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IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

CASE NO. 77,194

MARVIN M. SHUSTER, M.D., et al.,

Petitioner,

vs.

SOUTH BROWARD HOSPITAL DISTRICT PHYSICIANS' PROFESSIONAL LIABILITY INSURANCE TRUST,

Respondent.

_____/

RESPONDENT'S ANSWER BRIEF

By: JAY COHEN, ESQUIRE
Fla. Bar No. 292192
ATKINSON, JENNE, DINER, STONE,
COHEN & KLAUSNER, P.A.
Attorneys for Respondent
1946 Tyler Street
P.O. Drawer 2088
Hollywood, Florida 33022-2088
Telephone: (305)925-5501/944-1882

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REFERENCE

All reference to the record is designated as follows: (R-___). All reference to the Respondent will be designated by the term "Physicians' Trust." All reference to the Petitioner will be designated by the term "Shuster."

All reference to the Fourth District Court of Appeals Opinion will be designated as follows: (DCA Op.).

QUESTIONS CERTIFIED BY THE FOURTH DISTRICT COURT OF APPEAL

MAY AN INSURED MAINTAIN AN ACTION AGAINST HIS INSURER FOR BAD FAITH WHERE THE INSURER HAS SETTLED THE CAUSE OF ACTION AGAINST THE INSURED WITHIN THE POLICY LIMITS OF THE INSURANCE CONTRACT WHICH PROVIDES THAT THE INSURER MAY SETTLE THE CLAIM AS IT DEEMS EXPEDIENT, AND THE INSURED IS NOT EXPOSED TO AN EXCESS JUDGMENT THAT HAS CAUSED OTHER DAMAGE AS A RESULT OF THE SETTLEMENT?

STATEMENT OF THE CASE AND FACTS

Physicians' Trust adopts the statement of the case set forth in Shuster's Brief, but would add the following information. Included within Shuster's original Complaint (R-1-11) were the same three Counts as set forth in the Amended Complaint (R-21-31), which alleged breach of good faith on the part of Physicians' Trust as to the settlement of three separate medical malpractice lawsuits brought against Shuster. Shuster's allegations were that the Physicians' Trust should not have settled the lawsuits, even though the Physicians' Trust had such authority under the contract and the settlements were within policy limits, merely to protect Shuster from possible statutory disciplinary proceedings.

A Motion to Dismiss Shuster's original Complaint was filed on May 19, 1988 (R-12-15), and after a hearing on the matter, the court granted the Motion to Dismiss and allowed Shuster 20 days to file an Amended Complaint (R-20).

Shuster's Amended Complaint was filed on October 18, 1988 (R-21-31), the only change being that instead of alleging Physicians' Trust breached its duty of good faith, Shuster now alleged that Physicians' Trust acted in bad faith as to the settlement of the three referenced malpractice suits. On November 7, 1988, Physicians' Trust filed a similar Motion to Dismiss the Amended Complaint (R-32-34) and upon hearing the Court granted Physicians' Trust's Motion to Dismiss with Prejudice for failure to state a cause of action which relief could be granted (R-35). A Final Judgment was entered against Shuster on May 15,

1989 (R-38). On appeal, the Fourth District Court affirmed the lower court's opinion that the Complaint and Amended Complaint failed to state a cause of action. In affirming the dismissal, the Fourth District Court of Appeal also certified the following question to this Court as being one of great public importance:

> May an insured maintain an action against his insurer for bad faith where the insurer had settled a cause of action against the insured within the policy limits of the insurance contract which provides that the insurer may settle the claim as it deems expedient, and the insured is not exposed to an excess judgment but is caused other damages as a result of the settlement? (DCA Op. 14-15)

SUMMARY OF THE ARGUMENT

The answer to the certified question pending before this Court should be in the negative, i.e., there is no cause of action for bad faith when an insurer settles a claim against its insured, as it deems expedient, and the insured is not exposed to an excess judgment.

The express terms and conditions of a policy should be given its plain, simple and unambiguous meaning so courts are not required to rewrite its terms. The insurance policy contemplates an insured's monetary protection from his or her own negligence and not other so-called consequences.

