SUPREME COURT OF FLORIDA

CASE NO. SC02-152

KEVIN M. STEELE,

Petitioner,

vs.

SUSAN B. KINSEY and UNITED AUTOMOBILE INSURANCE COMPANY,

Respondents.

On Review from the Second District Court of Appeal,
Case Nos. 2D00-4295, 2D00-4384 and 2D01-533

BRIEF OF AMICUS CURIAE FLORIDA DEFENSE LAWYERS ASSOCIATION

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ARGUMENT

Requiring a Liability Insurer to Pay an Award of the Plaintiff's Attorney's Fees and Costs Against the Insured, Under Section 768.79, Fla. Stat., Regardless of the Circumstances Surrounding the Rejection of the Settlement Proposal, Would Be Unfair and Contrary to Both Public Policy and Bad Faith Law.

The Florida Defense Lawyers Association (FDLA) agrees with the arguments set forth in the Respondent's brief on the merits and will not repeat them here. Instead, this friend of the court brief will focus on the public policy related concerns implicated in the issues before the Court.

The Petitioner, and the District Court below, suggest that public policy would favor holding liability insurers liable for an award of the plaintiff's attorney's fees under section 768.79, Florida Statutes. [1] The premise underlying their argument appears to be that a liability carrier exercises complete control over the decision to accept or reject a settlement proposal. Therefore, according to the

[1] The Second DCA correctly concluded that the insurance policy plainly does not cover an award of the plaintiff's fees and costs under section 768.79. However, the court suggested in dicta that such a result may be contrary to public policy.

Petitioner and the lower court, the carrier should bear the consequences of its decision, including an award of the plaintiff's fees and costs under section 768.79.

The premise that liability carriers exercise complete control over settlement decisions is not entirely accurate. Typically, liability insurance policies provide that the carrier has the right and duty to defend a suit against the insured and to settle a claim or suit "as it deems expedient." E.g., Schuster v. South Broward Hospital District, 591 So. 2d 174 (Fla. 1992). This policy language normally allows the insurer to settle within policy limits without incurring bad faith liability to the insured. Id.

However, any settlement decision that may affect the insured's interests cannot be made unilaterally by the insurer. See Boston Old Colony Ins. Co. v. Gutierrez, 386 So. 2d 783 (Fla. 1980), cert. denied, 450 U.S. 922, 101 S. Ct. 1372, 67 L.Ed.2d 350 (1981). If the plaintiff makes a settlement proposal within policy limits, the insured has the right to demand that the carrier agree to the settlement or face the risk of a bad faith claim if the ultimate verdict is in excess of the policy limits. See Carbino v. Ward, 801 So. 2d 1028, 1031 n. 2 (Fla. 5th DCA 2001). In addition, as set forth in the newly promulgated "Statement of Insured Client's Rights": "No settlement of the case requiring you to pay money in excess of your

policy limits can be reached without your agreement, following full disclosure." Rules Regulating the Florida Bar – Amendments, 27 Fla. L. Weekly S387 (Fla. April 25, 2002), amending Rule 4-1.8, "Conflict of Interest; Prohibited and Other Transactions," adding new section (j).

An award of the plaintiff's attorney's fees and costs under section 768.79, Florida Statutes, is a species of extra-contractual damages since it is not normally covered under liability insurance policies. Thus, a liability carrier cannot reject a settlement proposal made pursuant to section 768.79 without risking potential bad faith liability if the ultimate judgment is more than 25 percent greater than the plaintiff's settlement proposal. Even if the ultimate judgment is within policy limits, the insurer may be liable to the insured for bad faith damages consisting of the attorney's fees and costs assessed against the insured pursuant to section 768.79.

The rule of law proposed by the Petitioner would hold the liability carrier per se liable for such bad faith damages, regardless of whether the carrier acted in bad faith. Such a rule of law would unfairly penalize liability insurance carriers without any due process and in contravention of bad faith law. One can imagine numerous circumstances in which the carrier acted in good faith even though an award of section 768.79 fees and costs was assessed against the insured.

The following are just a few examples:

1. The insured requested the carrier to reject the settlement proposal.

2. The insured has misrepresented the facts of the case relevant to the issues of liability and/or damages.

3. The carrier reasonably rejected the proposal based on the information then available.

4. The plaintiff's attorney withheld material information that would have affected the carrier's decision to accept or reject the proposal.

The latter example may involve bad faith conduct on the part of the plaintiff's attorney, which may prevent an assessment of fees under section 768.79. However, such conduct is often difficult to prove. A rule imposing on carriers per se liability for fees and costs under section 768.79 would encourage plaintiff's attorneys to withhold material information early in the case, while making a settlement proposal under section 768.79, to "set up" the liability carrier for bad faith liability for the plaintiff's fees and costs.

A liability carrier should not be penalized for litigating a case in good faith. A carrier contractually assumes only those risks set forth in the insurance policy. If it provides a good faith defense of claims and suits against the insured, there is no

legal basis for imposing extra-contractual liability. A rule imposing on carriers per se liability for an award of fees and costs under section 768.79 would violate due process, erode bad faith law and inevitably result in increased premiums.

There is no merit to the Petitioner's contention that insurance carriers have no incentive to accept settlement proposals if they face no liability for fees and costs under section 768.79. The fact is that they do face potential bad faith liability for section 768.79 fees and costs if they acted in bad faith. That provides a sufficient incentive for a carrier to carefully evaluate a settlement proposal in good faith.

There is no valid public policy that would be promoted by penalizing carriers with per se extra-contractual liability for section 768.79 fees and costs in the absence of bad faith. Bad faith law provides a sufficient method of policing carriers' exercise of their discretion regarding settlement offers. There is no need to superimpose on bad faith law a per se rule of liability applicable to awards of fees and costs against the insured under section 768.79.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. mail this 15th day of May, 2002, to: Michael W. Lehrer, Esq. and Jack Powell, Esq., 501 E. Kennedy Blvd., Suite 1275, Tampa, FL 33802; Hinda Klein, Esq. 3440 Hollywood Blvd., 2nd Fl., