IN THE FLORIDA SUPREME COURT

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

FLORIDA MUNICIPAL
INSURANCE TRUST

Petitioner,

vs.

VILLAGE OF GOLF

Respondent.
_______________________________/

PETITIONER, FMIT'S, INITIAL BRIEF ON THE MERITS

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Florida Municipal Insurance Trust - Petitioner

Florida League of Cities, Inc. - Petitioner’s Third Party Administrator

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Lewis, Longman & Walker, P.A. - 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

INTRODUCTION

Petitioner, FLORIDA MUNICIPAL INSURANCE TRUST, was the Defendant in the trial court. It will be referred to in this Petition as "FMIT."

Respondent, VILLAGE OF GOLF, was the Plaintiff in the trial court. It will be referred to in this Petition as "the Village."

References to the Record on Appeal will be: R. ___.

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ISSUES ON APPEAL

I. Whether the Estoppel Theory Approved in *Doe v. Allstate Insurance Co.*, 653 So.2d 371 (Fla. 1995), Can Be Applied to Conduct Arising Out of the Insurer's Investigation of a Claim Before the Claimant has Filed a Lawsuit.

II. Whether an Insured Must Prove Actual Prejudice When Claiming Coverage By Estoppel.

STATEMENT OF THE CASE AND FACTS

A. Statement of the Facts

Effective October 1, 1994, the Florida Municipal Insurance Trust (FMIT) issued a general liability policy of insurance to the Village of Golf (Village). R.1-2; T.1-171, Plaintiff's Exhibit 2. On October 11, 1994, a chlorine gas leak occurred at a water treatment plant owned by the Village. R.1-2; T.1-165. The Village immediately reported the accident to the FMIT and the FMIT hired a field adjuster named Greg Gibson to investigate the accident. T.3-239-242. The FMIT also began paying an attorney named George Roberts to assist with the investigation and represent the Village in matters relating to the incident. T.4-595-598. Field adjuster Gibson and Attorney Roberts met with employees of the Village Water Treatment Plant and met with employees of the owner of the chlorine tank (Jones Chemical), and conducted other investigation related to the accident. T.4-598-610.

By letter dated October 17, 1994, DuBois Growers, Inc., a nearby property owner, put the Village on notice of a potential claim for damages to its pepper crops as a result of the chlorine gas leak. R.1-2; T.1-183, Plaintiff's Exhibit 14. The Village immediately forwarded this written notice of claim to the FMIT who, in turn, requested field adjuster Gibson to look into the matter. Gibson contacted DuBois Growers representatives who advised that there was no visible damage to the pepper crops, and

that it was unknown whether the chlorine exposure would in the future harm the crop. T.3-332-333. DuBois Growers representatives informed Gibson that he would be notified in the event the pepper crops sustained any damage in the future. T.2-254-261 and T.2-319-324.

The Village subsequently received a number of relatively small claims for damages allegedly caused by the chlorine gas leak from persons and entities other than DuBois Growers. These claims for medical and veterinary expenses were gathered together by the Village and submitted to field adjuster Gibson. T.1-175-176. On December 4, 1994, Gibson sent these claims to the FMIT with a recommendation that the claims be paid even though liability appeared questionable. The FMIT subsequently paid $10,575.20 to resolve the claims presented to the Village as a result of the chlorine gas leak other than DuBois Growers' claim. T.2-251-254.

In late January or early February 1995, field adjuster Gibson was notified by DuBois Growers representatives that problems were now being observed with the pepper plants and Gibson went to the farm to meet with DuBois Growers representatives and photograph the crops. T.2-261-262; T.3-341. DuBois Growers representatives explained that some of the pepper plants had a stunted appearance, but it was unknown whether the crop yield would be effected and, if so, by how much. T.3-338-349.

In August 1995, DuBois Growers' attorney sent a letter to Gibson which claimed that the chlorine gas leak had caused $1,600,000.00 in property damage to the pepper crop. T.3-293-297. In November 1995, DuBois Growers then filed a lawsuit for damages against the Village, Jones Chemical and others allegedly responsible for the chlorine gas leak. R.1-3; T.3-299, Plaintiff's Exhibit 67. Upon receipt of the Complaint, the Village immediately forwarded the suit papers to the FMIT, and on November 14, 1995, the FMIT notified the Village that the DuBois Growers' Complaint was not covered by the policy of insurance and that the FMIT would not defend or indemnify the Village with respect to the lawsuit. R.1-3; T.3-412, Plaintiff's Exhibit 77. Specifically, the FMIT notified the Village that no coverage existed for the property damages sought by DuBois Growers pursuant to Exclusion G. of the policy which in pertinent part excludes coverage for:

> G. [ ] any claim for . . . property damage . . . caused by, contributed to or arising out of the actual or threatened discharge, dispersal, release, or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, pollutants or contaminants into or upon the land, the atmosphere . . . whether above or below ground.
>
> It is understood and agreed that the intent and effect of this exclusion is to delete from all coverages afforded by this policy any claim, suit, action, judgment, liability, settlement,

> defense or expenses . . . arising out of such actual or threatened discharge, dispersal, release or escape . . .
> R.1-15.

The FMIT advised the Village that it would continue to pay attorney George Roberts to represent the Village through the end of 1995 or if the Village preferred, it could immediately retain counsel of its own choosing. T.3-412-419. The Village elected to continue to have Attorney Roberts represent it through the end of 1995 and thereafter, retained the services of Attorney Phillip Gildan and ultimately, the firm of Lewis, Longman & Walker to represent it is in the lawsuit brought by DuBois Growers, Inc. T.4-536-545.