Finally, the public policy of Florida mandates the affirmation of the District Court's opinion so as to continue the promotion and encouragement of settlement of claims.

ARGUMENT

I.

IT IS NOT BAD FAITH TO SETTLE A CLAIM WHEN AN INSURER DEEMS IT EXPEDIENT AND THE INSURED IS NOT EXPOSED TO AN EXCESS JUDGMENT.

The Supreme Court accepted jurisdiction of this appeal after the Fourth District Court of Appeal certified a question as one of great public importance, to wit:

> May an insured maintain an action against his insurer for bad faith where the insurer had settled a cause of action against the insured within the policy limits of the insurance contract which provides that the insurer may settle the claim as it deems expedient, and the insured is not exposed to an excess judgment but is caused other damages as a result of the settlement?

The question phrased in another way queries whether an insurer as couched with the responsibility to defend, settle or pay a claim against its insured as it deems expedient, does so leaving the insured with no exposure to an excess judgment, could be liable for this conduct. The answer in the State of Florida is simply . . . no.

Appellant asks this Court to ignore legal principles and court decisions that have been the law in this state for many years. The distorted extension of Boston Old Colony Insurance Co. v. Gutierrez, 386 So.2d 783 (Fla. 1980), that the Appellant seeks is not meritorious. This Court, addressing the responsibility of an insurer in Boston Old Colony stated:

> The insurer must investigate the facts, give fair consideration to a settlement offer that is not unreasonable under the facts, and settle, if possible, where a reasonably

> prudent person, faced with the prospect of paying the total recovery, would do so.

See also Baxter v. Royal Indemnity Company, 285 So.2d 652 (Fla. 1st DCA 1973). It is clear the reference to the insurer's responsibility is to the payment of a claim so that the insured is not exposed to an excess judgment and this is where the insurer's duty ends.

The issue of "bad faith" has been addressed by this Court and given a succinct and practical definition. Bad faith is the refusal to defend, settle or pay a claim when to do so exposes the insured to an adverse verdict or judgment in excess of policy limits. Fidelity Casualty of New York v. Cope, 462 So.2d 459 (Fla. 1985), citing the case of Kelly v. Williams, 411 So.2d 902 (Fla. 5th DCA 1989), rev.den. 419 So.2d 1198 (Fla. 1982). This Court, explaining why it did not extend to a third party the duty of good faith by an insurer to its insured, reiterated the fundamental requirements for a bad faith action:

> The basis for an action remained the damages of an insured from the bad faith action of the insurer which caused its insured to suffer a judgment for damages above his policy limits. Id. at 461.

The underlying facts in Cope led to a logical conclusion by this Court that:

> An essential ingredient to any cause of action is damages. In this case Brosnan originally suffered a judgment in excess of his policy. Before this action was filed, however, the judgment was satisfied. Upon its being satisfied Brosnan no longer had a cause of action; if he did not, then Cope did not. Id. at 461.

An answer to the certified question by this Court in the affirmative would ignore and overturn long-standing, accepted and reasonable principles regarding any bad faith actions. Such a decision would not only be unreasonable, but would wreck havoc where none should exist.

II.

A BAD FAITH ACTION AS DEFINED IN FLORIDA IS ONE IN CONTRACT AND NOT IN TORT. AN INSURER SHOULD NOT BE LIABLE FOR EXERCISING ITS CONTRACTUAL RIGHTS.

Shuster cites in his Brief on Appeal cases from other jurisdictions purportedly supporting his position. Barney v. Aetna Casualty & Surety Company, 230 Cal.Rptr. 215 (Cal. App. 2d DCA 1986); Gardner v. Aetna Casualty & Surety Company, 841 F.2d 82 (4th Cir. 1988); American Home Assurance Company v. Hermann's Warehouse Corporation, 563 A.2d 444 (N.J. 1989). On what basis did those courts find a cause of action to exist when an insurer settled a claim within policy limits and did not expose its insured to an excess judgment? The answer lies in noting a fundamental distinction. Florida has viewed a bad faith action solely as one on contract and not tort. Thompson v. Commercial Union Insurance Company of New York, 267 So.2d 18 (Fla. 1st DCA 1972). Each of the claims in the cases relied on by Shuster was based on the existence of a separate independent tort. It is interesting to note, however, that the court in Gardner recognized the substantial judicial deference to a decision by a company to settle within the policy limits. Supra at 85.

