or knowing

misrepresentations of material fact. Therefore, the issue of whether the misrepresentation was material or not, was not even a consideration where the trial judge did not find that there was any knowing misrepresentation. If USAA wanted to cancel policies for unintentional misrepresentations, or inadvertent, or unknowing misrepresentations of material fact, it simply had to write a policy which said that. It could have written a policy that tracked the exact language of § 627.409, but it did not choose to do this. All of the grammatical suggestions regarding how Clarke's policy language should be interpreted, are again simply closing arguments, which were rejected by the trial court. It was somewhat disingenuous for USAA to argue that knowingly concealed or misrepresented material facts really means that an unknowing misrepresentation is sufficient to void its policy. The trial court did not find any knowing misrepresentation of a material fact by Clarke. In the absence of such a fact finding, the entire argument by USAA was of no avail. The main reason is that the sentence structure chosen by USAA has at best two reasonable interpretations, rendering the phrase ambiguous; and this ambiguity unquestionably has to be construed in favor of the insured, Clarke; who paid USAA premiums for six years, which premiums USAA retained.

Along the same line, USAA's argument that Clarke had to know that his status as an officer was material to USAA is not based on the Record, where USAA was unable to show that a single piece of information sent to Clarke would indicate that USAA insured only active or retired military officers; especially where USAA

admitted it insured other groups of people, including college students, non-military relations and Japanese airline pilots. The sum and substance of this argument was that officer status was material. However, that does not change the fact that the Final Judgment for Clarke was correct and must be reinstated.

D. USAA's Policy was not Void Ab Initio

USAA argued on appeal that since there was a misrepresentation, this was sufficient to void its policy ab initio and there is nothing for the appellate court to do but reverse and it did. USAA relied on Independent Fire Insurance Company v. Arvidson, 604 So. 2d 854 (Fla. 4th DCA 1992) for the proposition that the mere existence of a misrepresentation is sufficient to void the policy. However, the issue in Arvidson, just like this case, was whether there was a waiver of the material misrepresentation, such that the insurance company was estopped to deny coverage. In that case, the insured listed only herself as a driver and that she was married and wanted insurance for a BMW and a pick-up truck. In fact, she was not married and there were two adult drivers in her household; and these misrepresentations were apparently made so that the insured could also qualify for homeowner's insurance. Arvidson, 855. Subsequently, the insured married one of the adult residents, she notified her agent of the marriage, but said her husband would not be driving. Several months later, the insured's husband was involved in a serious automobile accident. The insurance company began an investigation as to whether there was coverage under the policy and six months later learned that the two adult drivers

had been living in the household at the time of the original application for insurance, but were not disclosed. Independent Fire then filed a complaint seeking recision of the automobile policy, based on the material misrepresentation. The trial court found that the insurance company had waived its right to rescind the policy and this was reversed on appeal. Apparently, the plaintiff's waiver argument in that case was based on actions which should have been taken after the husband's accident; because going back to the time of the application, there was absolutely no evidence that the insurance company had any knowledge of any misrepresentation of the insured's status. Arvidson, 856. Also, since there was absolutely no evidence of any waiver, the court held that her policy was void ab initio. What is important is that in Arvidson the Fourth District did not hold that where, after a three day trial, the judge entered an express finding of waiver, based on the evidence presented at trial, that somehow a misrepresentation still automatically voids the policy.

USAA also relied on Reliance Insurance Company v. D'Amico, 528 So. 2d 533 (Fla. 2d DCA 1988) and Motors Insurance Corporation v. Marino, 623 So. 2d 814 (Fla. 3d DCA 1993) for the theory that any material misrepresentation automatically voids a policy, so there is nothing left for the court to consider. In Marino, the claimants, Mateo and Marino applied for insurance with MIC to cover their new car and a binder was issued. MIC discovered that Marino's license had been suspended and that the claimants had failed to get a preinsurance inspection.

Therefore, MIC sent a notice to them stating it would not accept their request for insurance, but would extend the coverage until May 14, 1991 to allow them to find a new carrier. Five months later, the car was damaged in an accident and they filed suit against MIC for declaratory relief and breach of contract. The alleged insureds moved for summary judgment claiming ineffective cancellation of the policy and waiver of the right to rescind or cancel the policy under § 627.409. Summary judgment was entered in their favor and reversed on appeal; because MIC plead it conclusively established the affirmative defense of misrepresentation in the insurance application, as to the status of Marino's license; and the applicants failure to rebut this complete defense. There was no waiver or estoppel in the case, because MIC's mailed notice was a rejection of the application and not a cancellation of a policy; therefore, there was no lack of compliance by the carrier. Marino, 815. Again, there are no facts in Marino that are even marginally similar to the facts and three days worth of evidence presented at the Clarke trial.