Discovery in the lawsuit established that the pepper plants did not exhibit any signs of visible damage in the days immediately following the chlorine gas leak. Representatives of DuBois growers had taken dozens of photographs and a videotape of their crops in the days following the incident which showed no damage to the crops. T.4-545-546, 660-665, Defendant's Exhibits 16, 17, and 18. Additionally, testimony from a Florida agricultural agent who had visited the farm shortly after the incident, and the testimony of independent scouts hired by the grower to periodically check the

plant material, also established that there was no visible damage to the crops in the days following the chlorine gas leak. T.4-695, Defendant's Exhibit 13, p.44-45.

The Village consulted with numerous experts in plant pathology who advised the Village that the DuBois Growers' claim of delayed damage to the plant material was inconsistent with scientific literature and how chlorine gas effects plants. The experts consulted by the Village, including unpaid experts from the University of Florida, advised that where chlorine gas is sufficiently toxic to damage plant material, the exposure causes visible damage and burning to the plant's leaves within a matter of hours or days following the exposure. In essence, based on the undisputed photographic evidence and deposition testimony, the Village's experts opined that there was no chlorine injury to the DuBois Growers pepper plants. T.4-542-544 and T.3-432-447.

On November 19, 1997, after two years of litigation, the governing Board of the Village met in executive session to discuss with its attorneys the status of the DuBois Growers' litigation. The attorney for the Village summarized the evidence developed during two years of discovery and notified the Village that the case was very defensible because

the evidence established that there had not been any chlorine injury to the pepper plants. In pertinent part, counsel for the Village summarized the defense ability of the case as follows:

> Their (DuBois Growers) claim is going to be one based on a lack of any evidence and a lack of any scientific supporting theory. In other words, there is no support for the theory that chlorine gas creates a chronic injury, in other words, a long-term, residual, lasting injury. (13/7 to 13/12)
>
> [E]very expert we've spoken to says that, when you see a significant chlorine injury, you're going to see something that looks like a bomb site. . . . you're going to see an area where the injury is concentrated and then dissipating out as the chlorine dissipates. (6/2 to 6/8)
>
> We have found experts who are, who will be unpaid experts from the University of Florida who will come in and say, and Florida Atlantic University, who will come in and say they don't see anything in the photos, it doesn't make any sense based on the testimony, and they do not believe that there was any chlorine injury to these plants. (39/16 to 39/23).
>
> That person [DuBois' expert] is going to have some real credibility problems for several reasons. Number one, he's got no photographs of the actual plants in their, quote, injured state. Two, he's go not samples of soil, plant tissue, air, water, anything related to the incident from which he could base his opinion. (20/7 to 20/13)
>
> [A]ll of the photos we've seen to date, they further emphasize that there was not any recognizable damage. (5/25 to 6/2)

> And I'll go into the concept that this case is a good case for the defense. It's basically, I'd say, that the Plaintiff's claim lacks credibility. It's a chlorine incident. All the literature that we have indicates and the experts that we've gong to indicate that a chlorine injury should demonstrate immediate, substantial and very obvious harm. We do not have that here, and the Plaintiff admits that does not exist here. What he claims is an injury several weeks later that was unanticipated and that he had no answer for. That injury is not, the injury he's claiming is not consistent with the normal chlorine damage, nor is it consistent with the scientific literature on how chlorine should act on plants. (4/23 to 5/14)
>
> I think that - I don't think they can prove their case. I think that ultimately nine out of ten juries are going to find in your favor, under the facts as we know them today, okay? (48/7 to 49/2)
>
> [T]he facts that have developed so far evidence that it's a good case for your defense. (3/14)
>
> And, Mr. Botos, I think its possible you will get a zero judgment in this case. (74/11 to 74/12)

T.4-695, Defendant's Exhibit 13.[1]

On March 4, 1999, after an additional one and half years of litigation, the governing Board of the Village again met in executive session to discuss with its attorneys the status of the DuBois Growers' lawsuit. Again, the attorneys

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[1] References are to the page and line number of the transcript of Executive Session.

for the Village advised that the case was very defensible based on the absence of credible evidence to show that the chlorine gas leak had damaged or caused injury to the pepper plants. T.4-695, Defendant's Exhibit 14.

Ultimately, the Village elected to settle the lawsuit by paying DuBois Growers the sum of $237,500.00. In settling the lawsuit, the Village took into account that despite the fact that the case was very defensible, significant costs would be incurred in a trial of the action. T.4-571-572. The Village paid a total of $340,839.60 in attorneys' fees and litigation costs in defending the DuBois Growers lawsuit, or a total of $578,339.60 to resolve the action. T.4-529-530.

B. **Statement of the Case**

This action was commenced in October 1999 when the Village filed a four-count Complaint for damages against the FMIT. (App. C) Count I sought relief for breach of contract and asserted that the FMIT had breached the insurance contract by refusing to defend the DuBois Growers' lawsuit and by refusing to indemnify the Village for the damages sought. Count II purported to be an action for breach of duty to defend. Essentially, the Village asserted that the FMIT was not permitted to deny coverage based on an exclusion because it failed to issue a written reservation of rights within the time period established by Florida Statutes §627.426(2)(a). As a result, the Village asserted that the

FMIT was liable for the costs incurred by the Village in defending and settling the DuBois Growers' lawsuit. Count III asserted that the FMIT was estopped to deny coverage based on the FMIT's alleged failure to properly investigate the claim and preserve evidence during the thirteen month period of time between the assertion of the claim and FMIT's denial of coverage. Essentially, the Village asserted that the FMIT should have retained an expert to inspect the pepper plants while they were still in the ground and preserve plant material for later analysis. Finally, Count IV set forth a claim for negligence and alleged that the FMIT had failed to exercise reasonable case in the investigation of the DuBois Growers' claim. R1-1-26.

