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,
REPLY BRIEF

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ARGUMENT

I. THIS COURT SHOULD ACCEPT JURISDICTION TO DETERMINE THE PARAMETERS OF THE DOCTRINE OF COVERAGE BY ESTOPPEL.

The Village's assertion that this Court should decline to answer the question certified by the Fourth District Court of Appeal to be of great public importance should be rejected. The answer to the certified question is of extreme importance to insureds and insurers in the state of Florida, and will impact pre-suit relations between these parties and

effect the frequency with which reservation of rights letters are utilized, even though coverage issues are not yet apparent.[1]

The Village asserts that the Court should decline to answer the certified question because it claims that the question has in essence already been answered. To that end, the Village attempts to portray the Fourth District majority's decision in this case (despite certification by the entire panel) as nothing more than an application of "well established principles of estoppel." That is simply not the case.

This Court has never sanctioned the creation of insurance coverage by estoppel based upon the inadequacy of an insurer's pre-suit investigation. To the contrary, the Court has repeatedly instructed that the general rule in Florida

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[1] As Judge Farmer noted in his dissent below:

> Under [the majority's] disposition, what carrier faced with the same circumstance will now do anything to assist an insured similarly situated? Insurance carriers for cities and counties, and large corporations as well, will now tell their insured instead that there is no coverage, and therefore no assistance and no help, and that they will have to fend for themselves. Is this the kind of world the majority really wants to create? I daresay such a world conflicts with the one envisioned by the supreme court in its cases carefully limiting the circumstances on which insurance coverage can be created by estoppel.

FMIT v. Golf, 850 So.2d 544, 551 (Fla. 4th DCA 2003)(Farmer dissenting).

is that insurance coverage cannot be created by estoppel,[2] recognizing only two (2) very limited exceptions to that rule. The Crown Life exception does not apply here. And in Doe v. Allstate Insurance Co., 653 So.2d 371 (Fla. 1995), the Court found only that an insurance company could be estopped from denying coverage where it had erroneously assumed the defense of an insured in a lawsuit, where the parties had a complaint against which to measure whether the insurer had an obligation to defend. However, this Court has never considered whether the exception recognized in Doe should be extended even further, to permit the creation of insurance coverage by estoppel based upon an insurer's pre-suit investigatory conduct, especially in light of §627.426(1)(c), Florida Statutes, which provides that an insurer shall not be deemed to have waived any policy provision by investigating or even negotiating a settlement.

The Village's reliance on Cigarette Racing Team, Inc. v. Parliament Insur. Co., 395 So.2d 1238 (Fla. 4th DCA 1981) to support its argument is without merit for two (2) reasons. In that case, the insurer defended the purported insured for six (6) months *after* suit was filed. The Court simply reversed a summary judgment that had been entered

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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).

in favor of the insurer. In any event, Cigarette Racing was decided by the Fourth District Court of Appeal, the same court which has certified the question of whether the Doe exception should be extended to permit the creation of coverage by estoppel based upon an insurer's pre-suit conduct to be a matter of great importance requiring resolution. The Fourth District has therefore recognized that the issue is not settled, and has never been decided by this Court.[3] In fact, in his dissent below, Judge Farmer found that "the majority's decision is ***contrary to*** the Florida Supreme Court decisions against creating coverage by estoppel..." Florida Municipal Insurance Trust v. Village of Golf, 850 So.2d at 549. (Emphasis added)

It is well settled that once the Court accepts jurisdiction, it may review a district court decision for *any* error. Leisure Resorts, Inc. v. Frank J. Rooney, Inc., 654 So.2d 911, 912 (Fla. 1995); Lawrence v. Fla. East Coast Railway Co., 346 So.2d 1012, 1014, n.2 (Fla. 1977). The majority decision below found that a party seeking to create insurance coverage by estoppel need only establish that an adequate pre-suit 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

[3] Indeed, every certified question must first be decided by the district court of appeal before it can be considered by this Court.

So.2d at 548. (Emphasis added). For the reasons discussed in section III of FMIT's initial and reply briefs, that standard is far too relaxed to invoke the drastic measure of re-writing a contract to provide for insurance coverage where none was purchased, and was in fact expressly excluded.

