IN THE FLORIDA SUPREME COURT

CASE NO.: SC03-1598
L.T. NO.: 4D01-4892

FLORIDA MUNICIPAL
INSURANCE TRUST

Petitioner,

vs.

VILLAGE OF GOLF

Respondent.

_____/

ANSWER BRIEF OF RESPONDENT, VILLAGE OF GOLF

KENNETH G. SPILLIAS
Florida Bar No. 253480
KEVIN S. HENNESSY
Florida Bar No. 0602558
ERIC ASH
Florida Bar No. 0976891
Lewis, Longman & Walker, P.A.
1700 Palm Beach Lakes Blvd.
Suite 1000
West Palm Beach, FL 33401
Telephone: (561) 640-0820
Counsel for Respondent,
Village of Golf

CERTIFICATE OF INTERESTED PERSONS

Appellee certifies that the following persons and/or entities have or might have an interest in the outcome of this appeal.

Eric Ash, Esquire – Counsel for Respondent, Village of Golf

Michael T. Burke, Esquire – Counsel for Petitioner, Florida Municipal Insurance Trust

Florida Municipal Insurance Trust – Petitioner

Florida League of Cities, Inc. – Petitioner's Third Party Administrator

Kevin S. Hennessy, Esquire – Counsel for Respondent, Village of Golf

Johnson, Anselmo, Murdoch, Burke & George, P.A. – Counsel for Petitioner, Florida Municipal Trust

Lewis, Longman, & Walker, P.A., Appellate Counsel for Respondent, Village of Golf

Honorable Timothy P. McCarthy – 15th Judicial Circuit Court Judge

Tamara M. Scrudders – Counsel for Petitioner, Florida Municipal Insurance Trust

Kenneth G. Spillias, Esquire – Counsel for Respondent, Village of Golf

Village of Golf – Respondent

TABLE OF CONTENTS

PAGES

TABLE OF CITATIONS

Cases

Rules

PRELIMINARY STATEMENT

Petitioner, Florida Municipal Insurance Trust, was the Defendant and Respondent, Village of Golf, was the Plaintiff in the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida. In this brief, Petitioner shall be referred to as "Defendant" or "FMIT" and Respondent will be referred to as "Plaintiff" or "VOG".

The symbol "R" followed by the appropriate volume and page number shall refer to the Record on Appeal and the symbol "T" shall refer to the transcript of trial proceedings which is contained in Volumes V through IX of the Record on Appeal.

ISSUES PRESENTED

I. WHETHER THIS COURT SHOULD DECLINE JURISDICTION BECAUSE THE FACTS OF THIS CASE ESTABLISH ESTOPPEL WITHIN WELL-DEFINED PRINCIPLES OF LAW BY WHICH INSUREDS AND INSURERS ALIKE HAVE BEEN GOVERNING THEIR CONDUCT FOR AT LEAST OVER 20 YEARS AND WHICH NEED NO FURTHER EXPLICATION BY THIS COURT?

II. WHETHER THERE EXISTS ANY BASIS IN LAW OR FACT, ESPECIALLY IN THE FACTS OF THE PRESENT CASE, TO PRECLUDE THE APPLICATION OF THE DOCTRINE OF ESTOPPEL TO AN INSURER'S PRE-COMPLAINT CONDUCT WHERE THE ELEMENTS OF ESTOPPEL ARE PLEAD AND PROVED?

III. WHETHER EVIDENCE OF DETRIMENTAL RELIANCE AND PREJUDICE WAS PRESENTED BY THE PLAINTIFF TO THE JURY TO SUPPORT THE JURY'S VERDICT ON THE ISSUE OF ESTOPPEL?

STATEMENT OF THE CASE AND THE FACTS

The Defendant's statement of the case and the facts includes some inaccuracies

and some significant omissions. Plaintiff, Village of Golf, submits that the following statement of the case and facts accurately presents the relevant and necessary information for this Court to make a proper determination of the issues presented, as presented to the jury and to the Fourth District Court of Appeal.

As of October 11, 1994, the Defendant, FMIT, insured the Plaintiff, VOG, under a renewable indemnity agreement which had existed for years and that provided coverage from October 1, 1994 to September 30, 1995. (R. I, 117; T. 21, 171-172; Pl. Ex. 2). On that date, a chlorine gas leak occurred at VOG's water treatment plant resulting in a cloud of chlorine gas which covered properties adjacent to and in the vicinity of the water treatment plant. One of those properties was the DuBois farm located west of Military Trail. (R. I, 118; T. 21, 164-165, 167-168, 211-213).

As soon as the leak was contained and the "all clear" was given by the emergency response personnel, the Village Manager, John Mosher, contacted FMIT, the Village's insurer, spoke to a Ms. Tews and Mr. Roger Hagood and notified them of what had occurred. FMIT told Mosher that they would be handling any claims arising from the chlorine incident, instructed him to collect any claims and bills and set up a procedure for processing them. Almost immediately FMIT retained West Palm Beach attorney George P. Roberts to represent the Village in connection with claims and potential claims arising from the chlorine gas leak and further retained Greg Gibson of the Insurance Servicing and Adjusting Corporation to investigate the matter on behalf of the insurer and to serve as a local field adjuster. Mr. Gibson's assignment was to investigate and resolve potential claims arising from the gas leak and, pursuant to the terms of the contract, complete control of the matter was turned over to the

insurer, FMIT, and its representatives. (R. I, 118; T. 21-22, 170-174, 182, 186; Pl. Ex. 2, p. A-2).

As Gibson described his role at trial, he was hired (despite having had no prior experience handling environmental claims or claims for crop damage losses) to determine the cause of the incident, if there was any damage, and if FMIT had any responsibility for claims. (T. 241, 243, 246-247).

[1] According to attorney Roberts, he was hired to provide VOG with legal services, to make sure that nothing was done that might prejudice the rights of VOG at a later point in time (by, for example, editing drafts of reports prepared by VOG to avoid harmful admissions), to attend the investigation of the claim and to take care of legal issues as they came up, to provide a report on his assessment of VOG's potential liability for claims, to focus on liability and "to preserve the liability situation for the Village," (see footnote 1, *supra*) and, if a lawsuit was filed, to defend the Village in the litigation. (T. 243-247, 597, 605-606, 609, 628-629; Pl. Ex. 16). Attorney Roberts, who in the previous ten (10) years had been hired by FMIT as many as one hundred (100) times, also testified that in his twenty five (25) years of experience, it was very unusual for an insurer to retain him immediately after an incident and before suit was filed. (T. 216, 601-602, 640).

Within a couple of days of the incident, meetings occurred at VOG and at Jones Chemical, where the tank that leaked had been removed. These meetings were attended by Mosher, other representatives of the Village, representatives of Jones

[1] This testimony of FMIT's own adjuster is directly contradictory to the position FMIT has taken that determination of coverage occurs only "after" a lawsuit is filed.