Jury trial of the action commenced on May 14, 2001. Dr. Timothy Shubert, the primary expert hired by the Village in its defense of the DuBois lawsuit, testified at trial that when a crop is exposed to a potentially harmful substance such as chlorine gas, he likes to personally visually inspect the plants to determine whether the exposure has caused damage or injury to the plant material. In the case of the DuBois Growers exposure, Dr. Schubert testified that he was unable to do so because the plant material had been disposed of by the farmer long before he was contacted concerning the case. However, Dr. Schubert testified that the available photographic evidence and testimony of the

farmer and other persons who did see the plants in the days following the chlorine gas leak enabled him to determine within a reasonable degree of scientific probability that the chlorine gas leak did not damage the DuBois Growers' pepper crop. Indeed, Dr. Schubert testified that there was no evidence to show chlorine injury to the plants. T.3-419-456.

Attorney Greg Anderson who represented the Village's co-defendant, Jones Chemical, in the DuBois lawsuit, also testified. Consistent with the evaluation provided to the Village by its attorneys at the executive sessions, attorney Anderson testified that the DuBois Growers' lawsuit was very defensible because there was no substantial evidence to show that the chlorine gas leak had not caused damage or injury to the pepper plants. Like the Village, concern about the cost of a prolonged trial and the uncertainty that always exists when a case is presented to a jury, Jones Chemical elected to settle the DuBois Growers' claim. T.4-651-670.

During the trial FMIT also placed into evidence transcripts of the November 17, 1997 and March 4, 1999 executive sessions of the Village's governing body, which documented the Village's own attorney describing the absolute lack of evidence to support the DuBois lawsuit, as well as the numerous photographs of the pepper plants and

crops which were taken by DuBois Growers in the days following the chlorine gas leak which showed no evidence of damage. T.4-663 and T.5-746.

At the close of the Village's case, the trial court directed a verdict in favor of FMIT with respect to the negligence claim asserted in Count IV of the Complaint. T.4-577-595. Counts I, II and III went to the jury. Over FMIT's objection, the trial court instructed the jury that FMIT was required to comply with Florida Statutes §627.426(2)(a), which provides:

> A liability insurer shall not be permitted to deny coverage based on a particular coverage defense unless within thirty days after the liability insurer knew or should have known of the coverage defense, written notice of reservation of rights to assert a coverage defense is given...

The jury returned a verdict which found that the FMIT did <u>not</u> have a duty under its contract of insurance to provide coverage to the Village of Golf for the claim for damages brought by the DuBois Growers. (App. D) The jury did, however, find that the FMIT failed to timely raise its right to deny coverage, that it was estopped from denying coverage, and that the Village was damaged by the FMIT's actions in the amount of $436,651.69. R.3-369-370.

The trial court entered a final judgment in favor of the Village. R.3-482. In December 2001, the trial court granted the Village's Motion to Amend to include pre-judgment interest, and entered an Amended Final Judgment in the amount of $574.565.77. R.4-590-594 and R.4-595-596. (App. E) The trial court also entered a judgment which awarded the Village $368,448.10 in attorney's fees and costs for prosecuting the action against FMIT. (App. F) Thus, for a claim that was not covered by the Village insurance policy, a claim that was admittedly defensible, and was settled by the Village, the FMIT was required to pay a total of $943,013.87.00. FMIT appealed the Amended Final Judgment to the Fourth District Court of Appeal. FMIT argued (among other things) that the jury had been erroneously instructed that FMIT was precluded from denying coverage if it failed to timely issue a reservation of rights in accordance with §627.426(2)(a), Florida Statutes. FMIT argued that §627.426(2)(a) does not apply in instances where coverage is excluded under the policy. FMIT also argued that it could not be estopped from denying coverage based on its pre-suit investigation of the DuBois claim, and that in any event, the Village had not demonstrated that it was prejudiced by the FMIT's pre-suit investigation or involvement. The Village did not cross appeal the trial court's dismissal of its negligence claim.

On April 9, 2003, the Fourth District issued its decision which reversed the Amended Final Judgment, finding that the jury had been erroneously instructed that FMIT was precluded from denying coverage if it failed to timely comply with the requirements of §627.426(2)(a). Fla. Municipal Ins. Trust v. Village of Golf, 850 So.2d 544 (Fla. 4th DCA 2003)(Judge Farmer dissenting). (App. "B") The majority did, however, affirm the trial court's determination that FMIT could be estopped from denying coverage for a clearly excluded claim based on its conduct during a pre-suit investigation. The majority also found that the coverage can be created by estoppel for an expressly excluded claim when an adequate pre-suit investigation "could have" put the Village in a stronger position to defend the DuBois lawsuit. The court remanded for a new trial on Count III only.

In a written dissent, Judge Farmer disagreed with the majority's finding that coverage can be created by estoppel based on an insurer's pre-suit investigation. Judge Farmer wrote that he would find as a matter of law that there could be no coverage by estoppel under the circumstances presented.

FMIT filed a Motion for Rehearing and Rehearing En Banc, and a Motion for Certification. On August 6, 2003, the Fourth District Court of Appeal denied rehearing, but certified the following question as one of great public importance:

> CAN THE ESTOPPEL THEORY APPROVED IN *DOE v. ALLSTATE INSURANCE CO.*, 653 So.2D 371 (Fla. 1995), BE APPLIED TO CONDUCT ARISING OUT OF THE INSURER'S INVESTIGATION OF A CLAIM BEFORE THE CLAIMANT HAS FILED A LAWSUIT?

FMIT timely filed a notice invoking the discretionary jurisdiction of this Court.