D'Amico bought insurance from Reliance for his boat motor and trailer and the motor was then replaced with one of greater value and horsepower. D'Amico, 534. Subsequently, all three were stolen and he filed a claim against Reliance. Coverage was admitted for the boat and trailer, but not the motor, since Reliance had not been put on notice of the newly acquired motor. D'Amico sued Reliance and a final judgment was entered in his favor, based on the fact that Reliance had the benefit of the premiums paid by D'Amico, which premiums had been calculated

based on the motor listed in the policy. D'Amico, 534. The appellate court found that the replacement motor was not covered because D'Amico had not complied with the notice requirements. Since coverage never existed from the beginning of the policy, because the policy clearly and unambiguously required notice of the replacement or acquisition of a new motor, the new motor was never covered by the policy. D'Amico, 535. The fact that Reliance had accepted the premiums from D'Amico, because of its total lack of knowledge of the changed circumstances, could not be used to create coverage. D'Amico, 535. Obviously, D'Amico has absolutely nothing to do with the present situation. D'Amico is not a case that would require a finding that any material misrepresentation voids the policy ab initio and the Plaintiff's own cases do not even stand for that legal theory. Rather, in Arvidson and Marino, the courts expressly found that the theories of estoppel and waiver did not apply based on the complete lack of evidence in those cases to support those theories. Therefore, USAA was simply wrong in arguing that if there is a material misrepresentation, this automatically voids a policy and there is nothing else for this Court to consider. Rather, the trial judge found that USAA was estopped to deny coverage, based on three days of trial and a wealth of evidence; finding that USAA did not present clear and convincing evidence that it was entitled to cancel its policy. The Declaratory Judgment for Clarke must be reinstated.

E. USAA Failed to Show by Clear and Convincing Evidence That the Theories of Waiver or Estoppel Did Not Apply Based on the Evidence at Trial.

To begin with, it would be virtually impossible for USAA to meet its burden of proof by clear and convincing evidence, that it had not waived the right to deny coverage, or was estopped from denying coverage; where USAA repeatedly stipulated that it failed to follow its own thoroughly established procedures, which would have, within 60 days of Clarke's application, verified he was not a commissioned officer and his policy would have been cancelled automatically. This stipulation on the failure to follow-up with its own procedures, addresses the fact that USAA had a mandatory procedure of sending out, at 30 and 60 days, subsequent to the receipt of an application for insurance, the eligibility certificate and power of attorney; both of which needed to be signed and returned by the insured within 90 days of the application; or the policy was automatically cancelled. While there may be no requirements, statutory or otherwise, for USAA to have such a procedure, in fact USAA did have one and admittedly did not follow it. USAA could not even explain why the two absolutely essential documents for eligibility were never sent to Clarke; nor did it have any explanation why the policy was not automatically cancelled when the documents were not returned by Clarke within the 90 day period. It is important to remember that due to the nature of the USAA company, it can only act through a signed power of attorney from each of its members; and it must have a signed certificate verifying the application

is a commissioned officer. Therefore, under established Florida law, where USAA deliberately disregarded information sufficient to establish the misrepresentation, based on its own verification procedure; and additionally failed to even check the "glaring" discrepancy in the information contained in its own data, there was no doubt that USAA waived the right to rely on any misrepresentation and it was properly estopped from denying coverage.

USAA relied on its own Exhibit #9, which was a computer sheet of a data screen, which showed Clarke's age and his alleged date of commission; which would have made him an officer at age 17. The two dates even involve the same month, which make the subtraction easy. Glatsby admitted that she had been trained to know the ages of officers, the youngest of which was 22, and no one for USAA could testify that any insured commissioned officer existed at age 17. This discrepancy was "glaringly apparent." Clearly the evidence that USAA trained its representatives in knowing these various ages and categories, showed the information was important to USAA. It was not some esoteric, complicated mathematical calculation having nothing to do with the insurance, as USAA claimed.

The trial court relied on Johnson v. Life Ins. Co. of Georgia, 52 So. 2d 813 (Fla. 1951) for several principles that are directly on point with the situation in the present case. In Johnson, the wife, as a beneficiary, filed for benefits based on the death of her husband. The insurance company answered, stating that misrepresentation in the applications regarding the

health of the insured breached the contract and the company simply was limited to returning premiums and the payment of no benefits. Johnson, 814. Apparently, Mr. Johnson had been undergoing medical care two years prior to the date of the issuance of the policy and after the policy was issued the insured went into a tuberculosis sanitarium two months later. The agent continued to collect premiums, with the knowledge of the insured's tuberculosis condition; and tuberculosis was the cause of his death. As it was uncontroverted that the insurance agent had actual knowledge of the insured's condition two months after the policy was issued, both sides moved for summary judgment, which was then entered for the plaintiff, but only for the amount of premiums. The plaintiff appealed in order to recover the full face value of the life insurance policy. Johnson, 814-815. The exact issue was whether the facts showed a waiver, which would require reversal of the summary judgment below. The Supreme Court began by noting that forfeitures of rights under an insurance policy are not favored in the law, especially where a forfeiture is sought after a happening of the event, giving rise to the insurer's liability. Johnson, 815. Of course that is exactly what happened in this case where Clarke was insured in 1988; the accident occurred in 1989; USAA allowed Clarke to settle with the tortfeasor for $15,000, on the basis that he could recover the rest under his UM policy with USAA; and then in 1995 USAA denied coverage.

