IN THE SUPREME COURT
STATE OF FLORIDA

TALLAHASSEE, FLORIDA

Case No. SC06-2031
L.T. Case Numbers: 05-13457, 05-14671

ESSEX INSURANCE COMPANY,

Appellant,

v.

MERCEDES ZOTA, MIGUEL ZOTA,
LIGHTHOUSE INTRACOASTAL, INC.,
JACK FARJI, individually, and
BROWARD EXECUTIVE BUILDERS, INC.

Appellee.

Upon certification by the United States Court of Appeals for the Eleventh Circuit, nos. 05-13457 and 05-14671, following appeal from the United States District Court for the Southern District of Florida, no. 04-60619-CIV-COHN/SNOW.

Brief of Amicus Curiae
PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA
in support of Appellant, Essex Insurance Company

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CORPORATE DISCLOSURE STATEMENT

This amicus brief is presented by the Property Casualty Insurers Association of America ("PCI"). The PCI is a trade group representing more than 1,000 property and casualty insurance companies.

STATEMENT OF AMICUS CURIAE

This amicus brief is presented by the Property Casualty Insurers Association of America ("PCI"). The PCI is a trade group representing more than 1,000 property and casualty insurance companies. PCI members are domiciled in and transact business in all 50 states, plus the District of Columbia and Puerto Rico. Its member companies account for $173 billion in direct written premiums. They account for 50.2% of all personal auto premiums written in the United States, and 37.8% of all homeowners' premiums, with personal lines writers of commercial and miscellaneous property/casualty lines. In addition to the diversified product lines they write, PCI members include all types of insurance companies, including stocks, mutuals, and companies that write on a non-admitted basis. The PCI membership is literally a cross-section of the U.S. property and casualty insurance industry. In 2003, PCI members accounted for 36.4% of the homeowners' insurance premiums in Florida, 54.3% of the personal automobile insurance policies issued in Florida and wrote $12,849,157,000 of direct written premiums in Florida. Forty-two (42) PCI members are domiciled in Florida. In light of its involvement in Florida, PCI is particularly interested in the resolution of the issue before the Court on behalf of its members and their interests. This brief is filed on behalf of Essex Insurance Company. The authority therefor is PCI's Motion for Leave to File Amicus Curiae Brief.

STATEMENT OF THE ISSUES

I. There is a presumption under Florida law that statutes will not be read to supersede the common law unless the legislature's intent is explicit in that regard. Under Florida common law, delivery of the policy to the insured's agent constitutes delivery to the insured. Is the statutory requirement of delivery "to the insured" in § 626.922 Fla. Stat. (2006) so explicit as to supersede the common law?

II. Even assuming, *arguendo,* non-delivery of the policy, where a statute provides for specific penalties against a surplus lines agent who has not delivered a policy but no penalties against the surplus lines insurer, can a court create an additional penalty, purportedly under the statute, which is contrary to Florida common law?

III. Can an insurer be estopped from asserting any coverage defenses by the failure to deliver a copy of the policy to the insured, absent evidence of fraud and absent evidence of detrimental reliance?

SUMMARY OF THE ARGUMENT

In creating coverage by estoppel, the trial court precluded Essex from asserting any coverage defenses with respect to Zota's claim. The only stated basis for the trial court's ruling was the surplus lines agent's purported failure to comply with § 626.922 of Florida's Insurance Code. The trial court's ruling constitutes legal error for several reasons. First, the ruling is contrary to Florida common law that delivery to the insured's agent constitutes delivery to the insured. The legislature did not indicate a clear intent to supersede the common law in enacting § 626.922, therefore, the statute should not be construed in derogation of the common law.

Second, even assuming for the sake of argument that the policy was not "delivered" under the statute, § 626.922 provides that a surplus lines agent who fails to comply with that section is subject to the penalties available under § 624.15 Fla. Stat. (2006). The statute is silent with respect to penalties against the insurer. Nevertheless, although neither § 626.922 nor § 624.15 provides for any penalties against the surplus lines insurer, the trial court imposed the penalty of estoppel against Essex because of the surplus lines agent's purported failure to deliver the policy. The trial court's imposition of this additional penalty was improper.

Third, the trial court created coverage by estoppel even though the circumstances of this case do not fall within any exception to the well-settled

Florida rule that waiver and estoppel cannot create coverage, and did so without any finding of detrimental reliance, a necessary element of any estoppel.

