10-2.95

IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO.: 85,271

ST. PAUL FIRE AND MARINE INSURANCE COMPANY, as subrogee of MICHAEL B. SCHOENWALD, M.D.; UROLOGY ASSOCIATES; DRS. MEYERS, STRAUCH & SCHOENWALD, P.A.; MICHAEL B. SCHOENWALD, M.D.; UROLOGY ASSOCIATES and DRS. MEYERS, STRAUCH & SCHOENWALD, P.A., individually,

Appellants/Petitioners,

vs.

WILLIAM J. SHURE, M.D. and SOUTH BROWARD HOSPITAL DISTRICT PHYSICIANS PROFESSIONAL LIABILITY INSURANCE TRUST,

Appellees/Respondents.
_____/

FILED
SID J. WHITE
SEP 18 1995
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

ON REVIEW FROM THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT, STATE OF FLORIDA

APPELLANTS/PETITIONERS' REPLY BRIEF

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The issues presented on appeal need to be properly addressed by Appellee/Respondent, DR. SHURE. Appellant/Petitioner, ST. PAUL FIRE AND MARINE INSURANCE COMPANY, has extensively briefed and argued two basic points. First, the trial court erred in granting DR. SHURE's JNOV. Second, the Fourth District Court of Appeals erred when it upheld the trial court's ruling, and when it attempted to justify and approve the error of the trial court.

DR. SHURE's Answer Brief contains an overwhelming amount of jury argument in an attempt to convince this Court that their evidence was so persuasive that there was no way a jury could possibly render a verdict for ST. PAUL. Obviously, the jury disagreed. Nevertheless, that is not the issue on appeal. What DR. SHURE's Brief has ignored is the question that should have been addressed by DR. SHURE and the Fourth District Court of Appeals: Why was the granting of DR. SHURE's Motion for JNOV a proper ruling by the trial court? DR. SHURE takes the position that the crucial question is the "fundamental distinction between expert opinion as to physical facts (direct evidence) and an expert giving a speculative opinion (circumstantial evidence). [Respondent's Br. P.12.] After this critical distinction is asserted, DR. SHURE cites Cromarty v. Ford Motor Company, 341 So.2d 507 (Fla. 1976) and states:

> ... the court stated that the opinion at issue in the case "was grounded on the fact that the defendant had used the wrong type of forceps". [emphasis supplied] Comarty at 508-509. This court then explained that there is a critical difference between a fact and a circumstantial opinion not based on physical facts (which St. Paul glosses over even as it cites these words):

> It has been held that an expert opinion may support a jury verdict, so long as it is grounded in fact, even though it involves a conclusion as to causation... [emphasis supplied]
>
> Cromarty at 508-509.

[Respondent's Br. P.12]

If ST. PAUL's expert, Howard Barwick, Esq., had reviewed the file of a different malpractice action, or had not reviewed any materials from the underlying malpractice case, DR. SHURE might have some basis in describing his testimony as speculative. When DR. SHURE asks "where is the 'grounded in fact' condition precedent to the conclusion that the settlement was for tactical reasons", ST. PAUL has repeatedly responded that Mr. Barwick had the benefit of reviewing the entire malpractice file including depositions, pleadings, interrogatories, the trial transcript from the malpractice case, etc. [Appendix I, T. 730-734] Clearly, the factual basis for Mr. Barwick's opinion is his review of the items noted above. This is the basis of the direct evidence Petitioner, ST. PAUL, has been citing throughout this appeal. Apparently, DR. SHURE and the Fourth District would have preferred ST. PAUL to recite Mr. Barwick's entire trial testimony in its briefs as DR. SHURE has done with its experts. Instead the ST. PAUL has relied on the good judgment of the Court to review the entire record on appeal which includes Mr. Barwick's testimony in its entirety. [Appendix I, T.705-909] Nevertheless, DR. SHURE attempts to continuously call to task this decision made by the ST. PAUL. What Respondent and the Fourth District have yet to discuss is why his testimony is not direct evidence as to the issue of the bad faith

settlement, and why if this is direct evidence, was it proper for the trial court to grant DR. SHURE's Motion for JNOV.