Chemical and Gibson and Roberts. (T. 174-175, 242-243, 598-600, 602-604). Around this time, Mosher was also instructed to gather all bills submitted for damages and send them to Gibson who would forward them to FMIT for payment. As of October 20, 1994, it was Mosher's understanding that FMIT was going to pay all claims. (T. 176-179; Pl. Ex. 150, 152, 181). In fact, FMIT did pay claims of approximately $20,000.00 for damages arising out of the chlorine gas leak. (R. I, 118; T. 22, 193-195, 206, 217-219, 247-248, 609-610).

By letter dated October 17, 1994, six (6) days after the chlorine gas leak, attorney Raymond W. Royce, representing DuBois Growers, Inc., notified VOG that DuBois had discovered early indications of pepper plant damage resulting from the chlorine gas leak and placed VOG on notice that DuBois intended to hold it responsible for any and all damages incurred as a result of the explosion (evidence ignored by FMIT in its brief and arguments). Upon receipt by John Mosher, this letter was faxed to Roger Hagood at FMIT. (R. I, 118; T. 22, 183-185, 188, 225, 248-249, 336; Pl. Ex. 14). Ultimately, on or about November 2, 1995, almost thirteen (13) months after the chlorine gas leak, DuBois served VOG with a complaint for damages to its crops demanding $1,870,000. On November 14, 1995, FMIT notified VOG that coverage did not exist by virtue of Exclusion G in the contract and FMIT would no longer pay to defend VOG as of January 1, 1996. (R. I, 118-119; T. 22-23, 192, 206-209, 300, 356, 397-398, 412-413, 619; Pl. Ex. 67, 77). During this thirteen (13) month period, and up to January 1, 1996, FMIT, through its agents, including adjuster Gibson and attorney Roberts, represented VOG in all aspects of the claims arising out of the chlorine gas leak, directed VOG as to how to proceed and how to process claims,

instructed VOG to send all claims and information to FMIT and to direct all inquiries to FMIT and its representatives, notified VOG's representative that it (FMIT) was fully handling the matter, informed VOG that the claims arising out of the chlorine gas leak were covered under the insurance contract and never issued a reservation of rights letter or other notification to VOG that there was any question whatsoever of coverage. (R. I, 119; T. 23, 191-193, 210, 223, 226-227, 385, 615-618; Pl. Ex. 152).[2]

In investigating the DuBois claim, there were a number of steps that FMIT, mostly through Gibson, did and did not take. Upon receiving attorney Royce's letter, Gibson contacted Royce and spoke to him and Wayne DuBois. Royce indicated that they were not certain whether there were any damages and FMIT decided to take a "wait and see" approach. (T. 256, 257-259). What Gibson did *not* do at this point was personally go to the pepper farm and observe the plants, call an expert to assist with the analysis and investigation, take any photographs of the plants, preserve any of the plants, test or sample the fields, obtain affidavits or written statements from DuBois or any of its employees or representatives or even confirm his conversation with attorney Royce in writing. (T. 249-251, 257, 260, 320-322, 332). Nor did Gibson take down the names of the experts who Mr. DuBois indicated he had consulted at the University of Florida or contact any university experts himself. In addition, when Tropical Storm Gordon passed through the area in November, 1994, Gibson did not go out to the farm to see what impact, if any, Tropical Storm Gordon

[2] Tellingly, FMIT, in its brief, completely ignores the evidence that it took complete control of the matter immediately after the incident occurred and specifically informed VOG that it would cover losses from the incident.

may have had on the plants. (T. 383-385).

In or around January or February, 1995, Wayne DuBois called Gibson and informed him that they were noticing some damage to the crops. Gibson went to the farm and was informed by Mr. DuBois that photographs had been taken of the plants as well as a videotape of the damage. However, Gibson never received or saw the photographs or the videotape. Mr. DuBois pointed out areas of what he thought might be problems related to the chlorine and informed Gibson that they had been required to plow under several rows of plants and replant them. Mr. DuBois also informed Gibson that they were getting fewer peppers from their pepper crop than was anticipated. Gibson went to the farm alone taking no one from the Village, no one experienced in crop damages, and no plant experts with him. That was the one and only time Gibson ever visited the farm. From that point on, he relied on what Mr. DuBois told him. (T. 260-268, 278-282, 337-344; Pl. Ex. 35, 38, 74).

After visiting the farm, Gibson prepared a report to Mr. Hagood at FMIT asking whether it was time to hire an agricultural expert to assist them in determining the damages and their extent. This suggestion was refused as had been attorney Roberts' earlier recommendation to hire a metallurgist to evaluate the equipment. At this time, crops were still in the field, i.e., it was a time that an agricultural expert or appraiser could have evaluated the alleged damages. (T. 282-284, 287, 386-387, 631-632). After this visit to the farm, FMIT went back into its "wait and see" mode and Gibson continued to rely on Mr. DuBois to ultimately determine what the extent of the damages were and to provide an amount. (T. 285-287, 291-292).

Then, in August, 1995, the discussion with Mr. DuBois regarding the size of the

claim changed. Gibson was informed by attorney John Bryan that DuBois' claim for losses was $1,600,000. Gibson was astounded, reported the claim to FMIT and suggested the need to retain an accountant familiar with southeast Florida farms and an expert regarding the farming business. Despite the large claim now being made and this recommendation from its adjuster on the scene, FMIT again refused to authorize the hiring of experts and decided to wait until DuBois first produced documentation of its claim. (T. 292-297, 299, 377-378, 394-395; Pl. Ex. 44). By letter dated September 22, 1995, DuBois made a specific demand for $1,600,000 or $1,700,000. Again, no backup documentation was provided. (T. 298-299).

Once having been apprised of the lawsuit which was filed in November, 1995, Irma Cohen, a litigation adjuster who had taken over the DuBois file from Hagood in April or May 1995, and who herself had never previously adjusted a farm crop damage claim or a chemical contamination claim, sought and obtained a coverage letter from an attorney indicating that there was no coverage under Exclusion G. Based on this letter, FMIT then denied coverage and authorized attorney Roberts to represent VOG through December 31, 1995 in order that VOG could secure its own separate counsel. When she had first reviewed the file, she had not herself noticed any coverage issues. (T. 390-395, 398-400, 405, 408-409; Pl. Ex. 77). During her responsibility for the case, she did learn that DuBois had gone to the University of Florida for advice but made no effort to learn what the experts had told DuBois, nor did she speak to any experts or instruct Gibson to hire any experts to evaluate the claim. (T. 393, 395-398).

Gibson himself candidly acknowledged that if he had known at the time of attorney Royce's letter of October 17, 1994 that he was dealing with a potential

$1,600,000 claim, he would have done things differently, such as demand documentation, hire experts, and the like. (T. 306-307). For his part, and in addition to the steps taken by Mr. Gibson, attorney Roberts took the steps previously discussed and also made public records requests of the Delray Beach, Boynton Beach and Palm Beach County fire departments, reviewed those documents, reviewed Gibson's reports, requested documentation from attorney Bryan to support the $1,600,000 claim and, in December 1995, after the lawsuit was filed, requested documentation several times when instructed by VOG to make a settlement offer. (T. 608-613, 622-624, 630).