The next principle announced by this Court was that it was equally as well settled; almost 50 years ago; that when an

insurer has knowledge of the existence of facts justifying a forfeiture of the policy, any unequivocal act which recognizes the continued existence of the policy will constitute a waiver. Johnson, 815. Clearly continued acceptance of premiums and payment of claims by USAA constituted such a waiver; not to mention giving permission to Clarke to settle with Traynor, so he could receive the rest of his damages from his own UM carrier.

The lower court expressly relied on the following third legal principle announce in Johnson:

> ...While, ordinarily, the insurer is not deemed to have waived its rights unless it is shown that it has acted with the full knowledge of the facts, the intention to waive such rights may be inferred from a deliberate disregard of information sufficient to excite attention and call for inquiry as to the existence of facts by reason of which a forfeiture could be declared. See Zeldman v. Mutual Life Ins. Co. of New York, 269 App.Div. 53, 53 N.Y.S.2d 792, 794, in which it was stated that "Constructive notice may, however, be the legal equivalent of knowledge, in the sense that circumstances putting the insurer on notice may not be deliberately disregarded."
>
> Johnson, 815.

The life insurance company in Johnson had knowledge of the fact that the insured was suffering from tuberculosis only two months after the date of the issuance of the policy; and instead of making a further inquiry dictated by reasonable prudence, the carrier deliberately disregarded the information. Therefore, it had to be charged with the knowledge of the facts which would have been revealed by the inquiry. In addition, the acceptance and collections of the premiums, with the constructive notice of

the facts, was an unequivocal act which recognized the continued existence of the policy, wholly inconsistent with a forfeiture. Johnson, 815. The Supreme Court observed:

> ...And we agree that, in equity and good conscience, an insurance company should not be permitted to lull the assured into a false sense of security by accepting premiums after knowledge, either actual or constructive, of facts sufficient to avoid the policy, and then when the risk eventuates assert as a basis for escape from liability the existence of facts or conditions of which they were, or should have been, previously aware.
>
> Johnson, 816.

In the present case, not only did USAA keep collecting premiums, where it had actual, or at least constructive knowledge, of the facts that would void the policy; it paid other claims presented by Clarke; it admitted coverage in the present case when Clarke sued the tortfeasor; it authorized settlement by Clarke with the tortfeasor; and then, it declared the policy void. These circumstances alone supported by uncontroverted evidence, established as matter of law, a waiver by USAA, of the forfeiture provisions of the policy and the Final Declaratory Judgment has to be affirmed. Johnson, 816.

USAA argues that it had no constructive knowledge or any knowledge whatsoever regarding the misrepresentation; ignoring the fact that on the very computer sheet entered in evidence, as Plaintiff's Exhibit #9, all three segments of the computer data sheet showed Clarke as a commissioned officer at age 17. The new member representative Glatsby testified she was trained in looking at the various ages for commissioned officers, the

youngest of which was 22. USAA even tried to argue that it was possible to have the commissioned officer at 17, so there was glaringly apparent misinformation; and because Audie Murphy and George Bush were commissioned officers at 18 years of age and back in 1955 young men could enlist younger than 17. Of course, the application was not in the name of Audie Murphy nor George Bush, nor was there any explanation by USAA why the 17 year old commissioned officer's status listed on USAA's data sheet still did not put it on notice that there might be a misrepresentation.

Furthermore, USAA had a completely set procedure since eligibility as a commissioned officer was a prerequisite; the applicant had to fill out and return the eligibility certificate verifying his military status, as well as a power of attorney, in order for the insurance company to even function, since it is a private organization and not a regular insurance carrier. In fact, USAA's procedure required that these two documents be sent out within 30 days, along with a copy of the application, and again within 60 days; and if not returned in 90 days there was an automatic cancellation. Once again, the lack of receipt of the mandatory eligibility certificate and power of attorney alone, should have excited the intention of USAA and called for an inquiry; if not an automatic cancellation of the policy. Therefore, under the admitted definition of constructive knowledge used by USAA; which is a deliberate disregard of suspicious information; the misinformation below did border on actual knowledge, as all the information USAA needed to refuse coverage to Clarke, appeared on the application typed by Glatsby

into the USAA computer. Again, actual knowledge of a misrepresentation, plus the failure to receive back the eligibility certificate and power of attorney, simply cemented the fact that USAA disregarded, deliberately, the information sufficient to call for an inquiry of Clarke's application.

