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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, ETC.,

Respondent.
______________________________/

PETITIONERS MARVIN M. SHUSTER and MARVIN M. SHUSTER, M.D., P.A.'S INITIAL BRIEF

By: Charles C. Powers
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REFERENCE

Any reference to the record is designated by (R.)

Any reference to the Fourth DCA opinion, is designated as follows: (DCA Op.)

All reference to the Petitioner/Appellant is designated by the term **SHUSTER**.

All reference to the Respondent/Appellee is designated by the term **PHYSICIANS TRUST**.

QUESTION 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 BUT HAS CAUSED OTHER DAMAGES AS A RESULT OF THE SETTLEMENT?

STATEMENT OF THE CASE AND FACTS

The action in the trial court was filed on April 15, 1988 (R1-6). An Amended Complaint was filed October 18, 1988 (R21-26). **SHUSTER**, a physician, and his professional corporation, were insured by **PHYSICIANS TRUST**, an insurance carrier against liability for malpractice. **SHUSTER** was the defendant in three medical malpractice lawsuits, which WERE brought against him and his professional association by three separate plaintiffs. The claims were covered under a medical malpractice liability insurance policy issued by **PHYSICIANS TRUST** to **SHUSTER**. **SHUSTER'S** Complaint alleged that **PHYSICIANS TRUST** had breached its obligations to **SHUSTER** by settling the three malpractice suits without fully investigating the claims. The specific allegations set forth in the Amended Complaint were that **PHYSICIANS TRUST** failed to investigate the facts of the case, failed to determine the basis of the Plaintiffs' claims, failed to obtain independent expert evaluation of the claims to determine the merits, ignored **SHUSTER'S** request to deny liability and defend the suits, and settled the suits for sums substantially in excess of reasonable settlement values. The Amended Complaint alleges that as a direct and proximate result of the bad faith settlements, **SHUSTER** and his professional association were damaged, including lost income in the past and profits in the future because the inability for **SHUSTER** to obtain malpractice insurance is precluding his practicing at hospitals where insurance coverage is required and further, that he suffered damage to his

reputation and resulting mental and emotional distress (R21-26). A Motion to Dismiss was filed (R32-34) and after the hearing, each Count of the Complaint was dismissed with prejudice for failure to state a cause of action upon which relief can be granted (R35). Final Judgment for defendant was rendered (R38) and an appeal to the Fourth District Court of Appeal ensued. The Fourth District Court of Appeal affirmed the lower Court and in an opinion filed December 5, 1990 held that the Complaint failed to state a cause of action . However, the Fourth District Court of Appeal 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 HAS 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 HAS CAUSED OTHER DAMAGE AS A RESULT OF THE SETTLEMENT? (DCA OP. 14-15, APPENDIX PAGE 1-15).

SUMMARY OF ARGUMENT

A medical malpractice liability insurance carrier has an obligation to act in good faith towards its insured. That good faith obligation includes reasonably investigating claims, settling only if appropriate and for the value of the claim. When an insured surrenders to the insurance company his right to object to settlement the insurer has an obligation to consider the best interest of its insured in its decision to settle or defend the claim against the insured. An insurer should be liable for the foreseeable damages to its insured if the insurer in bad faith refuses to offer a defense to a frivolous case. The public policy expressed by the legislature in enacting statutes directed to this issue clearly enunciate that an offer of admission of liability or settlement made by the insurer be made in good faith and in the best interest of the insured. These legislative enactments merely codify this premise as it is enunciated in the case law.

ARGUMENT

This is an appeal from an Order granting a motion to Dismiss with prejudice. Therefore, this Court must assume that the insurer, **PHYSICIANS TRUST**, settled three cases against its insured without proper investigation, against the wishes of the insured, **SHUSTER** and exposed **SHUSTER** to various enumerated damages as a result of the settlement.

SHUSTER, in the instant case contends that an insurance company has an obligation to act in good faith towards its insured, whether in settling or defending a claim. Otherwise, the end result will be damages to the insured whether by an excess judgment or by loss of income as a result of the inability to obtain malpractice insurance and consequently, the inability to practice at hospitals where insurance coverage is required,[§458.320, Fla. Stat.(Supp.1986).] as well as damage to reputation and resulting mental and emotional distress.

In Florida, if a liability insurance carrier acts in bad faith by failing to settle liability claims against its insured within the policy limits when such opportunities are available, then the insurance company is liable for the damages that flow from that breach which usually is in the form of personal liability of the insured for the amount of the judgment in excess of the policy limits. Boston Old Colony Ins. Co. v. Gutierrez, 386 So.2d 783 (Fla. 1980).

Although an excess judgment is a typical incident to a bad faith case, it is the contention of Petitioner that it is not an

essential element of a bad faith case. The excess judgment in a typical bad faith case is simply the nature of the damage which results from the bad faith failure to settle. On-the-other-hand, the duty of the insurance company is to adjust the case and settle in a reasonable manner. It is the contention of the Petitioner here that when the insurance company breaches that duty in any way it can be responsible for any reasonably ascertainable damages. Thai theory would include the situation where an insurance company settles a case that reasonably should have been defended if properly investigated or settles for a large amount with little investigation when further investigation showed that it could have been successfully defended or settled for a minimal amount. If such a breach occurred then there would be a claim for the damages caused.