ARGUMENT

A. THE TRIAL COURT ERRED IN CONCLUDING THAT THE SURPLUS LINES AGENT FAILED TO COMPLY WITH § 626.922.

In construing § 626.922, the trial court concluded that a surplus lines agent must deliver a copy of the insurance policy "to the insured" and that delivery to the insured's agent does not constitute a "delivery" under the statute. As explained below, the trial court's conclusion ignored both Florida common law and well settled principles of statutory construction.

1. The Policy Was Delivered Under Florida Common Law.

It has long been the common law of Florida that delivery of an insurance policy to the insured's agent constitutes delivery to the insured. *See, e.g., Reliance Ins. Co. v. D'Amico*, 528 So. 2d 533, 534 (Fla. 2d DCA 1998); *Prudential Ins. Co. of Am. v. Latham*, 207 So. 2d 733 (Fla. 3d DCA 1968); *Jefferson Standard Life Ins. Co. v. Lyons,* 165 So. 351, 353 (Fla. 1936). The trial court's opinion acknowledged that the policy was delivered to the insured's agent in this case; therefore, the policy was "delivered" under Florida common law and the trial court's ruling was legal error, unless § 626.922 supersedes the common law.

2. § 626.922 Does Not Supersede The Common Law.

There is no indication that the legislature intended to supersede the common law when it enacted § 626.922. Thus, in construing § 626.922 in derogation of the common law, the trial court ignored basic principles of statutory construction.

In interpreting Florida statutes, the Supreme Court of Florida follows a simple approach. Where the legislature enacts a statute that could possibly be read as conflicting with the common law, a court should not interpret the statute in a way that would supersede the common law absent a legislative expression of intent to do so. *See, e.g., Carlile v. Game & Fresh Water Fish Comm'n*, 354 So. 2d 362, 364 (Fla. 1977). A court will not presume that a statute was intended to alter the common law. Instead, the presumption is that no change in the common law is intended unless the statute is explicit in that regard. *Id.* Inference and implication cannot substitute for clear expression by the legislature. *Id.* Accordingly, "a statute in derogation of the common law must be strictly construed." *See, e.g., Ady v. American Honda Fin. Corp.*, 675 So. 2d 577, 581 (Fla. 1996) (citations omitted).

In a case relevant to the issues in this action, the Supreme Court of Florida applied these principles of statutory construction in interpreting the Claims Administration Act. *See AIU Ins. Co. v. Block Marina Investment, Inc.*, 544 So. 2d 998 (Fla. 1989). The Act, § 627.426 Fla. Stat. (2006), provides that if an insurer intends to rely on a "particular coverage defense" it must take certain actions

within prescribed time deadlines. If the insurer fails to meet those deadlines, it may be estopped from asserting that "particular coverage defense." *Id.*

In construing § 627.426, the Supreme Court first stated the common law rule that waiver and estoppel cannot create coverage where none otherwise exists, i.e., where the insuring agreement is not met or where an exclusion bars coverage. *Block Marina*, 544 So. 2d at 999-1000. The Supreme Court then stated that because the legislature had not expressed the intent to supersede the common law in § 627.426, the statute should not be read in derogation of the common law. *Id.* at 1000. Therefore, the Supreme Court interpreted the statutory term "particular coverage defense" to mean only a defense to coverage that otherwise existed, such as a defense based on the breach of a policy condition. *Id.* By construing § 627.426 in this manner, the Supreme Court was able to give it meaning without having to construe it as superseding the common law.

Similarly, in this action the trial court should have construed the delivery requirement in § 626.922 as requiring delivery to the insured or its agent. Such a construction was called for in the absence of explicit legislative intent. Moreover, that construction would have been consistent with common law agency principles, while still giving meaning to the statute's requirement of delivery. The trial court committed legal error by not reconciling § 626.922 with the common law when it could and should have done so.

In distinguishing the cases cited by Essex for the proposition that delivery to the insured's agent constitutes delivery to the insured, the trial court stated that those cases could not control § 626.922 because they were decided prior to the latest amendments to the statute. *See Prudential Ins. Co. of Am. v. Latham*, 207 So. 2d 733 (Fla. 3d DCA 1968); *United Nat'l Ins. Co. v. Jacobs*, 754 F. Supp. 865 (M.D. Fla. 1990). The trial court added that § 626.922 is "clear." But the trial court never discussed whether it is "clear" that the Legislature intended to supersede the common law.