After being notified that FMIT would no longer provide coverage, VOG retained its utilities attorney, Phillip Gildan, to defend it against the DuBois claim. In November 1996, while the lawsuit was pending, Carrie Parker Hill became the Village Manager for VOG. (T. 499). Eventually, Mr. Gildan's firm was replaced by the firm of Lewis, Longman & Walker, P.A., to represent and defend VOG. (R. I, 119; T. 23, 209, 527-528, 540, 620-621).

Upon becoming Village Manager, Hill reviewed the Village's file on the matter and, to obtain background information, made telephone calls to the University of Florida and Florida Atlantic University as well as experts from Ithaca, New York. She was asked for photographs, soil samples, results of site visits, chlorine gas measurements and the like but had to inform the individuals she spoke with that what had occurred happened years before and that there was nothing except photographs because nothing else had been preserved. Having handled insurance claims for cities before, Hill described that she had expected to see pictures, witness statements,

documentation regarding the problem, adjuster reports, etc., in the file, virtually none of which existed. (T. 501-505, 543-544). She also called the County agricultural agent, Ken Schuler, and learned that he had visited the site the day after the incident. However, he had no notes and no one had ever previously contacted him about what had occurred or what he had observed. (T. 507-508, 543).

Hill testified regarding the progress of the lawsuit between DuBois and VOG. She sat through all of the depositions in order to reconstruct what happened. She was able to describe DuBois' case as developed in the depositions, especially the conflict between what Gibson claims Wayne DuBois had told him and what Mr. DuBois testified to at the deposition. In other words, where Mr. DuBois had, according to Gibson, said that there was no apparent damage observed immediately after the incident, Mr. DuBois' testimony at deposition was more consistent with the expert testimony in the case that there would be immediate damage to the plants, which Mr. DuBois in deposition claimed he saw. Hill went on to describe other aspects of Mr. DuBois' evidence and testimony which was inconsistent with Gibson's recitation of Mr. DuBois' statements at the time, none of which were documented by Gibson. (T. 508, 513-515, 521-522).[3]

The complaint against VOG also included co-defendants, Jones Chemical (the supplier of the tank), and Donald Onsager (the individual in charge of maintaining the

[3] This testimony of Ms. Hill and the testimony of other witnesses such as Dr. Timothy Scott Schubert and expert Richard Batterson (*infra* pp. 13-17) presented evidence going far beyond FMIT's characterization in its brief that "[e]ssentially, the Village asserted that the FMIT should have retained an expert to inspect the pepper plants while they are still in the ground and preserve plant material for later analysis." (Pet. Br.9)

tank). On the eve of trial an amended complaint was filed naming a new defendant, Wallace & Tierney (the manufacturer of the tank). During the course of the litigation, extensive discovery was engaged in and several experts were retained to rebut the claim that the chlorine gas could have caused the damage alleged by DuBois. All in all, VOG was able to prepare a relatively strong defense against the DuBois claim. However, because DuBois had its own expert testimony, had the testimony of Mr. DuBois and his family and employees who had all been in the pepper farming business for a long period of time, FMIT failed to preserve statements and evidence at and around the time of the incident to rebut the testimony and claims of the DuBoises, the significant amount of money that had already been spent to defend the claim as it approached trial, the significant additional amount of money that it would take to try the case and VOG's ultimate potential exposure to a verdict in excess of $1,600,000, the Village Council made the decision to settle the case before trial with DuBois for the amount of $237,500.00. VOG's total legal fees and costs in defending the action up through settlement were $340,839.69. (R. I, 119; T. 23, 522-531, 533-534, 552-554, 562-564, 571-573, 575; Pl. Ex. 153). The other parties in the case also all settled with DuBois, in some instances paying more to DuBois than VOG did. (T. 532).

At the trial of the present cause, VOG also presented the testimony of two (2) expert witnesses and of John Morrison, the Director of Property Liability Claims for FMIT. The first expert witness was Dr. Timothy Scott Schubert, a plant pathologist for the Florida Department of Agriculture and Consumer Services. (T. 420). Dr. Schubert testified that as a state employee he often responds to farmers calling and asking for help or information regarding problems with plants and has responded to

insurance companies as well asking for such help. (T. 421-424). Dr. Schubert described the protocol for investigation of gas leaks over widespread areas. He stated that site visits are essential and everything must be documented and that it is important to get to the site quickly to identify any injury symptoms consistent with the particular chemical at issue. (T. 425-426). With regard to the VOG incident, he was contacted by a representative of VOG in 1997, but by then the plants were long gone so he could not follow the protocol described. (T. 427-428). While he could render a likely diagnosis based on the photographs presented to him, he would qualify his diagnosis because of the inability to examine the actual plants. In addition, the photographs shown to him were not of the quality and detail necessary for a critical diagnosis of the visual symptoms. He stated that if he had been able to visit the site within one or two weeks of exposure, that would have been much more conducive to a complete and accurate diagnosis. (T. 428-429). Similarly, if he had visited the site after Tropical Storm Gordon, he would have had evidence available to determine the impacts related to the storm versus other potential causes. (T. 430-431). His qualified opinion, based on the photographs and other information provided to him, was that he did not see any conclusive evidence of chlorine damage. (T. 430, 438-441). Schubert also recalled Mr. DuBois telling him about croton-like changes, variegated veins, and similar symptoms regarding the plants. (T. 450). He stated that it would have helped in his analysis to know the concentration of chlorine in the cloud which was not provided to him. Schubert was aware that DuBois had hired Dr. Walter Heck, the author of numerous articles on air pollution damage to plants. Dr. Heck, according to Schubert, has more experience than Schubert in all aspects of air pollution damage to plants and

had opined that he believed there might be some basis to DuBois' claim of damage. (T. 452-454). Ultimately, Dr. Schubert stated that it was possible that the chlorine could have caused a setback to the pepper crop that could have decreased the yield, which was one of DuBois' claims.[4] (T. 454-455).

VOG also presented the testimony of Richard Batterson, an insurance consultant, and a former claims adjuster and claims manager who worked for insurance companies, insurance defense firms and plaintiffs' firms. (T. 461-463). In preparation for his testimony, Mr. Batterson reviewed the pleadings of the case, the depositions of Irma Cohen and Gregory Gibson, the FMIT Claims Manual, various correspondence and the code of ethics for adjusters. Based on his review, Mr. Batterson's opinion was that the DuBois' claim against VOG was not handled properly by FMIT. (T. 464-465). Initially, Batterson noted that FMIT investigated and settled numerous claims in the matter without issuing a reservation of rights letter, which was the first thing that FMIT should have done. In the absence of such a letter, the impact on the insured is that the insured feels it is covered and that someone is acting on its behalf and it thus has protection. (T. 465-466). A reservation of rights letter also alerts the insured to the fact of potential disclaimer of coverage so that it has an opportunity to investigate the case on its own, hire its own lawyers, obtain experts, etc. Here VOG did nothing based on its reasonable belief that FMIT was defending it and handling and settling the claims. (T. 467-468).

