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

REPLY BRIEF OF PETITIONERS ON THE MERITS

EUGENE FRANCIS CLARKE and
PHYLLIS CLARKE, his wife

(With Appendix)

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REPLY ARGUMENT

USAA's Brief arguing extensively about the evidence makes clear that there was disputed evidence and, therefore, the trier of fact was the proper entity to decide the evidence.

This case involved a non-jury trial with several days of testimony and after reviewing all the conflicts in the evidence the trial court issued 35 paragraphs of findings of fact, and then held there was coverage (R 829-835; A 4-10). The 19 pages of conflicting evidence in the Respondent's Brief cements Clarke's position that the judge resolved the conflicting facts with extensive fact findings, then, based on the factual determination, found USAA was estopped from denying coverage. USAA concedes that these factual determinations can not be reversed by the appellate court, unless it finds them to be "clearly erroneous." No such finding was made by the Fourth District; which just disagreed with the judge's fact finding that the misrepresentation, about military status, was "glaringly apparent" in USAA's records, and the conclusion from that finding of fact that USAA was legally estopped from denying coverage. United Services Automobile Association v. Clarke, 759 So. 2d 554 (Fla. 4th DCA 2000). The Fourth District expressly did an impermissible de novo review of the facts, after a non-jury trial and the Opinion must be quashed and the judge's Order reinstated.

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

the cases USAA relies on establish this standard and verify that the Fourth District could not reverse the trial judge's Order, which was based "on probative disputed facts," as it was conclusively correct. Holland v. Gross, 89 So. 2d 255 (Fla. 1956); In re Estate of Donner v. Anton, 364 So. 2d 742 (Fla. 3d DCA 1978)(appellate court cannot disturb judge's fact findings unless they are totally without any substantial evidentiary support); Anderman v. Miller, 359 So. 2d 472, 474 (Fla. 3d DCA 1978)("upon appellate review, the record and findings of the trial judge will be presumed correct..."); Tollius v. Dutch Inns of America, Inc., 244 So. 2d 467, 472 (Fla. 3d DCA 1970)("Equity Abhors forfeitures;" where all material facts are admitted on the issue of waiver or estoppel, it then becomes a question of law and no jury trial is required); Camp v. Moseley, 2 Fla. 171 (1848)(estoppel has been extended and receives a liberal, enlarged and enlightened construction, and the technicalities incident to estoppels are giving way to considerations of reason and practical utilities; the acts or admissions of the party operate in the nature of estoppel); see also, Coogler v. Rogers, 25 Fla. 853, 7 So. 391, 394 (1889)(admissions arising from the demeanor and conduct are conclusively against the party, where he has received a benefit therefrom or prejudiced another, and admissions may be presumed not only for the declarations of a party, but from his acquiescence or silence, and a failure to contradict a particular right amount to a prima facie admission of such right, estopping the party from later denying the existence of that right).

The disputed facts must be taken in the light most favorable to the winner at trial, Clarke, and not the Fourth District's opposite fact finding. USAA's argument is that it can have its salesperson take information over the phone, type it in on a computer, ignore it and not verify it; handwrite information on an application; and not mail it to the insured to verify and sign; and also completely ignore three follow up procedures to verify the written application and the computer draft, but still void a policy.

What happened, based on the testimony of Glatsby, USAA's sales person was that she spoke with Mr. Clarke on the phone and as she spoke with him she typed in the military information on the first computer screen; with this military information she determined eligibility and issued a policy number to Mr. Clarke, she then clicked to the second screen and took the remainder of the information, she then hit "enter," and the "final product" was Plaintiff's Exhibit 9 showing both Clarke's date of birth and date of commission in a single paragraph and on a single computer screen (T 54-57; 70). They were not side by side, but rather they were in the middle of one line and underneath to the right on another line in the same paragraph (A 1). Glatsby then filled in by hand, USAA's two page written application form which again asked for Clarke's date of birth; and she wrote in all the relevant information regarding his automobiles, etc.

