SUPREME COURT OF FLORIDA

BARRY L. BERGES,

Petitioner,

vs. **CASE NO.: SC01-2846**

INFINITY INSURANCE COMPANY, formerly known as Dixie Insurance Company,

Respondent.

ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, SECOND DISTRICT
CASE NOS. 2D99-5014 and 2D00-1972

PETITIONER'S REPLY BRIEF ON THE MERITS

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I. TAYLOR'S AUTHORITY TO SETTLE

Infinity contends throughout its answer brief that "[t]he key issue in this case is whether an insurer acts in bad faith when it timely agrees to pay the demanded policy limits to settle claims against its insured, but payment is not delivered to the claimant within the stated time limit because he did not have the legal authority within that time period to release the insured." Answer Brief (AB) at 1 (emphasis supplied). The district court's decision, however, extends well beyond the issue framed by Infinity by erroneously holding that Taylor lacked authority to present a valid settlement offer that required a good faith response from Infinity because he "had neither been appointed personal representative of his deceased wife's estate, nor had he obtained court approval of a settlement on behalf of his minor daughter at the time he made his 'offer.'" Infinity Ins. Co. v. Berges, 806 So. 2d 504, 508 (Fla. 2d DCA 2001) (emphasis supplied). Infinity's brief does not address this overriding aspect of the district court's decision. In fact, Infinity apparently concedes that the district court erred by holding that Taylor lacked authority to make a valid settlement offer because the insurer acknowledges in its brief that Taylor had the authority to conduct settlement negotiations with the insurer before his appointment as personal representative of his deceased wife's estate and guardian of his daughter's property. See AB at 23-24.

Further, Infinity's statement of the "key issue" is inconsistent with the record because the insurer in this case did not refuse to deliver payment of the settlement proceeds to Taylor "because he did not have the legal authority within that time period to release the insured." Taylor's May 2 settlement offer and Infinity's response both recognized that court appointments and approvals were necessary before the policy limits settlement could be finalized. (R-31 E30-31; R31- E11). Despite this apparent agreement, Infinity failed to settle Taylor's claims in good faith, not because Taylor lacked legal authority "at the time he made his offer" or because he lacked legal authority to execute a release, but because the insurer failed to procure Taylor's appointment as guardian and obtain court approval of the minor's settlement as agreed (R-40 784), failed to communicate with Taylor regarding the guardianship and estate as promised (R-31 E10; R-40 784), and allowed the settlement deadlines to expire without requesting an extension of time or placing the settlement funds in escrow. (R-39 650, 655).

A. Wrongful Death Settlement

Infinity argues that Berges' "relation back" argument based on section 733.601, Florida Statutes, should be rejected because he failed to argue that issue in the district court. In response, Berges raised section 733.601 in his motion for rehearing after the district court ruled that Taylor's settlement offer was not a "valid settlement opportunity" because he had not obtained the necessary court appointments at the time he submitted his offer. In any event, under the "tipsy coachman" rule, "an appellee [Berges' position in relationship to the final judgment], in arguing for the affirmance of a judgment, is not limited to legal arguments expressly asserted as

grounds for the judgment in the court below" and "can present any argument supported by the record even if not expressly asserted in the lower court." Dade County School Bd. v. Radio Station WQBA, 731 So. 2d 638, 644 (Fla. 1999).

On the merits, Infinity argues that the relation back doctrine cannot "validate a release signed by the would-be personal representative during the pre-issuance period." AB at 25. In response, since the district court held that Taylor lacked authority to submit a valid settlement offer on May 2, the issue is not whether section 733.601 validates a release signed by the prospective personal representative before appointment but whether section 733.601 validates the May 2 settlement offer and subsequent negotiations with the insurer. In this respect, once Taylor was appointed personal representative on May 14, 1990, his authority to act for the estate during settlement negotiations with Infinity related back to the date of his wife's death, and, accordingly, the district court erred by holding that Taylor's May 2 settlement offer was not a valid settlement opportunity and further erred by holding that Taylor's lack of authority on that date deprived Infinity of the ability to negotiate a settlement and protect its insured.