After again reiterating the trial testimony of various witnesses, DR. SHURE next argues that even "assuming that the 'direct evidence' is that DR. SHURE settled for tactical reasons, can this inference be elevated to a fact when it does not exclude all other reasonable inferences". [Respondent's Br., P. 17] The point is that it doesn't have to. The alleged plethora of contradictory evidence from DR. SHURE's expert witnesses, Mr. Ferrero and Mr. Bunnell, comes from the exact same source as Mr. Barwick's testimony. The testimony of Mr. Spector and Mr. Klein was not uncontradicted as Respondent asserts, but merely in contradiction to Mr. Barwick's testimony and reasoned opinion as to whether there was a good faith settlement. Testimony by Mr. Ferrero and Mr. Bunnell as to <u>their</u> <u>opinion</u> that the settlement was made in good faith is of no greater persuasive force than the opinion by Mr. Barwick that the settlement was not made in good faith. The same argument applies equally to the testimony of Mr. Spector and Mr. Klein. <u>Their</u> <u>opinion</u> that the settlement was in good faith is just that, an opinion, and the trier of fact (in this case, the jury) unanimously found that the settlement was <u>not</u> a good faith settlement in spite of their opinion(s). It is entirely possible, that the jury did not believe the testimony presented by Mr. Ferrero, Mr. Bunnell, Mr. Spector and Mr. Klein. They heard and weighed the evidence presented by both parties and found the settlement was not a good faith settlement. If Howard Barwick's testimony is direct evidence, the jury properly decided the issues based upon the law as given by the trial judge. The argument that the direct

evidence must exclude all other reasonable inferences is nonsensical. If it is direct evidence, the jury is to consider it. The trial court erred in granting the JNOV.

DR. SHURE makes a point of noting the "credibility" issue of DR. SCHOENWALD and how that had an impact in deciding whether to settle. Well, apparently DR. SHURE was bit by his own bug at trial in this case as it related to the credibility of his own witnesses. Respondent cites no applicable law to contradict the assertion of Petitioners that Mr. Barwick's testimony was direct evidence of the issue of whether the settlement was in good faith or not. Respondent's Answer Brief consists merely of reargument of the relative merits of DR. SHURE's testimony. This is pointless as it relates to the issue of the correctness of the trial court's granting the JNOV.

The second issue raised by Petitioner regarding the correctness of the opinion of the Fourth District Court of Appeals is dealt with by Respondent again arguing the merits of the witnesses' testimony at trial. This reargument of the testimony fails to distinguish or reply to Petitioner's argument other than to suggest several irrelevant and inapplicable theories for this Court to consider. Several points need to be addressed. Respondent cites the Tech-Built, Inc. v. Woodward-Clyde & Assoc., 38 Cal. 3d 488, 213 Cal. Rptr. 256, 698 P. 2d 159 (Cal. 1985) case for a non-issue. The issue on appeal is not, did DR. SHURE pay his fair share. The fair share determination was part of the jury instructions in this matter. The jury did not think he did. The Tech-Built, case was in fact the source of much of the charge given to the jury. [Appendix II, T.1519-1532] Additionally, the Tech-Built case does not require a showing of

collusion to prove that a settlement was not made in "good faith".

Further, the Miller v. Christopher, 877 F. 2d 902 (9th Circuit 1989) case cited by Respondent merely upholds a determination made by the trial court that the settlement in question was made in good faith because it was not disproportionate to the liability of the settling tortfeasor. A review of the instructions in this case indicate that the jury was given basically this same instruction by the court in this matter to consider. [Appendix II, T. 1523-1527] The jury in this case apparently felt DR. SHURE's settlement amount was in fact disproportionate to his fair share. The appeal in this case is the result of a JNOV being granted after the jury had already found that the settlement was not made in good faith. The Miller case provides no real guidance for this Court.

The McDermott, Inc. v. AmClyde, 114 S. Ct. 1461 (1994) case also cited by Respondent is equally inapplicable, as the specific issues of this appeal are not discussed, nor is the proportionate share theory applicable.

ST. PAUL's case against DR. SHURE was tried before a jury. The jury unanimously found that the settlement between the Bingers and DR. SHURE was not a good faith settlement pursuant to the instructions given by the Judge. This appeal is not, as DR. SHURE attempts to assert, a forum to reargue and weight the relative merits of the parties cases. The specific issue is the correctness of the JNOV granted by the trial court, and the correctness of the decision of the Fourth District Court of Appeals. Respondent has cited no relevant authority for the proposition that the Fourth District was correct in its assertion that a contribution Plaintiff such as ST. PAUL in this matter, has no right to a jury trial on the merits of it's case. DR. SHURE states that by

agreeing with ST. PAUL in this case and overruling the trial court and Fourth District opinions, settlements will become an endangered species. Highly doubtful. Contribution cases of this type are not brought on the basis of a whim or a wish, but are necessitated by the actions of a joint tortfeasor, with the consequence that the contribution plaintiff pays more than his pro-rata share to the injured party. The right and ability to bring this type of action before a jury should be preserved. The ruling of the trial judge and the Fourth District should be reversed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to NORMAN S. KLEIN, ESQ., Klein & Tannen, Attorneys for Appellees/Respondents, 4000 Hollywood Blvd., Suite 620 North, Hollywood, FL 33021 this 15th day of September, 1995.

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