SUMMARY OF ARGUMENT

The general rule in Florida is that estoppel cannot be invoked to create or extend insurance coverage. Only two (2) very narrow exceptions to that rule have been recognized. One exception (the "Crown Life" exception) applies when an insured has been misled in the initial procurement of insurance, in order to prevent a fraud or similar injustice. The other (the " Doe" exception) applies when an insurer assumes the defense of an insured and the insured is prejudiced by that defense. In these limited instances, and only in these instances, it has been held that an insurer may be estopped from denying coverage even though none exists. However, neither the Crown Life or the Doe exception allows for the creation of coverage by estoppel based on an insurer's mere pre-suit investigation.

This Court should decline the Fourth District's invitation to extend the Doe exception to create coverage by estoppel in instances of alleged inadequate pre-suit investigation, and answer the certified question in the negative. An extension of the Doe exception to pre-suit investigatory conduct would open the door to routine claims for coverage by estoppel, subjecting insurers to lawsuits for expressly excluded claims in the mere ordinary, rather than the extraordinary situation. What was intended to be a narrow exception would entirely supplant the general rule prohibiting

the creation of coverage by estoppel. Rather than the insurance contract governing the rights and obligations of the parties, coverage would become a jury question of whether a more thorough pre-suit investigation of an uncovered claim could have assisted in the ultimate defense of the claim. It would also significantly impact what assistance an insurer would be willing to offer to insureds pre-suit. Moreover, a finding that an insurance company is estopped from denying coverage for an excluded claim based on its pre-suit investigation is directly at odds with §627.426(2)(a), Florida Statutes, which expressly provides that insurers can conduct such investigations without waiver of any policy provision, including provisions which exclude coverage for the claim.

In addition to extending the Doe exception, the Fourth District has also expanded the doctrine of coverage by estoppel in a second way. Rather than adhering to the pronouncement made in Doe that an insured must demonstrate that an insurer's assumption of his defense ***has actually prejudiced*** the insured, Id. at 374, the Fourth District Court of Appeal found that the insured need only prove that an adequate investigation "***could have*** put it [the insured] in a stronger position . . . ." to defend the action for which coverage by estoppel is sought. FMIT v. Village of Golf, 850 So.2d at 548. (Emphasis added). The Fourth District's recognition of coverage by estoppel in the absence of proof of actual prejudice conflicts with the holding in Doe, and

permits courts to apply the doctrine of promissory estoppel, finding coverage for excluded claims, in the absence of clear and convincing evidence that the insured was ever prejudiced at all by any actions of the insurer.

ARGUMENT

I. THIS COURT SHOULD ACCEPT JURISDICTION TO DETERMINE THE PARAMETERS OF THE DOCTRINE OF COVERAGE BY ESTOPPEL, A MATTER OF GREAT PUBLIC IMPORTANCE WHICH AFFECTS THE RIGHTS AND OBLIGATIONS OF ALL INSURANCE COMPANIES AND INSUREDS IN THE STATE OF FLORIDA.

This case presents two (2) issues of great significance to every resident and every insurance company in the State of Florida, both of which arise frequently, involve public policy considerations, and are a matter of first impression in this Court. First, as certified by the Fourth District Court of Appeal as a matter of great public importance pursuant to Rule 9.030(a)(2)(A)(v), Fla.R.App.P., the issue of whether an insurance company can be estopped from denying

coverage for a clearly excluded claim based on its good faith conduct during a pre-suit investigation; and second, the related issue of what constitutes the prejudice which must be shown by one attempting to create coverage by estoppel.

The general rule in Florida is that insurance coverage cannot be created by estoppel.[2] In Doe v. Allstate Insurance Co., 653 So.2d 371 (Fla. 1995), this Court recognized a very narrow exception to that rule, finding that an insurance company can be estopped from denying coverage when it erroneously assumes the defense of an insured after a lawsuit has been filed, and the insured is actually prejudiced by the insurer's actions. The Fourth District's opinion in this case represents a dramatic expansion of the exception recognized in Doe, opening the door to the creation of coverage by estoppel based on conduct of an insurer before any suit is ever filed, during a mere pre-suit investigation. It does so despite that §627.426(1)(c), Florida Statutes, provides that an insurer shall not be deemed to have waived any policy provision by investigating or negotiating the settlement of a claim. Given that this represents an expansion of the narrow exception recognized in Doe which affects, or has the potential to affect, the rights and obligations of all insurance

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[2] See, Six L's Packing Company, Inc. v. Florida Farm Bureau Mutual Insurance Company, 268 So. 2d 560, 563 (Fla. 4th DCA 1972), adopted, 276 So. 2d 37 (Fla. 1973); Doe v. Allstate Ins. Co., 653 So.2d 371, 373 (Fla. 1995); AIU Ins. Co. v. Block Marina Inv., Inc., 544 So.2d 998 (Fla. 1989); Crown Life Ins. Co. v. McBride, 517 So.2d 660 (Fla. 1987).

companies and their insureds in the State of Florida, this Court should accept jurisdiction to determine whether the expansion is warranted.

A second issue related to the certified question also presents itself here, and also warrants the exercise of this Court's jurisdiction because it too questions the scope of the doctrine of coverage by estoppel– that is, the issue of what constitutes the prejudice which must be shown by one seeking to create coverage by estoppel. In Doe, this Court stated that an insured must demonstrate that an insurer's assumption of his defense ***has prejudiced*** the insured. Id. at 374. However, the Fourth District Court of Appeal found that prejudice to the insured may be established where an adequate investigation "***could have*** put it [the insured] in a stronger position . . . ." to defend the action for which coverage by estoppel is sought. FMIT v. Village of Golf, 850 So.2d at 548. (Emphasis added). The Fourth District's willingness to create coverage by estoppel in the absence of proof of actual prejudice results in another dramatic expansion of the doctrine of coverage by estoppel, providing an additional reason why this Court should exercise its jurisdiction and define the parameters when coverage for an excluded claim can be created by estoppel.