The pages of lawyer arguments by USAA, that the trial court decided the case wrong, were the same arguments contained in the Motion for Rehearing/New Trial, which were also rejected by the trial court. It was not the duty or right of the appellate court to reweigh the facts found by the trial judge. USAA was limited to a closing argument, because it failed to show clear and convincing evidence to support intentional misrepresentation and fraud in the trial court; and because it could not even come close to showing that the Final Declaratory Judgment was clearly erroneous; and it must be reinstated.

It is also important to note that, in the cases relied on by USAA, there was nothing at the time of those written applications, to put the carrier on notice of any misrepresentation; which is the single most important distinguishing factor between this case and those relied on by USAA. In Arvidson, supra, the claimant said she was married and lived alone. There was nothing on her application to indicate anything different. Along the same lines, in North Miami General Hospital v. Central National Life Insurance Company, 419 So. 2d 800 (Fla. 3d DCA 1982), the physical appearance of the insured was not enough to put the company on constructive notice that further medical care was necessary. Again, in Highway Insurance

Company v. Peterson, 186 So. 2d 48 (Fla. 1st DCA 1966), the material misrepresentation had to do with the age of drivers, where the applicant said that no one under 25 drove the vehicle and there was no way for the company to know that anyone under 25 was driving the vehicle. Finally, in New York Life Insurance Company v. Kay, 251 So. 2d 544 (Fla. 3d DCA 1971), there was a misrepresentation that the insured was 53, when he was actually 63. There was nothing at the time of the taking of the written application that would put the carrier on notice that further inquiry was required. Again, the single most important piece of information obtained by USAA on its application is whether the applicant is a commissioned officer. For USAA to claim that this was a "pedestrian" piece of information, which would not cause it to inquire further; when its application shows that the officer was commissioned at age 17; flew in the face of USAA's argument that commissioned status was critical to USAA; and also flew in the face of its argument that the three-part follow-up procedure to confirm commission status, should not in any way impose any duty to investigate on USAA.

It is interesting that USAA also claimed that the fact it waived its subrogation rights was of absolutely no importance whatsoever, when it authorized Clarke to accept the tortfeasor's $15,000 policy limits, where Clarke had a claim against his $300,000 in UM coverage. It was not just USAA that waived its subrogation rights, but Clarke too limited his recovery to $15,000 from the tortfeasor, relying on the fact that USAA had admitted coverage for the accident and he could obtain up to

$300,000 in underinsured motorist benefits from his policy, for the severe and permanent injury he sustained in the accident.

USAA convinced the Fourth District that the trial judge weighed the facts wrong, claiming it had no constructive knowledge of any misrepresentation; there was no waiver on its part; the fact that it stipulated that it did not follow its own procedures, which would have confirmed the misrepresentation within 30 days, was irrelevant; and that it was not its fault that it authorized Clarke to settle with Trayner for $15,000, when it then turned around and denied the $300,000 in UM coverage. This was all lawyer argument, not based on the Record, but the Fourth District agreed and did its own fact finding creating direct and express conflict. Neither USAA, nor the appellate court showed that the trial judge was clearly erroneous and could not point to any evidence that established below, under the clear and convincing standard, that the Fourth District had the right to void Clarke's policy ab initio.

Finally, the fact that USAA retained Clarke's premiums for six years; paid his prior claims; Clarke relied on USAA's authorization in limiting his recovery to $15,000 against the tortfeasor; and he relied on USAA's admission of coverage, when he sued it for $300,000 in UM benefits, establishes any necessary, detrimental reliance to estop USAA from denying coverage. Crown Life Insurance Company v. McBride, 517 So. 2d 660 (Fla. 1987).

Where USAA failed to show by clear and convincing evidence that there was an intentional material misrepresentation on the

part of Clarke, of which USAA had no active or constructive knowledge, the Judgment after the non-jury trial should have been affirmed. Where the Fourth District did a de novo review, without finding a lack of competent evidence, it erred as a matter of law in reversing the judge's finding. Clarke must be quashed, as it applied he wrong legal test and under the right test the Judgment below must be reinstated.

CONCLUSION

After trial on the merits, the trier of fact weighed the evidence and entered Final Judgment. There was abundant competent evidence to support the Final Judgment after the non-jury trial on the merits. Therefore, the Fourth District's de novo review and reversal must be quashed, as it is in direct and express conflict with the test in Conner, Shaw, Marcoux and Brown and the Final Judgment of the trial of fact must be reinstated.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 20th day of March, 2001 to:

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