The District Court in the instant case focused on this well-established distinction and stated, it is the "scope of the contractual undertaking" that is dispositive and not the nature of a fiduciary relationship (DCA Op. pg.12). As Judge Warner succinctly noted:

> . . . where the insurer acts within the authority and rights delegated to it . . . it

> cannot be liable to the insured for exercising its contractual rights.

Florida is not alone in this view. Other jurisdictions, which also subscribe to the contract theory of recovery in bad faith actions, have concluded there can be no bad faith if the insurer's actions in settling the claim were permitted under the policy. In Marginian v. Allstate Insurance, 481 N.E.2d 600 (Ohio 1985), a virtually identical question to the question certified herein was certified to the Ohio Supreme Court. The question as framed in Ohio was:

> Whether an insured has a cause of action against its insurer when, contrary to the wishes of the insured, the insurer settles claims lodged against the insured within the monetary limits of the insured's policy, or the policy empowers the insurer to settle claims as it feels appropriate. Id. at 601.

The Supreme Court of Ohio concluded that:

> The parties herein, expressly and unambiguously contracted to allow Appellant-Insurance Company the option of settling any claims made against the Appellee-Insured, regardless of whether such claims are groundless, frivolous or fraudulent if it determined that settlement were appropriate. Given the precise language, we find that there can be no set of circumstances under which the Appellee's causes for relief could be granted. . . . Accordingly, we hold that wherein a contract of insurance provides that the insurer may, as it deems appropriate, settle any claim or action brought against its insured, a cause of action alleging a breach of the insurer's duty of good faith will not lie where the insurer has settled such claim within the monetary limits of the insured's policy. Id. at 602, 603.

Similar decisions were rendered in Illinois in Casualty Insurance Company v. Town and Country Preschool Nursery, 498 N.E.2d 1177

(Ill. App. 1st DCA 1986); and in New York, Orion Insurance Company Ltd. v. General Electric Company, N.Y.S.2d 397 (Sup. 1985). Clearly, the decisions in Ohio, Illinois and New York made sense. Creation of a new cause of action grounded upon some fictional, mythical or speculative tort does not comport with this logic.

III.

THE HOLDING IN BORRELL BIGBY IS CONSISTENT WITH THE ESTABLISHED LAW OF BOSTON OLD COLONY AND KELLY V. WILLIAMS THAT A BAD FAITH ACTION EXISTS ONLY WHEN AN INSURER BREACHES ITS DUTY TO DEFEND AND EXPOSES ITS INSURED TO AN EXCESS JUDGMENT.

Shuster's reliance upon Aetna Insurance Company v. Borrell Bigby Electric Company, 541 So.2d 139 (Fla. 2d DCA 1989), is misplaced. He has either ignored or misconstrued the plain and simple meaning behind its holding, i.e., the insurer had a duty to defend and could not walk away from the defense of its insured at trial or on the appellate level. The Appellee, Physician's Trust, adopts Borrell Bigby because it embraces and parallels the very concepts that Boston Old Colony, supra, and Kelly v. Williams, supra, established. Borrell Bigby is consistent with the District Court's opinion in the case at bar that, when the insurer settles a claim within the policy limits of insurance and the insured is not exposed, there is no cause of action for bad faith. Borrell Bigby was a case of first impression in the state and raised the following issue:

> Whether an insurer's duty to defend its insured includes the duty to appeal an adverse judgment where good faith grounds exist to do so? Id. at 140.

The Second DCA found that it does. Borrell Bigby was sued for damages and Aetna was the primary insurance carrier. The trial resulted in a judgment in excess of the policy limits. Borrell Bigby demanded an appeal and Aetna's counsel recommended one, but Aetna declined. Aetna then interpleaded its policy limits into the court registry and refused to appeal.