This written but unsigned, application in the handwriting of Glatsby, was the Plaintiff's Exhibit A at trial and Exhibits 7 and 8 to the deposition of Glatsby (T 47-49; 59; 60; 70; A 2-3).

A copy of this written application was then given to a USAA technician, who completed the computer information, by typing onto the computer screen everything that was handwritten by Glatsby (T 60-61). Therefore, based on the testimony at trial, at least two people at USAA did see this information, contrary to what USAA claims. Therefore, there is evidentiary basis for the trial court's finding that this was apparent.

USAA is also incorrect when it repeatedly says it did not require a written, signed application; it did. The original written application was supposed to be sent to the insured for verification and to be signed as required by USAA's procedures. USAA's procedure was to send out three documents, which had to be signed by the insured to verify the application and returned; the original handwritten application, the eligibility certificate and the power of attorney (T 70-71). If these three documents were not returned after 30, 60 and 90 days, the policy was supposed to be automatically canceled. The evidence in this case is that these documents were never sent to Clarke. Nonetheless the policy was not canceled and Clarke paid premiums for six years. USAA stipulated that if it had followed its own procedures in relation to the three documents, USAA would have canceled the policy early on (T 90). The specious argument by USAA that it does not require written applications flies in the face of its own testimony at trial (T 71). Its procedure is to obtain a signed, written application from the insured, just like every other insurance company and as Clarke correctly stated, it failed to have him sign one. The legal issue therefore was whether a

company can cancel a policy without having a signed written application when its own procedures require it to have one, and based solely on information obtained over the phone by a salesman, which information contains a "glaringly" apparent misrepresentation and no verification in writing whatever; and the answer must be "no."

Moreover, this is a factual matter which is supposed to be determined by the trier of fact.

The key issue on the appeal is that the Fourth District's factual conclusion that the commission age discrepancy was not apparent and did not call attention to the situation, was in direct conflict with the fact finding made by the trial court. This was not a legal determination, this was a factual determination. The legal determination was that USAA was estopped from denying coverage based on the disputed facts as determined by the trial court; which facts were impermissibly vetoed by the Fourth District; causing the direct and express conflict.

It is important for this Court to affirm the rule that when a judge holds a non-jury trial, and the facts are hotly contested like they were in this case, the judge's findings of fact are presumptively correct, and the judge's factual determinations cannot be reversed unless it is conclusively shown to be without any evidentiary support whatsoever. Even USAA's cases hold this and require that the Fourth District's Decision be quashed and the Final Judgment for Clarke reinstated.

The trial court heard all the evidence and 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...". Clarke, 552. Therefore, it is as clear as can be that the Court of Appeal substituted its view of the evidence for that of the trial judge. It did not make a different legal finding based on some undisputed facts. The appellate court 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, as admitted by USAA in its Brief.

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 salesperson, who did not follow her company's procedure which required that the insured be sent the original of the handwritten application, to be signed, along with an eligibility certificate and a power of attorney to be signed.

While the carrier argues throughout the Brief that there is no rule requiring a written application from Clarke, and USAA had no such rule, this too was an express, contrary fact finding by the trial court, in paragraph 27, based on USAA's admission that a written application was required and not obtained (R 829-835; T 70-71; A 7).

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 to support the judge's findings," 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, after a non-jury trial consisting of days of disputed evidence. The Opinion below must be quashed and the Final Judgment for the insured reinstated.

Not only does USAA agree with the correct standard of review for an appellate court, but it actually gives this Court five more cases, which hold the same exact thing and are in conflict with Clarke. Therefore, there can be no question that the decision in Clarke, which did not apply the right law, is in direct and express conflict with Conner v. Conner, 439 So. 2d 887 (Fla. 1983); Shaw v. Shaw, 334 So. 2d 13 (Fla. 1976); Marcoux v.

Marcoux, 475 So. 2d 972 (Fla. 4th DCA 1985); and Brown v. Estate A.P. Stuckey, 749 So. 2d 490 (Fla. 1999). See also, Holland; Camp; In re Estate of Donner; Anderman; Tollius; supra.