[4] Doctor Shubert's testimony regarding Dr. Heck and his (Shubert's) statement regarding the possibility that chlorine could have damaged DuBois' crops is omitted from FMIT's brief.

In reviewing the conduct of the claims adjuster in this case, Batterson pointed out that the adjuster should first decide if there is coverage and then investigate the case (see footnote 1, s*upra*). The adjuster does not just rely on the representations of the claimant but must investigate, take and record statements and call in experts if needed, particularly in cases where the adjuster is not sure what the damage is. Here, Gibson did not have experience in these types of claims and should have called in assistance. (T. 469-473).

Batterson also pointed out there is a code of ethics for insurance adjusters. (T. 473). In reviewing the actions that were taken here, Batterson particularly pointed to the following actions that should have been taken by Gibson and FMIT: (1) they should have determined coverage; (2) they should have notified VOG and issued a reservation of rights letter; (3) by settling claims without a reservation of rights letter, they led VOG into believing there was coverage; (4) they should have hired an expert to analyze plants; and (5) they should not have just taken the word of the claimant. Batterson, who has been in the insurance business for over fifty (50) years, pointed out that claims do not get better if you let them sit. He also stated unequivocally that a reservation of rights letter should follow the notice of a claim and not wait for a lawsuit to be filed. (T. 476-477). While Batterson testified that under the insurance contract there was no coverage because of Exclusion G (T. 480), it was his opinion that without a reservation of rights letter, the insurer relinquished its rights in that regard. (T. 466).

VOG also presented the brief testimony of John Morrison of the Florida League of Cities. Mr. Morrison identified Plaintiff's Exhibit 4, the FMIT Claims Manual, and

Plaintiff's Exhibit 3, a document entitled "Role of Defense Counsel in Litigation" and Plaintiff's Exhibit 138, FMIT's Litigation Manual. (T. 492-494). A review of these documents demonstrates that FMIT considers the issues of timely issuance of a reservation of rights letter and timely and thorough investigation of claims as critical.

At the close of the Plaintiff's case the Defendant moved for directed verdict on all counts of the Complaint. (T. 577-593). The trial court denied the motions as to Counts I, II and III (T. 593) and granted the motion as to Count IV, the negligence claim (T. 594).

Among the witnesses called by FMIT was Greg Anderson, a defense trial attorney who represented Jones Chemical in the DuBois lawsuit. (T. 651). Unlike attorney Roberts, Mr. Anderson was hired only after Jones Chemical was named as a party in the lawsuit. There had been no attorneys on the case for Jones prior to the suit. (T. 652-653). Mr. Anderson stated that all of the defendants worked jointly on the issue of whether the chlorine damaged the crops. There was a joint defense agreement regarding the sharing of costs for witnesses and experts on the damage issue due to the fact that there were a significant number of witnesses they had to hire and pay to review the case. (T. 656-657, 665).

Anderson believed that the case was a defensible case and that they could provide a credible case that the chlorine gas leak did not damage the crops. It was, however, an expensive case to defend, requiring extensive work. While he was skeptical of the DuBois damage claims, DuBois had an economist supporting its $1,600,000 claim, a plant expert and DuBois family members who claimed to be pepper experts. (T. 667, 678-679, 682, 685-690). In addition to defending against

DuBois, the Defendants also had to defend against each other and VOG was deemed, at least by him, to be the "target defendant". (T. 684). Having communicated to his client that it had a defensible case, his client nonetheless also decided to settle citing the cost of trying a four (4) week case with experts and the expense of time away from work. (T. 667-668).

At the close of all the evidence FMIT renewed its motion for directed verdict on the remaining counts, which motion was denied. (T. 738-742). The matter was submitted to the jury on three (3) claims and the jury returned a verdict in favor of FMIT on the breach of contract claim and in favor of VOG on the breach of duty to defend and the estoppel claims. The jury's award of damages in favor of VOG was $436,651.69. (R. II, 369-370; T. 815). Thereafter, Defendant filed a Motion for Judgment in Accordance with Motion for Directed Verdict or in the Alternative Motion for New Trial. (R. III, 474-481). A Final Judgment on the verdict was entered on May 29, 2001 (R. III, 482). On June 4, 2001, the trial court entered its Order Denying FMIT's Motion for Judgment in Accordance with Motion for Directed Verdict and setting the motion for new trial for a hearing on July 13, 2001. (R. III, 483-485).

Due to the fact that the issue of pre-judgment interest had not yet been addressed when the trial court entered its Final Judgment, Plaintiff filed a Motion to Amend Final Judgment or for Rehearing on or about June 7, 2001. (R. III, 486-493). On July 13, 2001, a hearing was held on FMIT's Motion for New Trial and that motion was denied. (R. IIII, 494, 562-581). On December 7, 2001, a hearing was held on Plaintiff's Motion to Amend the Final Judgment at which time the Final Judgment was amended to include an award of pre-judgment interest. (R. IV, 590-594, 609-640).

SUMMARY OF THE ARGUMENT

I. Despite the certified question presented by the Fourth District Court Appeal and the arguments presented by the Defendant, the decision below does not present a departure from established principles of law or a question of great public importance which needs to be addressed by this Court. In both Cigarette Racing Team, Inc. v. Parliament Insurance Company, 395 So. 2d 1238 (Fla.4th DCA 1981, and Doe v. Allstate Insurance Co., 653 So. 2d 371 (Fla. 1995, the Fourth District Court of Appeal and this Court described the responsibilities of an insurer in defending a claim against its insured. Both courts made clear that an important element of the insurer's duties was the performance of the investigation prior to the commencement of a lawsuit. Both courts also recognized that the insurer's undertaking of those responsibilities, particularly when coupled with the improper handling of its duties, the lack of notice to the insured of a potential lack of coverage and the insured's reliance to its detriment on the insurer's improper and prejudicial conduct, can give rise to coverage by estoppel. In the decision below, the Fourth District did nothing more than apply these previously decided principles to the facts of the case presented here. As such, there exists no need for this Court to exercise jurisdiction to further consider the decision below.

II. FMIT is incorrect when it argues that in Doe this Court limited the application of the doctrine of estoppel to only those cases where the insurer's grievous conduct occurred only after a lawsuit had been filed against its insured. Not only did this Court *not* announce any such arbitrary rule, but neither the established principles of the doctrine of estoppel nor logic would support such a rule.