Analyzing the Boston case, supra, which is the touchstone case in Florida regarding the bad faith concept it is clear from the language of that case that the Petitioner claims herein are valid.

In Boston the Supreme Court stated that the insurer, in handling the defense of claims against its insured, has a duty to use the same degree of care and diligence as a person of ordinary care and prudence should exercise in a management of his own business. (Boston at 785). If a reasonably prudent person after investigating the claim, would have defended or would have held out for a nominal settlement, but the insurance company negligently and carelessly or in bad faith settles the claim for a large amount as is alleged in this case, the duty described in Boston is

nevertheless violated.

The Boston case goes on to state that . . . "for when the insured has surrendered to the insurer all control over the handling of the claim, including all decisions with regard to litigation and settlement, then the insurer must assume a duty to exercise such control and make such decisions in good faith and with due regard for the interests of the insured." (Id. at 785).

The Fourth District Court of Appeal carves an exception out of the Boston case but at least recognizes that the other jurisdictions are split over the issue of a bad faith action against an insurer who has settled within the policy limits but with other resulting damages (DCA Op.5).

Some of the jurisdictions, ie. California, in Barney v. Aetna Casualty & Surety Co., 185 Cal.App.3d 966, 230 Cal. Rptr. 215 (1986); New Jersey in Gardner v. Aetna Casualty & Surety Co., 841 F 2d. 82 (4th Cir. 1988), and American Home Assurance Co., Inc. v. Hermann's Warehouse Corp., 117 N.J. 1, 563 A.2d 444 (N.J. 1989), which have addressed the bad faith issue, have concluded that the insurer's obligation to act in good faith is not limited to a situation where the insured is exposed to an excess judgment. The Fourth District Court of Appeal quotes the New Jersey Supreme Court in American Home, supra as holding that "the nature of the relationship is such as to require an insurer to exercise good faith in its dealing with the insured particularly when the insured's money or other interests -- for instance reputation may be at risk." Id. at 447.

SHUSTER argues in the instant case that this duty of good faith dealing as set forth by the New Jersey Supreme Court should be expressly recognized by this Court.

There is support for this argument in §627.4147, Fla. Stat. (Supp.1986). This statute, in subsection (b) requires "...any offer or admission of liability, settlement offer or offer of judgment made by an insurer... shall be made in good faith and in the best interests of the insured." It is **SHUSTER'S** position that the good faith requirement was incorporated into the statute as a protection for the insured since the clause also authorized the insurer to have the exclusive discretion to make any decision with regard to a claim against its insured without consulting the insured.

This statute only applies to policies issued after October 1, 1985 and for that reason does not apply in the instant case. However, the reasoning and the intent of the legislature in enacting this statute should apply to **SHUSTER**.

The decision out of the 2nd DCA in Aetna Ins. Co. v. Borrell-Bigby Electric Co., 541 So.2d 139 (Fla 2d DCA 1989) supports the principle in § 627.4147 (b) by its holding. In Borrell-Bigby the issue on appeal was the insurance company's failure to appeal an adverse judgment against its insured. The insurance policy, as in the instant case, contained a provision giving the exclusive decision-making power to the insurer. The court, in its opinion, stated that:

> Florida recognizes that 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. Where good faith grounds exist, the insurer is obligated to appeal from an adverse judgment. In this case, Aetna acted based on its own best interests, disregarding the advice of its own counsel and the interest of its insured" Borrell-Bigby at 141.

Relying on the holding of Borrell-Bigby, **SHUSTER** argues that the same duty of good faith bound his insurer **PHYSICIANS TRUST** in the defense against the malpractice claims. The insurer had a duty to properly investigate the claims and make a good faith determination as to their defensibility. Furthermore, if the insurance company decided in its absolute discretion to settle, they had the duty to settle in an amount commensurate with the value of the claim and not settle for an excessive amount, even if under the policy limits. In the instant case, as in Borrell-Bigby, the insurer acted in its own interests, disregarding advice of its own counsel and the interests of its insured, **SHUSTER**.

SHUSTER submits that this Court should apply these same principles to his case, since it is obvious that although **SHUSTER'S** case is one of 1st impression, the good faith issue in Boston and Borrell-Bigby, parallels the issue in **SHUSTER** and indicates that Florida Courts are recognizing the need to move in the same direction that the California and New Jersey Courts (discussed previously) have already settled.

There are compelling public policy reasons for Florida Courts to recognize this duty of good faith to its insured.

The medical insurance crisis in Florida has been a source of much furor and controversy. With the rise of medical malpractice

insurance to astronomical rates in the 1980's there has been a continuing quest to place the blame somewhere. When the smoke cleared the blame landed squarely on "overzealous litigious" Plaintiff's attorneys who seek outrageous sums of money for their clients and then convince juries to award these sums.