This Court has never defined the type or extent of prejudice which must be shown by a party seeking to create insurance coverage by way of estoppel. If the Court determines that the Doe exception should be expanded to permit the creation of coverage based upon an insurer's pre-suit conduct, FMIT submits that the Court should clearly delineate the nature and/or extent of prejudice which must be shown in order to come within the exception. That is, the Court should decide whether one must show that it "could have" been prejudiced in its defense of the underlying lawsuit by the insurer's action(s), that it was probably prejudiced in its defense, such that the outcome of the action was more likely than not impacted, or that it was prejudiced in its defense, such that the outcome of the case was clearly impacted by the insurer's actions. If the doctrine of "insurance coverage by estoppel" is to exist, certainly the prejudice necessary to invoke the exception should be defined so that the exception can be reasonably applied.

The Village's assertion that this issue was not presented to the Fourth District Court of Appeal is simply incorrect. The issue was presented to the Fourth District both in FMIT's initial brief (pp.33-36), and in its Motion for Rehearing and En Banc Rehearing. (pp.5-7) Moreover, the Village's reliance on John Crocker v. Richard Pleasant, 778 So.2d 978, 990-991 (Fla. 2001) as support for its argument that the Court should refrain from deciding the issue is misplaced. In that case, the Court merely declined to exercise its discretion to decide an issue which "was not decided or discussed in the Fourth District's opinion." Here, the Fourth District majority opinion expressly discussed that one can obtain the benefit of coverage by estoppel in the absence of showing actual prejudice in its ability to successfully defend itself in the underlying lawsuit. While the Court can of course always decline to decide an issue, it is submitted that the issue presented here cries out for resolution, and that guidance is essential to the appropriate application of the doctrine which permits the creation of insurance coverage by estoppel.

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

In its argument, the Village takes the position that this Court should simply apply general principles of estoppel to create insurance coverage which it elected not to pay for, and which was expressly and unambiguously excluded

from its policy. The Village's argument entirely ignores the Court's repeated pronouncement that the general rule in applying equitable estoppel to insurance contracts is that estoppel may be used defensively to prevent a forfeiture of insurance coverage, but not offensively to create or extend coverage. Crown Life Ins. Co. v. McBride, 517 So.2d 660 (Fla. 1987), citing 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). In Crown Life, the Court said:

> "[E]quitable estoppel is not designed to aid a litigant in gaining something, but only in preventing a loss. In other words, it will not avail in the offense, but only in the defense."

Id. at 661, citing Kerivan v. Fogal, 22 So.2d 584, 586 (Fla. 1945).

The Village not only refuses to acknowledge the general rule prohibiting the creation of coverage by estoppel, but also refuses to acknowledge that the Court has recognized only two (2) *limited exceptions* to that rule, as set forth in Crown Life and Doe. The Crown Life exception, which permits the creation of coverage by estoppel

where to refuse to do so would sanction a fraud or other injustice which occurred in the purchase or issuance of an insurance policy, is obviously inapplicable here.[4] The Doe exception, which permits the creation of coverage by estoppel when an insurer has undertaken the defense of an insured in a lawsuit, is also inapplicable.[5] It is undisputed that FMIT did not assume the 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 that lawsuit.

In spite if its refusal to acknowledge exactly what it is asking this Court to do, the Village is without question asking this Court to dramatically **expand** the Doe exception to the rule which prohibits the creation of insurance

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[4] Not only was the Village not fraudulently led to believe that it had purchased coverage for the discharge of chlorine, it is undisputed that the Village elected not to purchase that coverage, and that the insurance policy contained a clear and unambiguous provision to that effect.

[5] As Judge Farmer wrote, "[t]he Doe exception requires a real live civil action on the claim against the insured." 850 So.2d at 554.

coverage by estoppel, allowing for the first time the creation of coverage based solely on pre-suit conduct.[6] Expansion of the Doe exception to permit the creation of coverage based on an insurer's pre-suit conduct would be entirely inconsistent with this Court's careful limitation on the exceptions to the broadly applied general rule which prohibits creating coverage by estoppel. The limited nature of the exceptions evidence the Court's recognition that giving any estoppel a wide sweep would allow the broad rule to be supplanted by what is strictly intended to be a rare and limited remedy. The Village attempts to justify the expansion by claiming that insureds should be protected against a false sense of security that can be had when an insurer acts to assist in the administration of a potential lawsuit. As Judge Farmer point out however, the Village never explains why the law should prefer a "false sense of security" as against clear contractual language to the contrary. 850 So.2d at 551, n.4.