The elements of estoppel are clear: 1) a representation of a material fact that is contrary to a later-asserted position; 2) reliance on that representation; and 3) a detrimental change in the position of the party claiming estoppel caused by the representation and reliance on it. If, in the context of a legal or contractual relationship

between parties, harm is caused to one party by conduct of the other which establishes the elements necessary to demonstrate an estoppel, a claim is established. In the present case, FMIT and VOG had such a legal and contractual relationship (insurer and insured) and facts presented to the jury were sufficient to establish the elements of estoppel. In those circumstances, the fact that all of the egregious and prejudicial conduct engaged in by FMIT occurred in the thirteen months prior to the filing the lawsuit (expect the act of withdrawal of representation which occurred after the filing of the lawsuit) does not change the fact that all of the elements of estoppel have been met. To hold that none of the insurer's conduct prior to the filing of the lawsuit somehow "doesn't count" would be to create an artificial defense to that wrongful conduct. There are no authorities to support such an artificial defense. There is no logic to support such an artificial defense. And further, the creation of such an artificial construct would undoubtedly encourage slip-shod investigations (such as occurred here) harmful to insureds who would then have no recourse against their insurers.

Here, the evidence presented to the jury established a woefully inadequate investigation contrary to FMIT's own policies and procedures and its own representative's recommendations, which ultimately placed VOG in the position of having to defend a significantly stronger case than it would have had to defend if FMIT's conduct had not been so blatantly improper. That being the case, the principles of Cigarette Racing Team and Doe were properly applied at both the trial and the District Court levels and those decisions should be affirmed.

III. Contrary to FMIT's argument, the decision below does not expand the

doctrine of estoppel with regard to the element of prejudice. Prejudice is an issue of fact which depends on a review of the circumstances of each individual case. Here, the evidence presented to the jury demonstrated prejudice to VOG by FMIT's conduct in VOG's need to expend large sums of money to defend itself against a claim in excess of $1,600,000 and ultimately resolve the case at the cost of hundreds of thousands of dollars. It is not the jury's verdict or the evidence presented to the jury which is a departure from well-established principles of law. Rather, it is FMIT's effort to have this Court quantify the required element of prejudice in the manner presented which would be a deviation from prior precedent. In essence, in the guise of seeking a pronouncement of law from this Court, FMIT truly seeks to have this Court set aside a jury verdict that was based on substantial competent evidence and preclude a new jury on re-trial from considering the same evidence.

STANDARD OF REVIEW

With respect to issue number I, the standard of review for the Supreme Court is complete discretion concerning whether it chooses to accept the certified question for review. See Zirin v. Charles Pfizer & Co., 128 So.2d 594 (Fla. 1961). Once having chosen to review a certified question, the whole decision is open for review. On review the Supreme Court may review the entire decision and record. See Rupp v. Jackson, 238 So.2d 86 (Fla. 1970).

As to issues II and III, the standard for review for the legal issues presented would be the same as that of the Fourth District Court of Appeal, which would require that the Supreme Court determine that the evidence, looking at the entire record in the light most favorable to the Plaintiff's position, is insufficient to establish a prima facie showing of the claims alleged. See Nunez v. Lee County, 777 So.2d 1016 (Fla. 2d DCA 2000); and Sixty-Six, Inc. v. Finely, 224 So.2d 381, 382 (Fla. 3d DCA 1969).

ARGUMENT

ISSUE I

THIS COURT SHOULD DECLINE JURISDICTION BECAUSE THE FACTS OF THIS CASE ESTABLISH ESTOPPEL WITHIN WELL-DEFINED PRINCIPLES OF LAW BY WHICH INSUREDS AND INSURERS ALIKE HAVE BEEN GOVERNING THEIR CONDUCT FOR AT LEAST 20 YEARS AND WHICH NEED NO FURTHER EXPLICATION BY THIS COURT.

Contrary to the arguments put forth by FMIT and, with due respect, to the question certified by the Fourth District Court of Appeal, the decision below does not present a question of great public importance which requires further consideration by this Court. Rather, the majority decision below applies well-established principles of estoppel to the facts of this case, not only in compliance with the legal principles announced in previous cases of the Fourth District and of this Court, but consistent with similar factual scenarios in the cases applying those principles.

FMIT argues that the issue of whether a pre-suit investigation by an insurer can constitute a part of the insurer's defense of the insured is a matter of first impression. This, however, is simply not the case. In Cigarette Racing Team, Inc. v. Parliament Insurance Co., *supra*, the Fourth District Court of Appeal applied the principle at issue here, coverage by estoppel, to reverse a summary judgment. The facts of that case demonstrated that the incident occurred on September 15, 1976; the insurer notified the insured shortly thereafter; insurer notified the insured that it would investigate the incident; suit was filed in July 1977; and on January 3, 1978 the insurer notified the insured that it was withdrawing its defense on the grounds of no coverage. In holding that that case fell squarely within the exception to the general rule that coverage could not be created by estoppel, the Fourth District noted as follows (*id.* at 1240):

> Parliament Insurance Company assumed the defense of its insured, Cigarette, without a reservation of rights or notice to Cigarette of possible non-coverage. *Some sixteen months after it had assumed responsibility of Cigarette's defense*, Parliament notified its insured that the policy did not provide coverage and therefore it would no longer defend the action. [Emphasis supplied]

In holding that evidence had been presented to support the claim of estoppel, the court in Cigarette unequivocally included the time prior to filing the complaint, during which the insurer took control of the case and investigated it, as being within the scope of the insurer's defense of the insured.

Similarly, in Doe v. Allstate Insurance Co, *supra*, this Court, in approving of the holding in Cigarette Racing Team, also described the nature of an insurer's obligation to defend as including pre-suit as well as post-suit conduct. In Doe this Court described the undertaking of a defense as follows (*id.*, 374-375):

> In fulfilling its promissory obligation to defend, the insurer employs counsel for the insured, *performs the pretrial investigation,* and controls the insured's defense after a suit is filed on a claim.
>
> * * *
>
> Thus, when the insurer undertakes the defense of a claim on behalf of one claiming to be an insured, we have recognized substantial duties on the part of both the insurer and the insured. If an insurer erroneously begins to carry out these duties, and the insured, as required, relies upon the insurer to the insured's detriment, then the insurer should not be able to deny the coverage which it earlier acknowledged. [Emphasis supplied]

At least since Cigarette Racing Team the law of Florida on coverage by estoppel has been known to be based on a factual predicate that the conduct of the insurer during the pre-suit investigation portion of its defense of its insured is a part of determining whether the insurer's conduct rises to the level of having established a

claim of estoppel. This predicate was further explained and confirmed by this Court's decision in Doe. The decision below in the present case is not an extension of either Cigarette Racing Team or Doe but, rather, is an application of the principles long ago established in those cases to the particular facts presented here.