Further, the trial court's ruling in this case ignores the Supreme Court's specific reluctance in *Block Marina* to permit coverage by estoppel in derogation of the common law under § 627.426, a statute that expressly provides for an estoppel under certain circumstances. The only possible inference from *Block Marina* is that the Supreme Court would be even less inclined to construe § 626.922 in a way that would permit coverage by estoppel, given that unlike § 627.426, the provisions of § 626.922 contain no estoppel language whatsoever.

Therefore, in light of the lack of explicit legislative intent in § 626.922 to supersede the common law, and in light of the Florida Supreme Court's holding in *Block Marina*, this Court should conclude that the trial court erred in construing § 626.922 in derogation of common law and finding a lack of delivery to allow coverage by estoppel. This Court should reverse the trial court's finding that the

surplus lines agent failed to comply with § 626.922 and remand to the trial court for a determination as to the applicability of Essex's coverage defenses.

B. BY SUBJECTING ESSEX TO § 626.922, THE TRIAL COURT IMPROPERLY CREATED NEW STATUTORY PENALTIES.

By its terms, § 626.922 sets forth certain duties of surplus lines agents, including the duty to delivery the insurance policy promptly. Also by its terms, a surplus lines agent may be subject to penalty for noncompliance, specifically including those administrative penalties allowable under § 624.15. Such penalties include, among other things, the suspension or revocation of the agent's license.

Even assuming for the sake of argument that the surplus lines agent failed to deliver the policy in this case, there is no language in § 626.922 that creates any duty or imposes any penalty upon a surplus lines insurer. The only statutory penalties are those provided in § 624.15. In that § 626.922 and § 624.15 do not provide for estoppel or any other penalty against a surplus lines insurer, the trial court's imposition of an estoppel cannot possibly be considered a statutory penalty. Therefore, the trial court's creation of coverage by estoppel constitutes legal error unless estoppel is available as a common law remedy. As established in the following section, the common law does not support an estoppel in this case.

C. THE CIRCUMSTANCES OF THIS CASE DO NOT FALL WITHIN ANY EXCEPTION TO THE LONGSTANDING FLORIDA COMMON LAW RULE THAT WAIVER AND ESTOPPEL CANNOT CREATE COVERAGE.

In that there is no statutory basis for an estoppel under the circumstances of this case, the imposition of an estoppel as a judicially created remedy must necessarily be consistent with Florida common law. It is well settled in Florida, however, that a court has no power to create coverage by estoppel where no coverage exists under the policy. *See, e.g., Duncan Auto Realty, Ltd. v. Allstate Ins. Co.*, 754 So. 2d 863, 864 (Fla. 3d DCA 2000); *General Sec. Ins. Co. v. Barrentine*, 829 So. 2d 980, 981-82 (Fla. App. 2002); *Block* Marina, 544 So. 2d at 1000. Thus, the trial court's creation of coverage by estoppel in this case must be deemed legal error unless the circumstances of this case fall within an exception to the longstanding common law rule.

There are only two exceptions to the longstanding rule that waiver and estoppel cannot create coverage. The trial court's ruling was not based on either of those exceptions. Therefore, reversal is warranted.

1. The Trial Court's Ruling Was Not Based On The *Village Of Golf* Exception.

One exception to the rule that waiver and estoppel cannot create coverage is where an insurer assumes the defense of an insured without reserving its rights to later deny coverage. If the insured can establish detrimental reliance, the insurer

may be estopped from asserting a coverage defense. *See Florida Mun. Ins. Trust v. Village of Golf*, 850 So. 2d 544, 546-47 (Fla. 4th DCA 2003) (citations omitted). That exception does not appear relevant to this case. Although the trial court opinion does not expressly state as much, it must be inferred from the trial court's opinion that Essex reserved its rights in this case. At a minimum, it is apparent form the trial court's opinion that its ruling was not based on this exception to the common law rule, as the exception and the cases adopting it were not discussed by the court.

2. The Trial Court's Ruling Was Not Based On The Fraud Exception.

The second exception to the common law rule regards an insurer's failure to deliver the policy to the insured. Therefore, Florida decisions regarding this exception inform the instant case. Under the second exception, if an insurer fails to deliver the policy, and if the insured can establish that the insurer purposely prevented the insured from reading the policy or fraudulently induced the insured to enter into the insurance contract without reading it, a court may properly impose an estoppel upon the insurer.

