017

IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

CASE NO. 77,194

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

Petitioners,

vs.

SOUTH BROWARD HOSPITAL DISTRICT
PHYSICIANS PROFESSIONAL LIABILITY
INSURANCE TRUST, etc.,

Respondent.

_____/

PETITIONERS' REPLY BRIEF

CHARLES C. POWERS, ESQUIRE
Fla. Bar No. 234923
MAXINE A. BRATEN, ESQUIRE
Fla. Bar No. 856304
POWERS AND KOONS, P.A.
Attorneys for Petitioner
~~1801 Australian Avenue South~~
~~Suite 201~~
~~West Palm Beach, FL 33409~~
(407) 478-5400

See change of address

TABLE OF CONTENTS

TABLE OF CITATIONS

I. REPLY TO RESPONDENT'S ANSWER BRIEF & AMICUS CURIE BRIEFS

Petitioner, Shuster, files this its Reply Brief to Respondent, Physicians Trust's, Answer Brief and the Amicus Curie Brief of Physicians Protective Trust Fund. The Brief of Amicus Curie, Florida Defense Lawyers Association, will be addressed in Section II.

Physicians Trust is determined to convince this Court that Shuster is attempting a "distorted extension" of Boston Old Colony Ins. Co. v. Gutierrez, 386 So.2d 783 (Fla. 1980). To the contrary, it is Physicians Trust who is distorting the opinion of this Court by insisting upon a narrowed interpretation of the holding in Boston Old Colony.

At no time does this Court in Boston hinge the requirement of good faith onto the specific factual scenario of the possibility of an excess liablity judgment against its insureds. Boston sets forth standards that insurance companies must meet in their dealings with their insured.

The Court clearly and with no restriction states that when an insured has surrendered to the insurer all control over the handling of a claim, including all discussions with respect to litigation and settlement, the insurer must asume a duty to exercise such control and make such decisions in good faith and with due regard for the interest of the insured. The Court never expressly or impliedly limits this duty of good faith to a

situation where excess liability is the consequence. An excess liability judgment is merely one possible outcome of the failure to act in good faith. This Court does not state that the possibility of excess liability judgment is the only situtaion where good faith is required.

When this Court states that the duty of good faith involves diligence and care in the investigation and evaluation of claims against the insured, it does not state that the insured has this duty only if an excess judgment is the result of its breach of that duty. This Court in Campbell v. Government Employees Ins. Co., 306 So. 2d 525 (Fla. 1975), reaffirms and reiterates the standard it sets forth in Auto Mutual Indemnity Co. v. Shaw, 134 Fla. 815, (1938) 184 So. 852, when it held in Shaw that:

> "...an insurance company owed an obligation to its insured by virtue of its contract to negotiate with the claimant in good faith and that its decision not to settle must be the result of weighing of probabilities in a fair and honest way; and that its decision should be honest and intelligent and a good faith conclusion based upon a knowledge of the facts and circumstances upon which liability was predicated and upon a knowledge of the nature and extent of the injuries as far as they reasonably could be ascertained."

The Amicus, Physicians' Protective Trust Fund (PPTF), in its brief in support of Respondent argues that "Florida Courts have uniformly recognized that an action grounded in good faith would not lie where the insured is not exposed to an excess judgment," and cites Florida Physicians' Ins. Reciprocal v. Avila, 473 So. 2d 756 (Fla. 4th DCA 1985) and Kelly v. Williams,

411 So. 2d (Fla. 5th DCA 1982), as support for this proposition.

PPTF is incorrect in its premise. The Court in Avila quotes from Kelly and states that the "essence of a bad faith insurance suit" is one in which the result is an excess judgment against an insured. Shuster does not dispute that premise nor is this language inconsistent with Shuster's argument, especially in light of what the Court in Avila and Kelly particularly emphasizes that "the essential ingredient in any cause of action is damages." Avila at 758.

One concludes from the holding in both of these cases that while the typical bad faith claim involves an excess judgment against the insured, the key to a bad faith action is damages as a result of the bad faith of the insurer. Nowhere does the Court indicate that the damages must flow from an excess judgment.

This Court set the standard by which an insurer can refuse to settle within policy limits and avoid a bad faith claim by the insured if an excess judgment is entered against the insured.

Shuster submits that this is the same standard which should be applied in his case and that the decision to defend or settle be based on this standard which this Court set forth in 1938 in Shaw and which still applies to this day. This standard for review by an insurer of a claim against its insured renders Physicians Trust's and all of its supporting Amicus Curie's argument of being caught in a Hobson Choice meritless. There can

be no bad faith claim if a good faith decision is made, regardless of whether that decision is to defend or to settle. The standard applies in either case.

Respondent and its supporters are being deliberately obtuse in refusing to acknowledge the real issue before this Court. The reason for this myopic attitude is one of an overriding drive to protect its interests with a self-serving and biased methadology.

In the instant case, Shuster was damaged both financially and emotionally because of the bad faith settlement by his insured. Respondent and its supporters are either unable to read the plain language of these cases or do not wish to give up their blind self-interest.