II. COVERAGE CANNOT BE CREATED BY ESTOPPEL FOR AN EXPRESSLY EXCLUDED CLAIM BASED ON AN INSURER'S INADEQUATE PRE-SUIT INVESTIGATION.

In Florida, the broadly applied general rule is that estoppel cannot be invoked to create or extend insurance coverage. Six L's Packing Company, Inc. v. Florida Farm Bureau Mutual Insurance Company, 268 So. 2d 560, 563 (Fla. 4th DCA 1972), adopted, 276 So. 2d 37 (Fla. 1973). See also, Doe v. Allstate Ins. Co., 653 So.2d 371, 373 (Fla. 1995); AIU Ins. Co. v. Block Marina Inv., Inc., 544 So.2d 998 (Fla. 1989); Crown Life Ins. Co. v. McBride, 517 So.2d 660 (Fla. 1987). The underlying rationale for this rule is that insurers should not be held liable for a risk which goes beyond a contractual agreement and for which no premium was collected. In the same vein, insureds should receive exactly the coverage they bargained and paid for, and not coverage which they elected to forgo.

The Supreme Court of Florida has recognized only two (2) very limited exceptions to this rule. First, in Crown Life Insurance Company v. McBride, 517 So.2d 660 (Fla. 1987), the Court held that promissory estoppel may be utilized to create insurance coverage where to refuse to do so would sanction a *fraud or other injustice* which occurred *in the purchase or issuance of an insurance policy*. The Court expressly restricted the application of the Crown Life

exception by holding that it applied only "to the ***limited extent*** expressed herein," Id. at 660 (emphasis added), and by later labeling the exception as "very narrow." AIU Insurance Co. v. Block Marina Investment, Inc., 544 So.2d 998, 1000, n.1 (Fla. 1989). Accordingly, the Crown Life exception has been said to apply only in circumstances where an insured was misled by an insurer in connection with the initial acquisition of an insurance contract, such that the insured reasonably believed it had obtained the coverage at issue for the premium paid. Aetna Casualty and Surety Co. of America v. Deluxe Systems, Inc. of Fla., 711 So.2d 1293 (4th DCA 1998); State Farm Mutual Automobile Ins. Co. v. Hinestrosa, 614 So.2d 633 (Fla. 4th DCA 1993).[3]

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[3] Judge Farmer commented in his dissent below that:

> To be sure, Crown Life is a tortured decision. The Court was split 4-3, with no less than three opinions attempting to justify the creation of the "fraud" estoppel exception. Only two justices joined in the "majority" opinion, each of the other two in the majority writing their own opinions. While close decisions are nonetheless still precedent for the result joined in by the simple majority, it is questionable whether much more than simple recognition of the fraud exception should be gleaned from the decision.

FMIT, 850 So.2d 544, 552, n.7. He also noted that in Crown Life the Court determined that the claimant had failed to prove even this limited estoppel by clear and convincing evidence. FMIT at 552.

The Crown Life exception does not apply here, as there is no allegation of fraud or other injustice alleged in the Village's purchase of its insurance policy from FMIT. To the contrary, it is undisputed that the Village elected not to purchase insurance coverage for property damage caused by the discharge of toxic chemicals, such as chlorine, and that the insurance policy which the Village did purchase contained a clear and unambiguous provision excluding such coverage.

In Doe v. Allstate Insurance Co., 653 So.2d 371 (Fla. 1995), the Court recognized the only other exception to the rule that insurance coverage can not be created by estoppel. There the Court held that if an insurance company assumes the defense of an insured in a lawsuit with knowledge of facts which would have permitted it to deny coverage, and the assumption of the defense results in prejudice to the insured, the insurer may be estopped from subsequently raising the defense of non-coverage.[4] In approving this "negligent defense" exception, the Court made clear that it is based on the carrier's assumption of sole control of the defense of an insured ***in a lawsuit***. That is, the exception

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[4] This exception was derived from the Fourth District's decision in Cigarette Racing Team, Inc. v. Parliament Ins. Co., 395 So.2d 1238 (Fla. 4th DCA 1981).

comes into play only after a lawsuit has been brought against an insured and the insurance company has undertaken to defend the insured in that suit.[5]

The Doe exception has no application in the instant case because it is undisputed that FMIT never assumed any defense of the Village in the lawsuit filed by DuBois Growers. Within fifteen (15) days after the Village sent FMIT the DuBois Growers Complaint, FMIT denied both coverage and a defense to the lawsuit.

Nevertheless, citing Doe, the majority decision from the Fourth District Court of Appeal below held for the first time as a matter of law that insurers can be estopped from denying coverage for expressly excluded claims based on the insurer's inadequate pre-suit investigation.[6] Respectfully, that holding represents not an application of the exception recognized in Doe to the rule prohibiting the creation of coverage by estoppel, but rather, an utterly dramatic and

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[5] In Doe, the insurer had been defending the lawsuit for approximately two (2) years when it sought to deny coverage. 653 So.2d at 372-373.

[6] No Florida appellate court has ever before held that an insurer was estopped to deny coverage for an excluded claim solely because it conducted an inadequate pre-suit investigation.

wholesale expansion of the doctrine of coverage by estoppel, far beyond what was intended by either the courts or the Legislature.