B. Minor's Settlement

Contrary to Infinity's argument, Berges is not contending that good faith required the insurer to deliver funds to Taylor before court approval of his minor daughter's settlement nor does the record reflect that Taylor conditioned settlement of his daughter's claim on that requirement. To the contrary, Taylor acknowledged in his May 2 offer that settlement of his daughter's claim required "special papers to be filed in court," and he agreed to "work with your [Infinity's] lawyers to handle

that." (R-31 E30). In response to his offer, Infinity told Taylor that "we as the insurance company would pay an attorney to arrange for the court approval of the settlement, that it would be no charge to him, that we would take care of the paperwork necessary for the guardianship to be set up . . . ." (R-40 784). Infinity acted in bad faith, not because it failed to give Taylor a check before court approval, but because the insurer failed to arrange for court approval of the settlement as agreed within the time frame established by Taylor's offer, failed to communicate with Taylor about the necessary paperwork as promised, failed to request an extension of time to complete the necessary paperwork and failed to escrow the settlement funds pending court approval as suggested by Taylor's settlement offer. As explained by the trial judge, Infinity assumed certain obligations for effecting a binding release that would have protected its insured "and then dropped the ball." (R-44 OT 20). Whether this lack of care and diligence in handling the claim rises to the level of bad faith presents a jury question. See Campbell v. Government Employees Ins. Co., 306 So. 2d 525, 530 (Fla. 1974) ("[S]uch matters as reasonable diligence and ordinary care [are] material in determining bad faith. Traditionally, reasonable diligence and ordinary care are considerations of fact—not law.").

Infinity attempts to "pass the buck" by arguing that it exercised good faith by assigning the guardianship work to attorney Korth whom Infinity characterizes without citation of authority or record reference as an "independent contractor." AB at 32. Apparently recognizing Korth's mistakes, Infinity argues further that "[i]f Berges questions the speed with which Taylor's attorney, or the independent attorney hired to assist Taylor, accomplished those tasks, that does not amount to bad faith on the

part of Infinity." AB at 32. Concerning Korth's legal status as an "independent contractor," some Florida courts have held that an insurance company is not vicariously liable in a legal malpractice case for the negligence of the attorney retained by the insurer to represent the insured in a third-party claim because the attorney generally is an independent contractor under those circumstances. See Marlin v. State Farm Mut. Auto. Ins. Co., 761 So. 2d 380, 380-81 (Fla. 4th DCA 2000), rev. denied, 786 So. 2d 1186 (Fla. 2001); Aetna Cas. & Sur. Co. v. Protective Nat'l Ins. Co., 631 So. 2d 305, 308-09 (Fla. 3d DCA 1993), rev. denied, 641 So. 2d 1346 (Fla. 1994). Korth, however, was not retained by Infinity to represent the insured. Korth was retained directly by Infinity to obtain court approval of the minor's settlement. (R-31 E55). Further, in bad faith actions, the insurance company has been held liable for the conduct of the attorney if it controls the attorney's defense and the attorney contributes to the insurer's bad faith. See Aaron v. Allstate Ins. Co., 559 So. 2d 275, 277 (Fla. 4th DCA), rev. denied, 569 So. 2d 1278 (Fla. 1990).

On the facts, Infinity's apparent attempt to convert Korth into an "independent attorney hired to assist Taylor" must fail. Korth was hired by Infinity "to arrange a court approved settlement" and "to verify that there are no liens filed by the medical providers." (R-31 E55). Korth was not hired to "assist Taylor." In any event, Korth was not solely responsible for Infinity's failure to timely comply with Taylor's settlement offer. As reflected by adjuster Fryer's notes, Korth called Fryer on May 23, 1990, to advise, that he would be "unable to have court approval in time for exp[iration] of time demand." (R-31 E9). Fryer, however, failed to take any action in response to Korth's advice.