The Fourth District Court of Appeal has addressed this specific issue. *See ZC Insurance Company v. Brooks*, 847 So. 2d 547 (Fla. 4th DCA 2003). In *ZC Insurance,* the Fourth District Court of Appeal created coverage by estoppel where the insured was provided documentation of the coverage but no documentation of

the exclusions to coverage. *Id.* at 549-550. The court concluded that because of this selective provision of information, the insurer failed to comply with the delivery requirements under § 627.421, which governs an admitted carrier's duties. *Id.* at 550.

Relying on the Florida Supreme Court's decision in *Crown Life*, the *ZC Insurance* court held that providing the insured with documents defining the coverages while failing to define the exclusions constituted fraud by omission. *ZC Insurance*, 847 So. 2d at 551 (citing *Crown Life Ins. Co. v. McBride*, 517 So. 2d 660, 662-663 (Fla. 1987)). In *Crown Life*, the Supreme Court stated that where an insurer makes affirmative representations that result in detrimental reliance by the insured, a court may authorize coverage by estoppel to prevent fraud or injustice. *Id.* at 662.

In the absence of fraud, however, coverage by estoppel is not allowable. As explained by Florida's courts, an insured has a duty to learn and know the contents of a policy before contracting for it. *See, e.g., Reliance Ins. Co. v. D'Amico*, 528 So. 2d 533, 534 (Fla. 2d DCA 1998). Therefore, absent evidence of fraud, i.e., that the insurer prevented the insured from reading the policy or induced the insured not to read it in its entirety before entering into the contract, the insured is bound by its terms even though the policy was not delivered to the insured. *Id.* at 535. *See also Onderko v. Advanced Auto Ins., Inc.*, 477 So. 2d 1026, 1028 (Fla. 2d DCA

1985); *Allied Van Lines v. Bratton*, 351 So. 2d 344, 347-48 (Fla. 1977); *United Nat'l Ins. Co. v. Jacobs*, 754 F. Supp. 865, 869 (M.D. Fla. 1990).

In this action, the trial court imposed an estoppel based solely upon the lack of a delivery without any finding of fraudulent conduct on the part of Essex. Therefore, the trial court's ruling cannot be based on the second exception to the rule. Equally important, it is contrary to Florida law as set forth in *ZC Insurance, Crown Life, D'Amico, Onderko, Allied* and *Jacobs.* The insureds had a duty to learn the contents of the policy before contracting for it, and are therefore bound by its terms. Coverage by estoppel is unavailable because no fraudulent conduct has been attributed to Essex.

3. The Trial Court Imposed An Estoppel Without Finding The Required Element Of Detrimental Reliance.

The trial court's ruling also constitutes legal error because in order for there to be an estoppel, one party must act in reliance on a statement or action by another party, and that reliance must result in detriment. Absent the element of detrimental reliance, there is no estoppel. *See Florida Mun. Ins. Trust v. Village of* Golf, 850 So. 2d 544, 548 (Fla. 4th DCA 2003); *Crown Life Ins. Co. v. McBride*, 517 So. 2d 660, 662-663 (Fla. 1987); *see also T.H.E. Ins. Co. v. Dollar Rent-A-Car Sys., Inc.*, 900 So.2d 694, 696 (Fla. 5th DCA 2005) ("Prejudice to the insured should be considered when imposing any sanction for failure to deliver a policy of insurance as required by § 627.421.").

In this case, the trial court did not even discuss, let alone find, prejudice or detrimental reliance on the part of the insureds. As a result, the court created coverage by estoppel without finding that the essential elements of estoppel had been met. That alone constitutes legal error and justifies a reversal in this case.

CONCLUSION

The trial court ruled that Essex was estopped from asserting any coverage defenses whatsoever. As a result, the trial court never determined whether the employment exclusions asserted by Essex barred coverage for Zota's bodily injury.

For the reasons stated above, the trial court's ruling should be reversed and this matter should be remanded to the trial court for a determination as to the applicability of any and all exclusions asserted by Essex.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that an original and six copies were filed with the Clerk of Court of the Supreme Court of Florida and one copy of the foregoing was furnished by U.S. Mail on this 31st day of October, 2006 to those listed on the Certificate of Service List attached.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in New Times Roman, 14-point font, in compliance with Rule 9210(a)(2) of the Florida Rules of Appellate Procedure.

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