USAA attempts to avoid reversal by arguing that everything contained in the Fourth District's opinion are conclusions of law, based on undisputed facts and therefore reversal by the Fourth District of the non-jury trial determinations was proper. No matter how USAA tries to gloss the Fourth District's Opinion, the Fourth District could not possibly have ruled that there was no estoppel, as a matter of law, because that type of determination can only be made based on undisputed facts. Tollius, supra. Virtually every fact in this case was disputed, as evidenced by the 19 pages of conflicting facts presented by USAA. Clarke was an improper review of disputed facts, after a non-jury trial, and no matter how USAA tries to reframe the case, what the Fourth District did was in direct and express conflict with the standards of review set out by this Court, in cases cited by both the Petitioner and Respondent. Because USAA has no way to get around the erroneous appellate fact finding, it argues everything else to convince this Court that the different result of the Fourth District was still right. To this end, the bulk of the Brief of USAA argues that there was a material misrepresentation, voiding USAA's policy, under § 627.409, Fla. Stat. (1995). To begin with, the trial court did not find that Clarke made a knowing or intentional material misrepresentation and USAA never even acknowledged its own more stringent policy:

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
> 3. in connection with the presentation or settlement of a claim.
>
> (R 808-809).

The Fourth District found that there was a misrepresentation which was material and thus USAA was entitled to void the policy under § 627.409(a) and (b).

Once again, as correctly stated, no law in Florida holds where the carrier admits it has no written, signed application, then the appellate court, de novo, finds no coverage based on an oral statement, that this is sufficient to ignore the express policy language and the policy can be voided under § 627.409. On appeal, USAA argues a material misrepresentation under the statute sufficient to void the policy. However, both USAA and the Fourth District failed to explain how the statute can be applied, when the policy itself has a stricter standard for voiding a policy; requiring not just a material misrepresentation, but a knowing, material misrepresentation. 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 more restrictive 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, neither the trial court, nor the Fourth District, found 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, 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 and under this law which is directly on point, USAA was not entitled to cancel Clarke's policy. Like much of the relevant case law cited by Clarke, Strickland is totally ignored by USAA. That is because it cannot explain it away, nor can it justify the direct conflict between Strickland and Clarke. The Fourth District used the wrong law to hold the opposite of the trial court and to reach the result it wanted. Florida law cannot be ignored, just

because the appellate panel does not like the result at trial. Rather the law on point controls. Here the law that applies is that the policy language chosen by USAA controls over any contrary or different provisions in § 623.409. Strickland, supra; Carter v. United of Omaha Life Insurance, 685 So. 2d 2 (Fla. 1st DCA 1996).

USAA argues that the appellate court was right in determining that the incorrect information, or the material misrepresentation regarding the commission date was not apparent and there was no actual knowledge on the part of USAA, and therefore, it could void the policy. To begin with, it is important to remember the salesperson, Ms. Glatsby, took all the information from Clarke in a single phone call on the first computer screen, typed his birthdate; on the next computer screen typed his commission date, she clicked enter once to create the "final product," which was the paragraph containing both dates and she filled out, in her own handwriting, an application form, again taking Clarke's birthdate. She also testified if someone came to her and told her they went through officer candidate school and became a commissioned officer at the age of 17, she would not believe them (T 82). She testified that she received training about ages and various ranks and when they are obtainable in the military, in order to determine eligibility and the youngest anyone at USAA knew someone to become a commissioned officer was at age 22, not 17 (T 81-84; 465-481). Glatsby admitted there was not a single form or anything written anywhere that indicated that Clarke had told anyone at USAA that he was a

Captain in the Air Force. Glatsby admitted that on the written application that she filled in herself, was a box where rank could have been filled in and she did not write Captain on the application form that she filled out during the same phone call, where she allegedly typed Captain on the computer screen just moments before (T 86-90). USAA's new, after-the-fact argument on appeal, that it never required any written applications from any of its insureds is just plain wrong; and in total conflict with the testimony of its own senior salesperson, Glatsby. USAA is wrong that no one at USAA ever looked at the customer data screen, which Glatsby herself testified she created and was later completed by a second employee, with the handwritten applications from information.

In other words, USAA argues that as long as USAA had no requirement for a written, signed application and as long as the salesperson for USAA claimed she never reviewed any of the information taken over the phone, it is entitled to cancel anybody's policy. Even if this Court were to accept the erroneous facts argued by USAA, it is respectfully submitted that an insurance company simply cannot stick its head in the sand and argue that it can rely on what its own salesperson says, does not have to have any written application signed by the insured, and it never has to view its own computer data or handwritten data, allegedly memorializing oral representations, but the carrier is still free to accept six years of premiums and then turn around and cancel the policy.

The trial court found, based on the conflicting evidence

presented at trial that it was "glaringly apparent" when looking at the information that a 17 year old cannot be a commissioned officer. The trial court found that the facts established that USAA had constructive knowledge of the misrepresentation; and the fact showed that USAA never followed its own procedures for verifying the oral information taken over the telephone. Applying Johnson v. Life Inc. Co. of Georgia, 52 So. 2d 813 (Fla. 1951), the insurance company had waived its right to invoke a forfeiture of the insurance policy. To avoid the application of Johnson, USAA argues that it can ignore the information it has, because the misrepresentation is not "glaringly apparent" (a pure question of fact). It makes a specious argument that it does not require a written application from its insureds, nor does it have to verify alleged oral information recited by its own salesperson. Therefore, it had no actual knowledge of any misrepresentation and was free to cancel the policy at will. USAA insists that Glatsby never looked at the computer screen she created and had no constructive or actual knowledge of the misrepresentation on the computer screen. This was just another fact question decided by the trial court against USAA.

Moreover, in Johnson, the court held that intent to waive the right to forfeiture can be inferred from a "deliberate disregard of information sufficient to excite intention and call for an inquiry as to the existence of facts by reason of which a forfeiture could be declared." Johnson, 815. Literally, where USAA repeatedly argues that because Glatsby did not look at the computer screen she created and no one at USAA ever looked at

this "final product" customer data screen; and because USAA never sent the original written application to Clarke to sign; nor the eligibility certificate; nor the power of attorney to sign; at the very least, this would seem to be more than sufficient evidence of a deliberate disregard of information to invoke the doctrine of estoppel and prevent USAA from voiding the policy. Johnson, supra.

USAA argues that there was no actual knowledge of the material misrepresentation; and the Fourth District agreed, finding that there were no factual circumstances sufficient to put USAA on notice of the true facts; even though the trial court had expressly made a fact finding exactly the opposite. Not only did USAA's salesperson see and/or disregard the information on the computer screen, it also disregarded its own procedures, another factor taken into consideration by the trial court, in finding USAA was estopped from denying coverage. Had someone looked at the screen, it would have been glaringly apparent that a 17 year old is not a captain in the Air Force, even back in 1955. Had USAA followed the 30-60-90 day procedure for verification and cancellation, the policy would have been canceled, as USAA stipulated. The original written application was not sent to Clarke to sign, nor was the eligibility certificate or power of attorney. Once again, USAA's disregard of all these procedures was sufficient under Johnson for the application of estoppel.

However, for the purposes of this appeal, what is important is that the Fourth District made its own fact finding; that there

was no actual knowledge on the part of USAA; and made a fact finding that the information was not disregarded; and made a fact finding that the information was not glaringly apparent; and therefore concluded that the wrong case law, from Johnson, was applied by the trial court to the Fourth District's facts and reversed.

Not one of the conflict cases are even discussed by USAA, rather it presents six more cases that further establish conflict. Jurisdiction exists, based on the conflict, which even USAA proved to this Court. Clarke must be quashed and the Order and Final Judgment below reinstated.

CONCLUSION

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 3rd day of August, 2001 to:

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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.

INDEX TO PETITIONERS' APPENDIX