FMIT's argument that this Court should exercise jurisdiction in this case to determine "the issue of what constitutes the prejudice which must be shown by one seeking to create coverage by estoppel" (Pet. Br.19) should also be rejected by this Court. First, contrary to FMIT's assertion, this issue is not related to the certified question and was not presented to the Fourth District in the manner and context in which it is sought to be presented to this Court. For this reason alone, the Court should decline to hear this issue. See e.g. Crocker v. Pleasant, 778 So.2d 978, 990 (Fla. 2001).

Moreover, the issue of prejudice is a factual determination to be made by the finder of fact based on the evidence presented in each particular case. See Cigarette Racing Team, Inc. v. Parliament Insurance Co., *supra* at 1240; see also Tucker v. Seward, 400 So.2d 505 (Fla. 4th DCA 1981); Kaplan v. Phoenix of Hartford Co., 215 So.2d 893 (Fla. 3d DCA 1968). To ask this Court to define the type of prejudice that would need to be established to support a claim of estoppel is, aside from asking this Court to do the impossible given the myriad of factual situations which may occur, to ask this Court to usurp the role of the jury or judge as factfinder.

For the reasons set forth above, as further supported by the arguments below, VOG respectfully submits that this Court should decline to exercise jurisdiction over the present case.

ISSUE II

THERE EXISTS NO BASIS IN LAW OR FACT, ESPECIALLY IN THE FACTS OF THE PRESENT CASE, TO PRECLUDE THE APPLICATION OF THE DOCTRINE OF ESTOPPEL TO AN

INSURER'S PRE-COMPLAINT CONDUCT WHERE THE ELEMENTS OF ESTOPPEL ARE PLEAD AND PROVED.

FMIT asks this Court to create a formulaic rule which would preclude the application of the doctrine of estoppel, as set forth in Cigarette Racing Team and Doe, where some or all of the insurer's egregious conduct, which would otherwise satisfy all of the elements of the doctrine of estoppel, occurred prior to the institution of a formal lawsuit against the insured. In other words, FMIT argues that in *all cases*, no matter how wrongful or egregious the conduct of the insurer is, no matter how reasonable the insured's reliance on the insurer is, and no matter how prejudiced the insured is by the insurer's egregious conduct, as long as that conduct occurred before the formal filing of a lawsuit, the insured cannot avail itself of the doctrine of estoppel to obtain relief for the damaged caused by the insurer's conduct. There is no support in either law or policy to support this argument.

Contrary to FMIT's assertion (Pet. Br. 23) this Court did not, in Doe, limit its finding that an insurer may be estopped from raising the defense of non-coverage only in those circumstances where the insurer did not assume sole control of the matter until a lawsuit was filed. To the contrary, in upholding the decision of the Fourth District Court of Appeal in Cigarette Racing Team, and in its own language in Doe describing what the defense of a claim entails, this Court made abundantly clear that where the facts establish all of the elements of the doctrine of estoppel, there is no talismanic point in time, or single event, which determines whether or not the doctrine, otherwise proven, will be applied. Nor, as a matter of policy, is there any basis or justification for the drawing of such an artificial line.

Generally, estoppel arises when a party, through its voluntary conduct, lulls

another party into a disadvantageous legal position because the latter party, in good faith, relies upon the first party's conduct and has been lead to change its position for the worse. See e.g. Major League Baseball v. Morsani, 790 So.2d 1071 (Fla. 2001). To demonstrate estoppel, it must be shown that there was a representation of a material fact that is contrary to a later-asserted position, that there is a reliance on that representation and that a change in position detrimental to the party claiming estoppel is caused by the representation and the reliance on it. See e.g. Department of Revenue v. Anderson, 403 So.2d 397 (Fla. 1981); Fla. Dept. of Transportation v. Dardashti Properties, 605 So.2d 120 (Fla 4th DCA 1992); Zurstrassen v. Stonier, 786 So.2d 65 (Fla. 4th DCA 2001). In none of the cases cited, nor in any authorities discovered by VOG's counsel, has there been found to be an arbitrary or formulaic rule established that would preclude the application of the estoppel doctrine when all of its elements have otherwise been established. Yet, this is precisely what FMIT asks this Court to create in the context of insurance contracts.

The facts of this case demonstrate the fallacy of FMIT's position. Contrary to FMIT's assertions (Pet. Br. 24, 28), the jury's and the Fourth District's application of the estoppel doctrine in the present case was not based solely on what FMIT refers to as an "inadequate pretrial investigation." In truth, if FMIT's conduct in the present case cannot, as a matter of law, be viewed as establishing an estoppel, then the doctrine of estoppel must be deemed totally inapplicable to insurance contracts. There is no legal basis for treating insurance contracts differently than any other contract or legal relationship between parties.

VOG will not repeat all of the facts supporting the findings of estoppel as they are thoroughly set forth in the statement of the case and the facts. It suffices to say that from immediately after the incident, FMIT took complete control of the case, took the unusual step of immediately hiring an attorney, specifically informed VOG that the claims were covered claims, paid several claims, assigned an inexperienced adjuster to the case, failed to preserve witness statements or physical evidence in circumstances where quick action was necessary to preclude unwarranted or manufactured claims, refused its own representatives' requests and recommendations to retain experts to rebut any claims of loss and failed to give its insured, VOG, any notice of even a potential refusal of coverage until *after* the lawsuit was

filed over thirteen (13) months *after* its assumption of total control for the responsibility of protecting VOG against claims arising out of the chlorine gas incident.

These facts go far beyond a mere "inadequate pre-suit investigation." What occurred to VOG here, due to the conduct of FMIT, is not only what the law is intended to prevent, but what FMIT's own internal policy and procedural manuals seek to prevent in terms which are particularly relevant to the issues presented here.

In the contract of insurance between FMIT and VOG, the definition of "member" states that "[t]he coverage afforded applies separately to each member against whom *claim is made or suit is brought*. . ." (Emphasis supplied). (Pl. Ex. 2, p. B-4). In the coverage section of the policy are found the following provisions: (Pl. Ex. 2, A-2):

> (f) The member and the Fund agree that the Fund is to defend in the name of and on behalf of the member any *claims, suits or other legal proceedings* . . .
>
> * * *
>
> (m) The member agrees to permit . . . attorneys selected by the Fund, to defend . . . all *claims, suits, allegations or demands* . . . [Emphasis supplied].

Similarly, in FMIT's Litigation Management Manual, the following statements are found (Pl. Ex. 138):

> Effective litigation management often, if not usually, means a *claim* is resolved short of litigation. [Emphasis supplied]. (p. 4).
>
> Prompt settlement before a meritorious *claim* becomes a lawsuit is the best control of legal costs, but some litigation may be necessary. [Emphasis supplied]. (p. 5).
>
> Defense counsel is to implement a strategy of coordinated defense. (p. 31).
>
> > By properly dividing labor in connection with the *defense effort between our claims personnel and defense counsel*, we can make more effective and economic use of these resources. [Emphasis supplied]. (p. 32).