Borrell Bigby brought a declaratory relief action against Aetna. The trial court granted a summary judgment in favor of Borrell Bigby on the issue of Aetna's liability. Aetna appealed and contended that it had no duty to appeal the underlying judgment. Aetna's policy provided that it shall defend its insured, but Aetna argued that its duty to defend ceased when it paid the policy limits into the court registry and therefore had no duty to appeal. This clearly left the insured liable for the amount of the judgment in excess of the policy limits and is the very essence of a bad faith claim. The court in Borrell Bigby opined:

> Florida recognizes the duty to defend an insured is broader than the duty to indemnify . . . . We find this duty precludes an insured from interpleading its policy limits and walking away from the defense of its insured at either trial or appellate level. (Emphasis added) Id. at 141.

The court went on to say:

> . . . the insurer cannot truncate its defense obligations by leaping to pay a questionable judgment or claim as Aetna attempted to do here. (Emphasis supplied) Id. at 141.

Borrell Bigby clearly was decided on the insurer's failed duty to defend and not on the basis that the insurer was liable for other so-called consequential damages for its tender of policy limits.

IV.

PARTIES TO A LIABILITY POLICY CONTRACT PROTECT THEMSELVES FROM AN ADVERSE JUDGMENT FOR THEIR NEGLIGENCE UP TO THE AMOUNTS OF THEIR POLICY LIMITS AND NOT OTHER SO-CALLED CONSEQUENTIAL DAMAGES. EXPRESS TERMS OF A CONTRACT MUST BE ADHERED TO AND COURTS SHOULD NOT REWRITE TERMS AND CONDITIONS.

Parties, who have contracted and agreed to certain terms and conditions of insurance policies, do so to protect themselves from and against claims up to and including the limits of their policy for their negligence. It is not contemplated between the parties to include protection from damage to reputation, denial of staff privileges at hospitals, increase in premiums, availability of coverage and other alleged consequential damages. If that were the case, the parties would have specifically contracted otherwise. Judge Warner, in her opinion for the District Court clearly noted, "the insurer obligates itself to indemnify the insured for liability on claims, not damage to the insured's reputation as a result of the claim." (DCA Op. pg.13).

It is not within the province of the courts to rewrite contracts between parties. This would be contrary to well established legal tenet. The District Court in the instant case recognized the long-standing principle in Florida that the courts should give effect to the express terms and conditions of written contracts when the language of the contract is clear and unambiguous. State Farm Fire and Casualty Company v. Oliveras, 441 So.2d 175 (Fla. 4th DCA 1983). Specifically, the courts cannot rewrite the terms of policies. See Pastori v. Commercial Union Insurance Company, 473 So.2d 40 (Fla. 3d DCA 1985); Gulf Insurance

Corp. v. Continental Casualty Company, 464 So.2d 207 (Fla. 3d DCA 1985). An affirmative answer to the certified question would, in effect, rewrite Shuster's policy and breathe a right into it where the express language shows none to exist.

V.

THE PUBLIC POLICY OF THIS STATE IS TO ENCOURAGE SETTLEMENT OF CLAIMS. IF AN INSURER COULD BE LIABLE FOR DOING SO, IT WOULD DISCOURAGE SETTLEMENTS, EXPOSE AN INSURER TO ADDITIONAL MONEY DAMAGES AND CREATE HAVOC IN OUR COURT SYSTEM.

Most importantly, in considering the issue on appeal, this Court should recognize that it has been and should continue to be fundamental public policy of the State of Florida to encourage parties to resolve their differences by way of settlement. DeWitt v. Miami Transit Company, 95 So.2d 898 (Fla. 1957); Florida East Coast Railroad Company v. Thompson, 93 Fla. 30, 111 So. 525 (1927). Case law is unanimous that courts favor amicable settlements of disputes and the avoidance of litigation. An answer to the certified question in the affirmative, would demolish judicial precedent encouraging settlement and reverse the trend established by Florida's legislature and encouraged throughout the judicial system.