The majority's decision correctly recognizes that Doe permits the creation of coverage by estoppel when an insurer has undertaken the defense of an insured and has done so in a manner that has prejudiced the insured. However, the majority goes on to hold that "***the undertaking of a defense includes both investigating the accident as well as defending the lawsuit***," 850 So.2d at 548,(emphasis added), and reasons that therefore, the Doe exception applies and insurers can be estopped from denying coverage for an expressly excluded claim based upon a pre-suit investigation. Historically, however, the law has required insurers to make the decision of whether or not to undertake the defense of an insured at the time a lawsuit is filed. It is in fact well settled under Florida law that an insurance company's duty to defend an insured is determined ***solely*** from the allegations set forth in the Complaint against its insured. See, Amerisure Ins. Co. v. GoldCoast Marine Distr., Inc., 771 So.2d 579, 580 (Fla. 4th DCA 2000);

Smith v. General Accident Ins. Co. of America, 641 So.2d 123, 124 (Fla. 4th DCA 1994); Fla. Farm Bureau Mutual Insurance Co. v. James, 608 So.2d 931 (Fla. 4th DCA 1992).[7]

That point was made abundantly clear in Capoferri v. Allstate Insurance Co., 322 So.2d 625 (Fla. 1975), where an insured sued his automobile liability insurer for withdrawing from his defense in an action stemming from a traffic accident wherein he ran into another vehicle. After initially filing an appearance on the insured's behalf, the insurer withdrew because the Complaint filed against the insured only asserted an action for assault and battery, and the policy at issue did not provide coverage for intentional acts. The insured, however, claimed the insurer could not refuse to defend based solely on the allegations contained in the Complaint, given that the insurer's own investigation showed that the mishap at issue was an accident which was covered under his policy. Finding that the insurer had no duty to defend, and that it properly withdrew (even after initially filing an appearance), the Court held:

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[7] If the allegations in the Complaint state facts that bring the claim within the policy's coverage, the liability insurer must defend the lawsuit. Similarly, if the allegations of the Complaint state facts that assert a claim for which coverage does not exist because of a policy exclusion, the insurer has no obligation to defend the lawsuit. Aetna Commercial Insurance Co. v. American Sign Co., 687 So.2d 834 (Fla. 2nd DCA 1996).

> In Florida, the generally recognized rule is that the insurer is under a duty to defend a suit against an insured only where the complaint alleges a state of facts within the coverage of the policy.

Id. at 626. Similarly, in Liberty Mutual Insurance Co. v. Lone Star Industries, Inc., 661 So.2d 1218 (Fla. 3rd DCA 1995), it was held that an insurer had no duty to defend an insured in connection with underlying actions alleging groundwater contamination from the insure's wood-treating facility, because the Complaint that was filed against the insured did not allege facts which fell within the insured's policy coverage.[8]

The above cases make clear that an insurance company cannot make a determination on whether it has a duty to defend an insured unless and until a lawsuit has been filed. Only at that time can the insurance company examine the specific allegations being made against an insured, and measure those allegations against the provisions of the insured's insurance policy. Only at that time can the insurer undertake the insured's defense.

The Fourth District's majority finding that an insurer can undertake the defense of its insured before a lawsuit is ever filed puts the proverbial cart before the horse. Since the duty to defend cannot arise until a Complaint is filed,

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[8] There the Court also found that the insurer's did not waive its right to deny coverage of the excluded claim based upon its initial appearance in the case.

the insurer cannot undertake that duty before that time. A pre-suit claim against an insured can be investigated, settled or denied, but it cannot be defended. A defense does not begin until the insured is served with a lawsuit or other legal action for monetary relief such that a response (defense) is required on or behalf of the insured.

By holding that "the undertaking of a defense includes both investigating the accident as well as defending the lawsuit," 850 So.2d at 548, and reasoning that the undertaking of the defense can create coverage by estoppel, the majority in effect requires insurers to make coverage determinations well before any lawsuit is filed. The Court in essence thrusts upon the insurer the need to determine whether it will undertake an investigation, and therefore the duty to defend and indemnify an insured, as soon as the insured notifies the insurer of a potential, as of yet unfiled, claim. The majority holds that an insurer, without the benefit of a Complaint defining a particular cause of action or setting forth specific allegations which can be analyzed by the insurer in relation to the provisions of the insured's policy, must immediately decide whether it will engage in a pre-suit investigation, which could constitute the undertaking of the insured's defense and later preclude it from denying coverage.

The exceptions to the rule prohibiting the creation of coverage by estoppel have been purposefully limited and narrowly employed. As the careful limitation suggests, the intent is to ensure that insureds and insurers alike will be bound by the express terms of their contract, and therefore, only the coverage that was bargained and paid for will be provided absent the need to prevent fraud or similar injustice.[9]

The Fourth District majority decision extending the exception recognized in Doe to subject insurers to liability based on pre-suit conduct potentially opens the door, and in fact the flood gates, to suits claiming coverage by estoppel. Insurers conduct at least some minimal investigation on every claim. Insureds will now be able to assert that a court should create coverage for an excluded claim because the insurer did not investigate quickly enough, did not reserve its rights to deny coverage during the investigation, and failed to conduct a detailed enough investigation to discover or preserve evidence. Rather than a ***limited*** exception to prevent fraud or injustice, the doctrine of estoppel

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[9] The general rule, rather than the narrow exceptions, would seem particularly applicable in instances where, as here, there are two sophisticated parties, a policy is clear and unambiguous as to the coverage excluded, and the insurer's pre-suit conduct in attempting to assist its insured (before it could even engage in a meaningful coverage determination by measuring allegations of a Complaint against the policy) was, in Judge Farmer's words, "both benign and understandable." 850 So.2d at 550

becomes a powerful vehicle to create coverage based on an insurer's alleged "inadequate" pre-suit investigation of an excluded claim. Indeed, the decision significantly expands potential use of the doctrine. As Judge Farmer noted in his dissent below:

> The fear is that giving any estoppel a wide sweep would allow the general rule to be supplanted by what is strictly intended to be a rare and limited remedy.