The Court demands diligence and care by the insured in its investigation of claims against its insured as an unqualified duty. To narrowly apply this principle to an excess judgment situation suggests that the insured only has a duty of good faith sometimes; that the duty to investigate and evaluate claims properly, only exists sometimes.

Shuster is merely asking for the true interpretation of Boston Old Colony and Shaw to be enforced. Shuster does not deny the insurer's discretion to settle in an amount it deems expedient. Shuster asks only that diligent investigation and evaluation be undertaken *in good faith* and that whether the claim is settled or defended, it be based upon due regard for the insureds' interests as required by the principles set forth by

this Court. It is not unreasonable to find that if a duty of good faith exists, it exists in a case settled within policy limits as well as in a case where excess liability is possible.

Physicians Trust accuses Shuster of attempting to rewrite the insurance policy by requiring the insurer to act in good faith even when settling within the policy limits. The question arises, hasn't Boston "rewritten" the insurance policy to require good faith in a situation where excess liability is possible. This requirement of good faith doesn't appear in the clear and unambiguous terms of the policy. The Court, by its holding in Boston, has written this requirement into the insurance policy, yet Respondent would not allow this rewriting under certain circumstances. Respondent's argument that the policy language is the final determinant of the rights of the parties has already been overruled by Boston Old Colony. Respondents and the Fourth District Court of Appeal are both clearly wrong on this point. The duty of good faith exists regardless of the policy language, not because of it. Therefore, if there is any support for Respondent, it must be on other grounds.

Physicians Trust argues that the insurer has sole discretion to settle or defend a claim even if the claim is frivolous. If this were true, then the ordinary meaning of the agreement to defend any suit, even if groundless or frivolous, would be false. Shuster submits that the good faith duty exists to check the otherwise unlimited power of the insurer.

II. REPLY TO FLORIDA DEFENSE LAWYERS ASSOCIATION'S AMICUS BRIEF

Florida Defense Lawyers' Motion to file its Amicus Brief was untimely in that the motion was submitted on March 26, 1991, after the Respondent's Answer Brief was served on March 18, 1991. The Florida Defense Lawyers did not ask nor have the permission or approval from either the Petitioner or Respondent in this action. The Florida Defense Lawyers' Brief should therefore not be accepted by this Court and should be stricken from this appeal.

If this Court should decide to accept this Amicus Brief of the Florida Defense Lawyers, this Court should be aware that the Florida Defense Lawyers' Brief addresses two issues that are not before this Court, and have not previously been raised by the Respondents in either the lower court, the Fourth District Court of Appeal, or this Court. In addressing Shuster's claim that Physicians Trust failed to adequately investigate the claims, the Florida Defense Lawyers are asserting defenses not heretofore raised. Additionally, in arguing against Shuster's claim that the settlement amount was excessive, Florida Defense Lawyers again raise defenses not heretofore raised by Physicians Trust. See Acton v. Ft. Lauderdale Hospital, 418 So.2d 1099 (1st DCA 1982). (Amicus do not have standing to raise issues not available to the parties, nor may they inject issues not raised by the parties.)

The Florida Defense Lawyers make it absolutely clear that they seek to protect the insurer at the expense of the insured. Yet the defense attorney is hired by the insurance company to defend the insured in any action against the insured. The fact that the defense lawyers are ethically bound to defend the interests of their clients (the insureds), yet in this matter their true allegiance is shown to be to the insurer, demonstrates the truly defenseless position of the insured in these matters and speaks loudly tht insureds need the the protection requested herein by Petitioner.

CONCLUSION

Good faith dealing by an insurance company towards its insureds is not a new concept. This Court espoused good faith in 1938 and continues to do so to this day.

To make good faith a sometime principle is to degrade our system and demoralize those who ask only for fairness and honesty when in a vulnerable position. Insureds like Shuster depend upon insurance companies to protect their interests only to find themselves betrayed by the very people they have trusted to guard them from something all doctors fear, frivolous law suits by individuals looking for windfall settlements.

Shuster does not seek veto power. Shuster does not seek to strip the insurance company of its discretion. Shuster only asks for a good faith investigation before the insurance company comes to a decision to either settle or defend.

Respectfully submitted,

CHARLES C. POWERS

MAXINE A. BRATEN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail this 9th day of May, 1991, to RICHARD W. WASSERMAN, ESQ., 420 Lincoln Road, Suite 256, Miami Beach, FL 33139; JAY COHEN, ESQ., 1946 Tyler Street, Hollywood, FL 33022-2088; KIMBERLY A. ASHBY, ESQ., P. O. Box 633, Orlando, FL 32801; JOSEPH M. TARASKA, ESQ., and TODD M. CRANSHAW, ESQ., P. O. Box 538065, Orlando, FL 32853-8065; and ARTHUR J. RANSON, III, ESQ., P. O. Box 2631, Orlando, FL 32802.

POWERS AND KOONS, P.A.
Attorneys for Petitioners
1801 Australian Ave. South
Suite 201
West Palm Beach, FL 33409
407/478-5400

By _____
CHARLES C. POWERS
Fla. Bar No. 234923

By _____
MAXINE A. BRATEN
Fla. Bar No. 856304