Even though the claims made against Shuster occurred prior to the effective date of Fla. Stat. § 627.4147, this statute is instructive because it clearly and unequivocally demonstrates the legislative intent of encouraging insurance companies to settle malpractice claims despite the fact the insured is against the settlement of such a claim. The legislature in § 627.4147, Fla. Stat., gave full authority to the insurer:

> To determine, to make and to conclude, without the permission of the insured, any offer of admission of liability and for arbitration pursuant to Fla. Stat. § 766.106, settlement offer, or offer of judgment, if the offer is within the policy limits . . . . (Emphasis added)

This legislative intent is deeply rooted in the public policy of encouraging settlements. If this were reversed, we would find insurers in turmoil as a result of the onslaught of litigation. Insurers would be placed in a precarious no-win situation. They would be either sued for settling or not settling claims within their policy limits.

What public benefit is there for creating this risk potential? This would dramatically impair an insurer's desire to settle claims and would leave insureds open to the risk of excess judgments, just what should be avoided. Practically, insurers might risk paying additional monies on claims that could have been resolved if a clear incentive to settle is taken away. This would discourage settlement of those claims that, for a variety of reasons, ought to be settled and resolved without protracted litigation.

An affirmative answer to the certified question could create another dilemma. The insurance industry potentially could refuse to settle claims because of possible exposure to its insureds for reverse bad faith. An occurrence of this sort would have a devastating effect on the courts of our state and would further clog congested trial calendars.

CONCLUSION

The insurance policy in question provides in pertinent part:

> The company shall have the right and duty to defend any suit against the named insured seeking such damages, even if any of the allegations of the suit are groundless, false or fraudulent. The company may make such investigation and such settlement of any claim or suit as it deems expedient. The company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the company's liability has been exhausted by payment of judgments or settlements (R-1-11, 21-31).

These clauses are common with liability policies and have been construed by the courts to provide a broad duty to defend, see Baron Oil Company v. Nationwide Mutual Fire Insurance, 470 So.2d 810 (Fla. 1st DCA 1985), and a discretionary duty to settle, as the District Court noted in its opinion. However, the plain, simple and unambiguous meaning of that clause must be given its effect based on contract law and established bad faith law. This is consistent with the public policy of Florida to encourage settlement and to promote an insurer settling claims to protect its insureds from exposure to a judgment in excess of coverage.

The policy covering Shuster was for his protection within the express limits provided. Injury to reputation and other so-called consequential damages were not within the ambit of the policy's protection. The Physician's Trust did not insure against any claim being made and whatever stigma attached to the incidents. Shuster cannot assert that a trial, even if victorious, would have prevented a loss of reputation, a loss of staff privileges,

increases in premiums, loss of coverage or other consequences arising out of the claim. Endorsement of such a hypothesis defies credibility and would give credence to unsupported conjecture incapable of being proved.

The public policy ramifications clearly outweigh the speculative nature of Shuster's argument and cause of action and therefore mandate the support and affirmation of the District Court's opinion in this case.

WHEREFORE, Appellee, Physician's Trust, respectfully requests that this Court affirm the District Court of Appeal's Opinion of December 5, 1990, and answer the certified question in the negative.

Respectfully Submitted,

ATKINSON, JENNE, DINER, STONE,
COHEN & KLAUSNER, P.A.
Attorneys for Respondent
1946 Tyler Street
P.O. Drawer 2088
Hollywood, Florida 33022-2088
Telephone: (305) 925-5501/944-1882

By: _____
JAY COHEN
Fla. Bar No. 292192

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to CHARLES C. POWERS, ESQUIRE, Powers & Koons, P.A., 1801 Australian Avenue, South, Suite 201, West Palm Beach, Florida 33409, this 18th day of March, 1991.

ATKINSON, JENNE, DINER, STONE,
COHEN & KLAUSNER, P.A.
Attorneys for Respondent
1946 Tyler Street
P.O. Drawer 2088
Hollywood, Florida 33022-2088
Telephone: (305)925-5501/944-1882

By: _____
JAY COHEN
Fla. Bar No. 292192

L/00031288