850 So.2d at 553. That is exactly the result that has been reached here. The Fourth District's decision effectively broadens the Doe exception to such an extent that, if permitted to stand, the exception will swallow the rule.

At the very least, every claim asserting coverage by estoppel will become an issue of fact for a jury. Insureds will claim that more investigation should have been conducted, that the insurer simply did not do enough, or all that it could have and should have before suit was filed.

If the majority's decision stands, the obvious consequence will be that insurance companies can and will do only one thing– before ever undertaking the investigation of any claim, they will immediately issue reservation of rights letters to every insured upon notification of any claim. That result, and indeed the entire notion that an insurer can be subjected

to a determination of coverage by estoppel based upon a pre-suit investigation, is directly contrary to Florida Statute §627.426(1)(c), the Claims Administrations Statute, which provides:

> **Without limitation** of any right or defense of an insurer otherwise, **none of the following acts by or on behalf of an insurer shall be deemed to constitute a waiver of any provision of a policy** or of any defense of the insured thereunder:
>
> > (1)(c) **Investigating any loss or claim under any policy** or engaging in negotiations looking toward a possible settlement of any such loss or claim.

(Emphasis added). Consistent with common law, the statutory provision expressly protects an insurer from expansion of its coverage obligations because it conducted a pre-suit investigation. The majority's holding only conflicts with the safe harbor provisions of this statute, but renders them a nullity. Surely a party cannot be estopped premised upon conduct that is expressly permitted under the Claims Administration Statute.

Contract law does not and should not provide for the creation of insurance coverage by estoppel predicated on an insurer's pre-suit investigation. This does not mean to say, however, that an insured would be without other remedies, such as those sounding in tort, if in fact an insured suffers damage as the result of an insurer's pre-suit investigatory conduct. Remedies are available. For instance, if an insured gathered evidence to support its defense in

a future lawsuit, and the insured entrusted that evidence to an insurer, who then lost the evidence, the insured would have a remedy against the insurer for spoliation of evidence. Under appropriate circumstances, insureds may also have actions for bad faith. However, they cannot enjoy the creation of insurance coverage which they declined to purchase and have never paid for.

For these reasons, FMIT respectfully submits that the certified the question of whether the Doe exception applies to create coverage based on an insurer's pre-suit conduct, be answered in the negative, and that the matter be remanded with directions to enter judgment in favor of FMIT.

III. A PARTY CLAIMING COVERAGE BY ESTOPPEL MUST CLEARLY AND CONVINCINGLY PROVE THAT IT WAS ACTUALLY PREJUDICED BY THE INSURER'S ACTIONS.

In addition to expanding the doctrine of coverage by estoppel by subjecting insurers to estoppel based on pre-suit conduct, the Fourth District's majority opinion also expands the doctrine in a second way, and one that is potentially even more devastating to insurers than permitting coverage by estoppel for pre-suit investigatory conduct.

In Doe, it was clearly held that estoppel cannot be used to create coverage unless the insured proved that it had actually been prejudiced. 653 So.2d at 374. In fact, the Court held:

> ...**we clearly state that the insured must demonstrate that the insurer's assumption of the insured's defense has prejudiced the insured**. It is the fact that the insured has been prejudiced which estops the insurer from denying the indemnity obligation of the insurance policy.

Id. (Emphasis added).

Nevertheless, the Fourth District's majority opinion held here that the court may create coverage for an expressly excluded claim when an adequate pre-suit investigation "***could have*** put [the insured] in a stronger position..." to defend the DuBois Growers lawsuit. FMIT, 850 So.2d at 548. (App.A) The Court indicates that it is enough for an insured to show that it might have been prejudiced, without showing that it actually was prejudiced, in order to create coverage.

The Fourth District majority holding conflicts with Doe, which expressly states that an insured must demonstrate that it was actually prejudiced by the insurer's assumption its defense. In fact, because the exceptions to the general rule against creating coverage by estoppel are premised upon the doctrine of "promissory estoppel," Doe v. Allstate

Company, 653 So.2d 371, 373 (Fla.1995) quoting Crown Life Insurance Company v. McBride, 517 So.2d 660, 662 (Fla. 1987), and Florida law is well settled that "for promissary estoppel to be applied, the evidence must be clear and convincing," Vencor Hospitals South, Inc. v. Blue Cross and Blue Shield of Rhode Island, 86 F.Supp.2d 1155 (S.D. Fla. 2000); W.R. Grace and Co. v. Geodata Services, Inc., 547 So.2d 919, 925 (Fla. 1989), one claiming coverage by estoppel must prove actual prejudice by clear and convincing evidence.

The Supreme Court of Florida has not addressed the type of loss or damage which must be shown to establish actual prejudice and estop an insurer from denying an otherwise non-existent indemnity obligation. However, in order to give effect to the settled proposition that coverage by estoppel is the exception, rather than the rule, the prejudice must be significant and should be outcome determinative.

Cases which discuss this issue in related contexts support that one claiming coverage by estoppel must do more than prove that it *could have* been prejudiced by the insurer's actions, and should be required to prove that the insurer's actions significantly impacted the insured's defense of the underlying claim.