C. Collateral or Judicial Estoppel

Although the issue was not mentioned by the district court, Infinity argues that Taylor should be collaterally or judicially estopped from arguing that a valid settlement could have been reached based on the outcome of the underlying tort suit. See AB at 35-39. The defense of collateral estoppel "serves as a bar to relitigation of an issue which has already been determined by a valid judgment." Stogniew v. McQueen, 656 So. 2d 917, 919 (Fla. 1995). To sustain a collateral estoppel defense, the proponent bears the burden of proving that the parties and issues in the prior action and the present action are identical and the prior matter was fully and finally determined by a court of competent jurisdiction. See Mobil Oil Corp. v. Shevin, 354 So. 2d 372, 374 (Fla. 1978).

"'Judicial estoppel is an equitable doctrine that is used to prevent litigants from taking totally inconsistent positions in separate judicial, including quasi-judicial, proceedings.'" Blumberg v. USAA Cas. Ins. Co., 790 So. 2d 1061, 1067 (Fla. 2001) (quoting Smith v. Avatar Properties, Inc., 714 So. 2d 1103, 1107 (Fla. 5th DCA 1998)). In order to apply judicial estoppel, "'the parties must be the same and the same questions must be involved.'" Blumberg, 790 So. 2d at 1066 (quoting Chase & Co. v. Little, 116 Fla. 667, 156 So. 609, 610 (1934)).

Identity of Parties. Recognizing that Taylor is not a party to this case, Infinity argues that Berges and Taylor are privies because Taylor is the "real party in interest." AB at 38. "For one to be in privity with one who is a party to a lawsuit or for one to have been virtually represented by one who is a party to a lawsuit, one must have an interest in the action such that she will be bound by the final judgment as if she were a party." Stogniew, 656 So. 2d at 920. Although Berges and Taylor share a common interest in the outcome of the current litigation, they occupied antagonistic positions in the underlying tort suit and therefore were not privies in the first action. Moreover, parties are not in privity for estoppel purposes merely because they share the same interest in the outcome of the litigation. See Stogniew, 656 So. 2d at 920; Khan v. Simkins Indus., Inc., 687 So. 2d 16 (Fla. 3d DCA 1996)**. Further, the written agreement between Taylor and Berges, which Infinity approved and signed, does not create a relationship between them sufficient to invoke collateral or judicial estoppel as Infinity contends. In fact, the agreement precludes an estoppel defense by expressly providing that it "do[es] not constitute a waiver or estoppel as to any issues which may be asserted in defense of either the claims asserted by Plaintiffs [Taylor] against Defendants [Berges and Moody] or any action which may be brought against Infinity pursuant to the policy or for alleged bad faith." (R-11 2195). Also, the decision in O'Hern v. Donald, 278 So. 2d 257 (Fla. 1973), does not hold that the judgment creditor and judgment debtor are privies for estoppel purposes as Infinity suggests. On limited facts, O'Hern** simply holds that an excess judgment entered against the insured in a personal injury action has priority over the claims of the insured's other

creditors.

Identity of Issues. The defense of collateral estoppel cannot be invoked successfully unless the issues in the prior and present actions are identical, see Surf Colony Dock Ass'n, Inc. v. Vanderbilt Towers, 708 So. 2d 304, 305 (Fla. 2d DCA 1998), even though the essential facts in both actions overlap. See Hyatt Legal Services v. Ruppitz, 620 So. 2d 1134, 1137 (Fla. 2d DCA), rev. denied, 629 So. 2d 133 (Fla. 1993); Keramati v. Schackow, 553 So. 2d 741, 745 (Fla. 5th DCA 1989). Similarly, to invoke judicial estoppel "the positions must be clearly inconsistent" and "the same questions must be involved." Chase & Company, 156 So. at 610.