Thus, even identifying the "undertaking of a defense" as the precise point in time to look at in determining whether the insurer's conduct gives rise to an estoppel, under FMIT's own internal policy and procedure manuals as well as the contract between FMIT and VOG, the *defense* of the matter is not limited to the time after litigation has actually commenced. Together with the facts of this case and the

holdings of Doe and Cigarette Racing Team, Defendant simply cannot make out a case that, as a matter of law, it did not undertake the defense of the DuBois claim.

Also contrary to FMIT's assertions (Pet. Br. 24-27), there is nothing in the Fourth District's opinion which interferes with or adversely affects insurers' decision-making processes with regard to whether or not to undertake a defense. Whether or not they are required to issue a reservation of rights letter under Section 627.426 (2)(a), Florida Statues, in coverage exclusion cases, insurance companies certainly may do so to place insureds on notice that they cannot rely on the existence of coverage.

[5] In fact, the testimony of FMIT's own representatives belies the argument it makes here. Both George P. Roberts, the attorney hired by FMIT to represent VOG immediately after the gas leak, and Greg Gibson, the adjuster hired for the same purpose, testified that among the responsibilities for which they were hired was the determination of whether FMIT had any responsibility for the claims. (T. 243, 246-247, 609-610, 628-629).

None of the cases cited by FMIT on this issue requires a different result. Aetna Commercial Insurance Co. v. American Sign Co., 687 So.2d 834 (Fla. 2d DCA 1996) involved neither a pre-suit investigation nor estoppel issues in a case where the insurer's first notice of the action was when it actually was sent a copy of the complaint. Similarly, neither Capoferri v. Allstate Insurance Co., 322 So.2d 625 (Fla. 3d DCA 1975) nor Liberty Mutual Insurance Co. v. Lone Star Industries, Inc., 661 So.2d 1218 (Fla. 3d DCA 1995) involved estoppel issues. In those

[5] FMIT's own internal policies and manuals consistently stress the importance of the timely issuance of the reservation of rights letters and, in doing so, make no distinction between coverage defenses and coverage exclusions as distinguished by this Court in AIU Insurance Co. v. Block Marina Investments, Inc., 544 So.2d 998 (Fla. 1989). See Plaintiff's Exhibits 3, 4 and 138.

cases it was held that insurers do not waive coverage defenses solely by entering an appearance inasmuch as insurers need a reasonable time to investigate claims before determining coverage. Waiver, however, is not the issue presented in the present case. It is for that reason that Section 627.426 (1)(c), Florida Statutes, also cited by FMIT (Pet. Br. 29-30), is inapposite to the issues presented. As previously noted (*supra* at 20, 27), to demonstrate estoppel the necessary elements are: 1) a representation of a material fact that is contrary to a later asserted position, 2) reliance on that representation, and 3) a change in position detrimental to the party claiming estoppel caused by the representation and reliance. On the other hand, the elements of waiver are: 1) the existence at the time of the waiver of a right, privilege, advantage or benefit which may be waived; 2) the actual or constructive knowledge of the right; and 3) the intention to voluntary relinquish the right. Zurstrassen v. Stonier, s*upra*; see also Capital Bank v. Needle, 596 So.2d 1134 (Fla. 4th DCA 1992). Hence, the case law and statutory provisions precluding a finding of waiver in particular circumstances are not support for precluding a finding of estoppel under the different factual and legal context presented here.

FMIT's request that this Court establish an arbitrary, bright line point before which the doctrine of estoppel could not be applied in insurance coverage cases *no matter how egregious the facts*, ignores several fundamental points. First, it ignores its own policies and procedures. Second, it ignores the principles of estoppel as they are and have been traditionally applied. Third, it ignores the egregious factual circumstances presented in the present case in favor of an artificial construct for which there is no legal or practical support. Finally, there is no support in the record, nor has FMIT provided support, for its apocalyptic vision that somehow the decision below, which follows decisions of the Fourth District in 1981 and the decision of this Court handed down in 1995, will open the floodgates to a slew of unfounded and unsupportable claims of inadequate pre-suit investigation in all or most cases in which coverage is denied. There is no indication that any such occurrences took place after the decisions in Cigarette Racing Team or Doe and there is no support for the proposition that such occurrences will take place based on the decision below. Nevertheless, if

there is a slew of wrongful or negligent claim adjusting which demonstrably prejudices insureds, insurance companies are appropriately held accountable for their wrongful conduct.

ISSUE III

EVIDENCE OF DETRIMENTAL RELIANCE AND PREJUDICE WAS PRESENTED BY THE PLAINTIFF TO THE JURY TO SUPPORT THE JURY'S VERDICT ON THE ISSUE OF ESTOPPEL.

FMIT argues that the District Court's majority opinion expands the doctrine of estoppel with respect to the issue of prejudice. In truth, FMIT seeks to have the decision of the jury, the trial judge and the Fourth District that there exists substantial competent evidence to support a finding of estoppel, ruled upon and set aside by this Court by somehow transforming that determination into a question of law which is of great public importance to the administration of justice.

Prejudice is generally and inherently a factual issue. Cigarette Racing Team, Inc. v. Parliament Insurance Co. *supra* at 1240; Tucker v. Seward, *supra*; Kaplan v. Phoenix of Hartford Insurance Co., *supra*. Contrary to FMIT's assertion (Pet. Br. 32), the Fourth District's opinion did not hold that it was enough for an insured to show that it might have been prejudiced. To the contrary, the Fourth District held that the evidence showed that VOG *was* prejudiced by the acts and omissions of FMIT upon which VOG had relied. It was these acts and omissions which the Fourth District noted could have put VOG in a stronger position to defend the DuBois lawsuit without having to expend well over $300,000.00 in costs and fees before settling the litigation for a significant amount of money in order to avoid the risk of a judgment being entered for seven times the settlement amount.

The cases cited by FMIT do not support its position here. In Coregis Insurance Co. v. McCollum, 961 F.Supp 1572, 1578 (M.D. Fla. 1997) the court held as follows:

> However, the prejudice to the insured that resulted in both of those cases [Doe and Cigarette Racing Team] occurred *when the insurer assumed the insured's defense without a reservation of rights or notice to the insured of possible noncoverage until several months or even years after the underlying claim has been made*. [Emphasis supplied].

It is this finding that is particularly applicable to the present case. Evidence was presented to satisfy this prejudice requirement as set forth by the Middle District of Florida and this Court.

Furthermore, aside from the cases cited by FMIT for the general proposition regarding the showing necessary to establish estoppel, the cases cited as being in "related context" are, in fact, quite distinguishable. Bontempo v. State Farm Mutual Automobile Insurance Co., 604 So.2d 28 (Fla. 4th DCA 1992) is not a case that addresses the issue of detrimental reliance or prejudice in the estoppel context. Rather, it addresses the prejudice which must be shown from an insured's lack of notice to excuse an insurer's lack of performance. Even so, the court in Bontempo recognizes that the question of prejudice is a factual issue to be determined by the factfinder.