The legislature obviously was cognizant of this crisis and in enacting § 627.4147(b) was attempting to resolve the conflicting interests involved.

The legislature clearly enunciated its position when they stated, ". . .It is against public policy for any insurance... policy to contain a clause giving the insured the exclusive right to veto any offer for admission of liability,... settlement offer or offer of judgment when such offer is within policy limits." The legislature also made it abundantly clear in the plain language of the remainder of clause (b) that their affirmative public policy is to require that such unlimited discretion to make those decisions must be tempered with good faith and with the best interests of the insured taken into account: "However any offer of admission of liability, settlement offer, or offer of judgment made by an insurer... shall be made in good faith and in the best interest of the insured." § 627.4147 (b).

The legislature clearly recognized the implied obligation of good faith inherent in every liability insurance policy. They also recognized that the insured may not always be furthering the policy of reducing insurance costs by settling cases but may become unreasonably liberal in that regard to the detriment of the insured

and so as to instigate a plethora of frivolous suits designed to coerce easy settlement for undeserving plaintiffs at the ultimate expense of the insured.

The Fourth District Court of Appeal next relies on this Court's opinion in Thompson v. Commercial Union Ins. Co. of N. Y., 267 So.2d 18 (Fla. 1972) which held that insurer bad faith actions sound in contract not in tort. The DCA reasons "that where parties have unambiguously contracted to give the right to settle to the insurer, the insurer does not breach its contract by exercising that right." (DCA Op.10).

However, in this case, the insurance company drafted a contract that unequivocally divests **SHUSTER** of any right to object to a settlement, and thereby depriving him of any right to defend himself even if the allegations against him are false and frivolous.

Based upon this logic, the insurer has the power to arbitrarily settle a case whether or nor it should be settled. Although the DCA acknowledges the fiduciary relationship theory expressed in Baxter v. Royal Indemnity Co., 285 So.2d 652 (Fla. 1st DCA 1973) it concludes that "the fiduciary aspect of the insurer/insured relationship is determined by the scope of the contractual undertaking. Because the insured has conferred on the insurer by contract the complete obligation and authority to settle (and pay) claims... it must exercise that authority and exercise good faith with due regard for the insured' interest to be free of monetary obligation as a result of the claim made." (DCA Op.12).

The Court uses the language "the insured conferred on the insurer." First, it is doubtful that any insured under this kind of a policy would describe his agreement to the terms of the policy as "conferred" upon the insurer..." More likely the insured would talk about unequal bargaining power and use the terms "forced to agree to this condition or be without insurance."

Second, the DCA agrees that there is a good faith requirement which has been enunciated throughout the case law, going back to the seminal case, Boston Old Colony Insurance Company v. Gutierrez, supra and continuing to the present. The DCA however, maintains that the scope of the good faith requirements is limited to being "free of monetary obligation as a result of the claim made." (DCA Op.12).

The Court interprets monetary obligation as liability in excess of the insured's policy limits. Petitioner argues that monetary obligations can include other additional and substantial money damages such as inflated insurance premiums and loss of income. These are very real damages. A physician cannot be a hospital staff or practice medicine at all unless he has insurance. (§ 458.320). Settlement of claims against an insured results in cancellation of an insurance policy. Cancellation of an insurance policy results in inability to practice medicine. The 4th DCA is holding that this devastating consequential impact on the insured is totally irrelevant to the insurance company in deciding to settle a case.

The DCA also addresses the insurer's right under its policy to

settle a claim "as it deems expedient," and defines "expedient" as self-interest. Therefore, the DCA concludes that for the insurer to be guided by self-interest is not bad faith. This interpretation is contrary to the public policy intent expressed by the legislature in § 627.4147(b) and contrary to the purpose of the insurance policy itself.

A doctor purchases such a policy and is the beneficiary under the policy and yet, the insured's self-interest prevails. Therefore, instead of being a beneficiary under the policy, the insurer becomes as much of an adversary as the party suing the doctor. Petitioner finds it impossible to believe that the Court in their holdings are sending this message to insured in this state.

Petitioner **SHUSTER** only asks that the insurance company offer a reasonable defense and be reasonable in effectuating settlement. **SHUSTER** makes no request for veto power, only for the safeguard of good faith as a check on the unlimited power an insurance company has acquired to decide the fate of its insured.

CONCLUSION

The Fourth District Court of Appeal's Opinion should be reversed and Petitioner's Amended Complaint reinstated.

DATED this 25th day of February, 1991.

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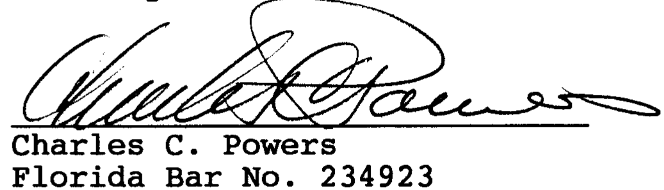

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a copy of the foregoing has been furnished by U.S. Mail, this 25th day of February, 1991, to:

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