Precluding application of collateral or judicial estoppel, the issues in the underlying tort suit and the present bad faith action are not the same. In the underlying suit, the issue that was litigated and decided by partial summary judgment was whether the parties reached a binding, enforceable settlement agreement without court approval. In the instant bad faith case, the issue that was decided by the jury was not whether the parties effected a binding, enforceable settlement, but whether the insurer should have achieved a binding, enforceable settlement as required by good faith.

Further, assuming for the sake of argument that Berges and Taylor are privies, Berges' present position—that a binding, enforceable settlement with Taylor should have been accomplished by the insurer—is not inconsistent with Taylor's position in the prior action where he argued that he lacked the requisite authority to effectuate a settlement without court approval because Infinity failed to handle the necessary paperwork to finalize the settlement as agreed.

Infinity's Position in the First Suit. Assuming Infinity and Berges were in

privity in the underlying action, the insurer's estoppel argument cuts both ways. In the first suit, Infinity argued persistently that Taylor's claims against Berges had been settled (R-8 1578); yet now Infinity takes the opposite position—that Taylor lacked the legal authority to settle. The insurer cannot have it both ways.

II. DUTY TO COMMUNICATE WITH INSURED

On this issue, Infinity first argues that the insurer was not obligated to inform Berges about Taylor's May 2 settlement offer because the offer did not represent a valid "settlement opportunity." See AB at 39-40. For reasons previously argued, Taylor had the legal authority to make the May 2 settlement offer and, accordingly, Infinity was obligated to communicate the offer to Berges. In addition, Infinity also breached the duty established by Shaw to warn the insured about a potential excess judgment once it determined that the claimant's potential recovery exceeded policy limits. See Auto Mut. Indem. Co. v. Shaw, 134 Fla. 815, 184 So. 852, 858 (1938). In this respect, Infinity knew before Taylor submitted his May 2 settlement offer that the insured's liability was "100%" and Taylor's damages exceeded policy limits. (R-37 263). Although Infinity's duty to advise the insured arose at that point, the insurer did not inform Berges about the possibility of an excess judgment until after the deadline for accepting Taylor's settlement offer expired. (R-38 495-96).

For two reasons, this court should reject Infinity's next argument that an insurer owes no duty to advise the insured of settlement opportunities when the company has agreed to pay policy limits. See AB at 39. First, the duty to advise the insured arose in this case before Taylor made his settlement offer. Second, as illustrated by Higgs v. Industrial Fire & Cas. Co., 501 So. 2d 644 (Fla. 3d DCA 1986), rev. denied, 511

So. 2d 298 (Fla. 1987), the insurer's acceptance of a policy limits settlement offer does not terminate its obligation to exercise good faith. See Initial Brief at 36. If the insurer informs the insured about the proposed settlement, the insured can monitor the insurer's timely compliance with the agreement through private counsel, his insurance agent or his own resources.

As a fall-back position, Infinity argues without supporting authority that it is entitled to a new trial because the jury instruction given by the trial court on the duty to advise issue did not include the language "'under all the circumstances,' acting 'fairly and honestly toward the insured and with due regard for the insured's interests.'" AB at 42. In response, the subject instruction was taken almost verbatim from this court's decision in Boston Old Colony Ins. Co. v. Gutierrez, 386 So. 2d 783, 785 (Fla. 1980), and therefore correctly stated the law. (R-28 5664; R-44 1499). Further, the trial court preceded its special instruction on duty to advise with Florida Standard Jury Instruction (Civ.) MI 3.1 which informed the jury that an "insurance company acts in bad faith in failing to settle the claim against its insured within its policy limits when under all the circumstances it could and should have done so had it acted fairly and honestly towards its insured and with due regard for his or her interest." (R-44 1498-99) (emphasis supplied). In light of this instruction, it would have been redundant for the trial court to have repeated the emphasized terminology in the duty to advise instruction which immediately followed. (R-44 1499). In any event, because Infinity stipulated to a general verdict form which did not differentiate between Berges' two theories of recovery—failure to settle and failure to advise—the two issue rule precludes appellate review on this point (R-42 1218-20). See Barth v. Khubani, 748 So. 2d 260 (Fla. 1999).