Galinko v. Aetna Casualty and Surety Co., 432 So.2d 179 (Fla. 1st DCA 1983) is also significantly distinguishable. In the first place, it applies North Carolina law, not Florida law. The court there specifically says it is *not* addressing an estoppel theory thus arguably implying that estoppel would be available with the proper facts. Furthermore, in the context presented in Galinko, the court indicates that in Florida the burden appears to be on the party asserting no prejudice to prove that there is no prejudice - a burden it can be safe to say FMIT is not asking

this Court to place on insurers in the present circumstances. And, once again, the court recognizes that the determination whether prejudice has been established is one for the factfinder.

Tiedtke v. Fidelity and Casualty Co. of New York, 222 So.2d 206 (Fla. 1969) is of no support to FMIT's position here. As in Galinko, this Court in Tiedtke held that where an insured failed to comply with the terms of a policy requiring written notice of an accident "as soon as practicable" as a condition precedent to the insurer's liability, the insured had to show that there was no prejudice to the insurer by the delay in notice, i.e. the burden was on the party claiming no prejudice rather than the party claiming prejudice. Perhaps of more significance to the issues in the presence case is the following language of this Court in Tiedtke (*supra* at 209-210):

> The second factor which precludes us from affirming the District Court is the Company's obvious breach of its concurrent obligation to its insured to inform him of the fact of its disclaimer of liability within a reasonable time. We recognized in Bergh v. Canadian Universal Ins. Co., 216 So.2d 436 (Fla. 1968), that nonwaiver agreements are valid, but coupled this with a cautionary statement that such agreements do not have the unfettered power in all circumstances to supersede the doctrines of waiver and estoppel.
>
> Here, the Company informed the insureds on August 18, 1964 that it would defend the suit, but on the condition that it could disclaim liability at a later date. From the date of the letter until December 1965, a period of a year and four months, the Company defended without actually disclaiming liability. Then, only after an adverse judgment was returned, it refused to satisfy the judgment. We think that the Bergh rationale clearly applies under these facts and the Company should not be allowed to withdraw . . . .
>
> If an insurer intends to stand on any forfeiture reservation, it should inform the insured as soon as practicable after it has ascertained facts upon which it bases its forfeiture. In the instant case, it is apparent that many months before the trial, the Company had gathered all the information it needed for either the defense of the suit or for raising the

> forfeiture issue and disclaiming liability. Each case of this nature must, of course, be considered on its own merits.

To the extent that Tiedtke addresses issues in a related context to the present case, it is these quoted portions of this Court's decision in Tiedtke which are most analogous to the present case where FMIT represented VOG for over thirteen (13) months, early on having gathered all the information needed to make a determination of whether to defend the claims or not and failing to timely notify VOG of even the possibility of a disclaimer. And, as noted by this Court in Tiedtke, each of these cases must be considered on its own merits.

Finally, Vines v. United States, 28 F.3d 1123 (11th Cir. 1994) and Bowman v. State, 748 So.2d 1082 (Fla. 4th DCA 2000), involve the showing needed to be made to establish ineffective assistance of counsel in criminal cases. These cases can hardly be viewed as being in a related context to the estoppel issues presented in this Court in the present case.

FMIT's argument that there existed no evidence of prejudice to VOG is belied by the record. There was a plethora of evidence to support VOG's position that it was prejudiced by FMIT's actions. For example, if the written or recorded statements of DuBois or its employees had been taken at the time of Gibson's initial contact with them, it would have made it much more difficult for Wayne DuBois to later change his story to match the testimony of the experts as to what could be expected to be seen immediately after exposure to chlorine. Similarly, if the chlorine concentration measurements which were taken at the time had been preserved, it could have established without question lack of sufficiently concentrated levels to cause plant damage. These things FMIT's representatives did not do. Similarly, if experts had been retained to observe the plants immediately after their exposure to the chlorine, or if the agricultural agent's observations of the plants had been recorded at the time, this could have belied the claim later made by DuBois that there were physical indices of damage immediately after exposure. These are but a few of the steps that should have been and could have been taken that would not only have made the case more defensible, at less cost, but could have headed off the substantial claim which DuBois ultimately developed (in the absence of a record that could have prevented it) of $1,600,000 in damages and which VOG, at

its cost, was ultimately required to defend.

These facts are further buttressed by the testimony of Richard Batterson as to the defects in the investigation and defense of the claim on the part of FMIT, and Dr. Timothy Scott Schubert as to how his "qualified" opinion could have been rendered unqualified if more timely observations and data had been gathered and preserved. In these circumstances, and given the fact that, as stated by Defendant's own witness, Mr. Anderson, VOG was the "target" defendant (T. 684), there can be no basis for Defendant's argument that the decision to settle for one-seventh of the amount being claimed, after well over $300,000 had already been spent on the defense of the claim, facing a trial of several weeks and potential liability of $1,600,000, must be deemed, as a matter of law, the failure to demonstrate prejudice because the matter did not go to trial. And, prejudice having been established by the evidence, the *amount* of prejudice becomes irrelevant in determining the applicability of the estoppel doctrine to provide coverage. Florida Physicians Insurance Company v. Stern, 563 So.2d 156, 160 (Fla. 4th DCA 1990).

On this issue, FMIT's real argument is that the quantum of evidence presented was insufficient to support the jury verdict. This question was, however, one for the jury and there existed substantial competent evidence in the record to support it. No "expansion" of the doctrine of estoppel is demonstrated by the record or the Fourth District's opinion on this issue.

CONCLUSION

The majority decision of the Fourth District Court of Appeal applied established principles of estoppel law to the facts presented. Moreover, given the facts, the Fourth District's application of the law was correct. Accordingly, the Respondent, VOG, respectfully requests that this Honorable Court decline to exercise jurisdiction in the cause or, in the alternative, affirm the opinion and order of the Fourth District Court of Appeal.

Respectfully submitted,

_____

KENNETH G. SPILLIAS
Florida Bar No. 253480
KEVIN S. HENNESSY
Florida Bar No. 0602558

ERIC ASH
Florida Bar No. 0976891
Lewis, Longman & Walker, P.A.
1700 Palm Beach Lakes Blvd., #1000
West Palm Beach, FL 33401
Telephone: (561) 640-0820
Facsimile: (561) 640-8202
Attorney for Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to **Michael T. Burke, Esquire**, Johnson, Anselmo, et al., 790 East Broward Boulevard, Suite 400, Fort Lauderdale, FL 33303-0220, by U.S. Mail, this _____ day of October, 2003.

_____
KENNETH G. SPILLIAS

CERTIFICATE OF COMPIANCE WITH RULE 9.210(A)(2), F.R.A.P.

COUNSEL certifies that this Brief was typed using Times New Roman 14.

_____
KENNETH G. SPILLIAS