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[6] In an effort to bolster its argument, the Village repeatedly describes FMIT's conduct as "egregious" and "wrongful." The record of course demonstrates that FMIT's conduct was, in Judge Farmer's words, both "benign and understandable." 850 So.2d at 550. FMIT merely tried to assist the Village with its investigation and claims administration, and there is nothing whatsoever in the record to indicate any bad faith, ill intent or "egregious" conduct by FMIT.

In any event, an expansion of Doe to create coverage based on the pre-suit conduct of an insurer would be inconsistent with Florida Statute §627.426(1)(c), Florida's Claims Administration Statute. This statutory provision expressly protects an insurer from the expansion of its coverage obligations based upon its pre-suit conduct. Insurers are clearly intended to be free to investigate and to even negotiate the settlement of claims without fear of creating coverage. In an effort to avoid the plain intent of the statute, the Village claims that the statute safeguards only against the "waiver" of coverage defenses by insurers, not against their being "estopped" from raising provisions of the policy. That argument must fail, given that the very purpose of the statute is to permit insurers to conduct pre-suit investigations without losing the right to dispute coverage. Recognizing the distinction advocated by the Village would render the safe harbor provisions of the statute meaningless. As Judge Farmer noted:

> ...the essential thrust of the CAS is precisely to address the circumstances when the carrier will be estopped to assert a policy provision. As *AIS Insurance* makes clear, however, the CAS cannot be used to create coverage by estoppel because to do so would raise constitutional defects by impairing an obligation of contract. Thus, the estoppel permitted by the CAS is limited to other policy clauses the breach of which may result in a forfeiture of coverage provided by the policy.

> Under the CAS, no conduct of the carrier in good faith investigation of a possible claim against the insured can result in coverage where the policy explicitly excludes coverage for the claim.... It is apparent that the insured's theory of estoppel is in direct conflict with the clear text from the CAS. Surely the supreme court did not mean to allow an estoppel on the basis of conduct clearly permitted by the CAS.

850 So.2d at 554.

Additionally, the Court should refuse to expand the Doe exception because of the impact such an expansion would have on insurance relationships. Historically, the law has required insurance companies to make the decision of whether or not to undertake the defense of an insured at the time a lawsuit is filed. If the Court holds that an insurer can "undertake the defense" of an insured by virtue of pre-suit conduct, insurers will be subjected to routine claims for coverage by estoppel. Logically, insurers conduct at least some minimal investigation on every claim. They will now do so at great risk, always concerned that their actions will later be claimed to have created coverage. The creation of coverage will no longer be a rare instance, reserved for the most compelling circumstance. The fact that coverage can be created will encourage fraudulent and spurious claims from those desperate to obtain the coverage that they had

earlier decided not to purchase. Moreover, the issue will always become one of fact, requiring the determination of whether each pre-suit investigation was "adequate."

The logical result of recognizing the creation of coverage by estoppel based upon pre-suit conduct will be that insurer's will be far more likely to routinely issue reservation of rights letters, even when no substantial coverage issue has arisen. That will be the only sure way insurers will be able to completely protect themselves against claims asserting coverage by estoppel.

While the Village tries to downplay the significance of the routine issuance of reservation of rights letters, the end result will be that these letters will be rendered useless. Like any warning, reservation of rights letters are designed to be meaningful, prompting insureds to take action to protect themselves. However, if these warnings become routine, they will over time be regarded by insureds as a mere "precautionary" measure, will no longer be taken seriously, and will not serve their intended purpose of notifying insureds when there is a serious question as to coverage. In the end, the insurance companies will protect themselves, but insureds will either be left to fend for themselves in pre-suit

matters, or be left wondering whether the pre-suit reservation of rights letter they received really means anything at all.[7]

While contract law does not and should not provide for the creation of insurance coverage by estoppel predicated on an insurer's pre-suit investigation, insureds are not without remedies for true "egregious" and "wrongful" conduct, as the Village implies. Insureds have remedies sounding in tort when they suffer damage as the result of an insurer's pre-suit investigatory conduct. Spoliation of evidence claims can be made when an insurer undertakes to gather evidence, then fails to preserve it. Under appropriate circumstances, insureds may so have an action for bad faith. If the Legislature deems it appropriate, other remedies can be created. However, under current contract law, insureds are not entitled to the benefit of insurance coverage which they declined to purchase and have never paid for, based upon their insurer's pre-suit conduct.