For instance, the rule in Florida is that an insurance company, in order to avoid liability under its policy on the ground that the insured violated a cooperation clause, must show that the lack of cooperation was material and that it was ***substantially prejudiced*** in the particular case by such lack of cooperation. Bontempo v. State Farm Mutual Automobile Insurance Co., 604 So.2d 28 (Fla. 4th DCA 1992).

When an insurer claims prejudice from a loss of subrogation rights, an insured can show a lack of actual prejudice by showing that the financial condition of the tort-feasor is such that no recovery was ***realistically*** available. Galinko v. Aetna Casualty and Surety Co., 432 So.2d 179 (1st DCA 1983).

In another related context, the Supreme Court of Florida held that "mere speculation that prejudice may exist will not suffice when lack of prejudice is clearly demonstrated". Tiedtke v. Fidelity and Casualty Company of New York, 222 So.2d 206, 209 (Fla. 1969) (insure can not deny coverage based upon late notice where a lack of prejudice is established).

In order to establish a claim for ineffective assistance of counsel, one must demonstrate that his counsel's performance was deficient and that his counsel's deficient performance resulted in prejudice. The term "prejudice" there has been held to mean:

> the reasonable probability that, but for counsel's unprofessional errors, **the result of the proceedings would have been different**.

Vines v. United States, 28 F.3d 1123, 1127 (11th Cir. 1994)(citations omitted, empahsis added); See also, Bowman v. State, 748 So.2d 1082.

In Coregis Insurance Company v. McCollum, 961 F. Supp. 1572, 1578 (M.D. Fla. 1997) Chief United States Middle District Judge Kovachevich discussed the issue in another related context and held as follows:

> Defendants also claim that the Plaintiff's assumption of their defense in the underlying malpractice case has prejudiced them in that Plaintiff chose to include Marine City and Senger as defendants in its Declaratory Judgment action. Defendants, assert that, by serving a copy of the Johnson Memorandum to Defendants Marine City and Senger with Plaintiff's Complaint for Declaratory Judgment, Plaintiff Coregis has effectively sabotaged their defense of the underlying lawsuit by disclosing a memorandum that the Defendant insureds considered to be privileged. Defendants rely **on Doe v. Allstate Insurance Company, 653 So. 2d 371 (Fla. 1995)** and Cigarette Racing Team, Inc. V. Parliament Insurance Company, 395So. 2d 1238 (Fla. 4th App. 1981) to support their arguments. Both of those cases hold that "if an insurer erroneously begins to carry out its duty to defend its insured, and the

insured relies upon the insurer to the insured's detriment, then the insurer should not be able to deny the coverage which earlier acknowledged." Doe, 653 So. 2d at 374, *see also* Cigarette, 395 So. 2d at 1239-40.

However, the prejudice to the insured that resulted in both of those cases 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. Doe, 653 So. 2d at 372-73; Cigarette, 395 So. 2d at 1239. That is not the case here. The prejudice Defendants allege to have suffered in the instant case is the disclosure of an allegedly privileged memorandum which the Defendants assert has sabotaged its defense to the underlying malpractice case. However, to estop the insurer from denying coverage, the insured must "demonstrate that the insurer's assumption of the insured's defense has prejudiced the insured." Doe, 653 So. 2d at 374. Here, the defendants have not demonstrated that the Plaintiff Coregis's assumption of their defense has indeed prejudiced the Defendants in the underlying malpractice claim. The malpractice action is pending in state court and its outcome is unknown. **If Defendants McCollum and the McCollum firm are found to be liable in the underlying malpractice practice, and Defendants can show that Plaintiff Coregis's disclosure of the Johnson memorandum to Marine City and Senger in this Declaratory Judgment action prejudiced them, then McCollum and the McCollum firm may file an bad faith action against Plaintiff Coregis. Until then, this Court will not speculate as to whether Plaintiff's actions have prejudiced the Defendants in the underlying action**. *(Emphasis added)*

Judge Kovachevich's analysis of prejudice is both logical and prevents the Doe exception from swallowing the general rule that coverage cannot be created by estoppel. In essence, unless the insured is actually damaged or injured

in its defense of the claim in some real and significant way, the estoppel exception will simply envelop the general rule that nonexistent excluded coverage cannot be created by estoppel. It would be easy to allege that more *could have* been done by an insurer in almost any pre-suit investigation.

In the instant case, the record is devoid of any clear and convincing evidence of prejudice. Although acknowledging that the underlying claim was completely defensible, the Village's case was based on speculation that a more thorough pre-suit investigation would have made it easier or less expensive to defend and settle the DuBois Growers lawsuit. While any pre-suit investigation can always be better or more thorough, the fact that something else could have been done which if it produced certain results may have impacted the defense of a subsequent lawsuit, is not sufficient clear and convincing evidence to establish the "prejudice" needed to create coverage by estoppel.

In short, the Village is required to prove actual prejudice to prevail on its claim for coverage by estoppel. Prejudice in this context must equate to significant harm, such that it substantially impacted the outcome of the underlying claim.

CONCLUSION

The Defendant, FMIT, respectfully submits that the Amended Final Judgment should be reversed and the matter remanded to the trial court for entry of judgment in favor of the Defendant, FMIT, in accordance with the reasons and authorities stated above.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail to **KEVIN S. HENNESSY, ESQUIRE** / **KENNETH SPILLIAS, ESQUIRE**, Lewis, Longman & Walker, P.A., Attorneys for Appellee, 1700 Palm Beach Lakes Boulevard, Suite 1000, West Palm Beach, Florida, 33401, this 7th day of October, 2003.

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that Appellant, FLORIDA MUNICIPAL INSURANCE TRUST's, Initial Brief complies with the font and other requirements set forth in Rule 9.210(a) of the Florida Rules of Appellate Procedure.

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Michael T. Burke, Esq.