Infinity next argues that a new trial should be granted because it "was improperly precluded from offering evidence and argument on, and instructing the jury on, its theory the offer was a 'setup.'" AB at 42. In response, the record shows that the trial court never prevented Infinity from asserting its so-called "setup" defense.

Before trial, Berges filed a motion in limine to preclude Infinity from offering evidence that attorney Dale Swope or Taylor "'tricked, trapped or set up'" the insurance company. (R-24 4819). In response, Infinity's attorney told the trial judge he planned to use the setup defense in opening statement, closing argument and in questioning Swope and Taylor. (R-36 41). On the first day of trial, the trial court denied Berges' motion in limine without prejudice to Berges making "any appropriate objection when the question is asked."

[1] (R-36 46). Neither party, however, called Swope as a witness and Infinity did not question Taylor regarding its "setup" defense as counsel had represented to the court. In any event, the trial court would have been correct to disallow the setup defense since the motive or "comparative bad faith" of the claimant or the claimant's attorney is not a defense to insurer bad faith under Florida law. See Nationwide Prop. & Cas. Ins. Co. v. King, 568 So. 2d 990, 990-91 (Fla. 4th DCA 1990).

III. CUNNINGHAM PROPOSAL

Infinity argues that it cannot be faulted for rejecting Taylor's Cunningham proposal in 1990 based on pre-Cunningham case law which held that a cause of action for bad faith did not accrue until the underlying litigation was resolved. See AB at 43-44. The record shows, however, that Infinity could not have relied on then-existing law because it filed its own pre-Cunningham declaratory judgment action seeking a judicial determination of its bad faith liability several years before the excess judgment

[1] The trial judge did restrict the use of the terms "trick," "trap" and "setup" during opening statement but only because such terms are argumentative and therefore inappropriate for opening statement. (R-36 46).

was entered. See AB at 6-7. Further, contrary to Infinity's argument, the insurer's declaratory judgment action would not have accomplished Cunningham's goals of promoting settlement and conserving judicial resources because Infinity's declaratory judgment action, unlike Taylor's proposal, left Berges exposed to the excess judgment regardless of the outcome.

Infinity next argues that Taylor's proposal was not a true Cunningham agreement because it included terms which Infinity considers objectionable. See AB at 45-46. Infinity, however, offers no authority finding those terms unreasonable or inconsistent with Cunningham's objectives. Further, by approving the Cunningham procedure, this court did "not restrict the terms that the parties to such a stipulation may put into their agreement." United Services Auto. Ass'n v. Jennings, 731 So. 2d 1258, 1260 (Fla. 1999). Whether the terms proposed by Taylor's Cunningham stipulation were reasonable and whether Infinity should have accepted the proposal on Taylor's terms present questions of fact for the jury.

CONCLUSION

The district court's decision should be quashed.

Respectfully submitted:

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I HEREBY CERTIFY that a copy of the foregoing has been furnished to Elizabeth C. Wheeler, P.O. Box 2266, Orlando, FL 32802-2266; Charles W. Hall, P.O. Box 210, St. Petersburg, FL 33731; Tracy Raffles Gunn, P.O. Box 1438, Tampa, FL 33601; James Kaplan, 100 Southeast Second Street, Miami, FL 33131; David M. Holmes and Jeremy A. Stephenson, 120 North LaSalle Street, Chicago, IL 60602; Stephen E. Day and Rhonda B. Boggess 50 North Laura Street, Suite 3500, Jacksonville, FL 32202 and Philip M. Burlington, 1615 Forum Place, Suite 3A, West Palm Beach, FL 33401 by U.S. Mail this 2nd of December, 2002.

CERTIFICATE OF TYPE SIZE AND STYLE

The undersigned attorney hereby certifies that this brief was prepared using a 14-point Times New Roman proportionally spaced font in accordance with Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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