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[7] The Village's assertion that the absence of coverage by estoppel will "encourage ship-shod investigations" (Answer brief, p.21) makes no sense. Insurance companies can and will either refuse to engage in pre-suit investigations altogether, or reserve all rights on coverage issues. There would be no reason for an insurance company to set out to perform negligent inspections, when the very purpose of the investigation is to determine their own potential liability.

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

If the Court determines that an exception to the general rule against creating insurance coverage by estoppel exists based on an insurer's pre-suit conduct, then the Court should provide guidance as to the nature and extent of "prejudice" which must be shown by a party seeking to invoke that exception. That is, the Court should determine whether the Fourth District's pronouncement that an insured need only show that it *could have* been prejudiced in its defense of an action is correct, or whether an insured need show something more, such as more likely than not the outcome of its defense in the underlying suit was impacted, or that it was actually impacted in that the insurer's conduct was clearly and convincingly outcome determinative.

The Village's assertion that what constitutes "prejudice" necessary to invoke insurance coverage by estoppel is merely a factual determination which will vary from case to case and needs no explanation must be rejected. Juries need to be instructed on what sort of prejudice can invoke coverage by estoppel. Certainly when juries consider negligence actions, they are instructed on what "negligence" is. Similarly here, juries need to have a standard by which to determine

what constitutes the "prejudice" necessary to justify the creation of insurance coverage where it did not previously exist. If it is enough to show merely that the insured's defense *could have* been impacted, coverage by estoppel will be easily found. If prejudice must be clearly proven and outcome determinative, then juries will be governed accordingly and the creation of coverage by estoppel will found in far fewer instances.

FMIT submits that the prejudice must be real, outcome determinative and clearly proven. In Crown Life, supra, in a specially concurring opinion, Justice Grimes noted:

> ...[T]he application of promissory estoppel to create coverage facilitates the possibility of fraudulent claims. Perhaps this is sufficient justification for the requirements that the proof must be by clear and convincing evidence.

Id. at 663 (citation omitted). In a separate concurrence, Justice Willis wrote:

> ... to support a finding of equitable estoppel the facts necessary to constitute it must be shown with certainty and not taken by argument or inference, nor supplied by intendment, but clearly and satisfactorily proved.

In Doe, this Court also held that estoppel cannot be used to create coverage unless the insured proved that it had actually been prejudiced, saying:

> ...**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. at 374. (Emphasis added). These decisions, coupled with the general rule which prohibits the creation of coverage in all but rare and limited instances, support the conclusion that purported insureds must do much more than show that they could have been prejudiced in the defense of an action. Only then can the exception be prevented from swallowing the rule.

The Village's assertion that FMIT "truly seeks to have this Court set aside a jury verdict that was based on substantial competent evidence..." (Answer brief, p.22) is utterly without merit. The jury in this case never determined that the Village was actually prejudiced by FMIT's alleged negligent defense of the Village. (See verdict form, App. 2) The jury was improperly instructed that pursuant to §627.426(2)(a), it must find in favor of the Village if FMIT had not issued a reservation of rights letter. It was for that reason that the Fourth District set aside the jury's determination, finding that the erroneous instruction was "tantamount to telling the jury it had to return a verdict for the insured." 850 So.2d at 548. The jury's verdict does not reflect a determination that the Village was actually prejudiced in its defense

of the DuBois action. In fact, the record is devoid of any clear and convincing evidence that FMIT's actions (or inactions) impacted the Village's defense, or that any action or inaction by FMIT was outcome determinative. The Village's own lawyers described the case as completely defensible. Despite the Village's effort to make it appear otherwise, its own expert was quite capable of confidently rendering an opinion that the DuBois crops suffered no damage from the chlorine leak.

The Village's argument in its Answer Brief demonstrates quite clearly the need to define hat prejudice will suffice to invoke coverage by estoppel. Despite the lack of evidence necessary to prove the DuBois claim, the Village claims that it was prejudiced by not having even more photographs, witness statements, etc. that would have simply made its case even more rock solid. The Village's case was premised upon the mere 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, should not be considered sufficient clear and convincing evidence to establish the "prejudice" needed to create coverage.

CONCLUSION

FMIT respectfully submits that the Amended Final Judgment should be reversed, and the case remanded for entry of judgment in favor of FMIT in accordance with its Motion for Directed Verdict.

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 21st day of November, 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.

____
Michael T. Burke, Esq.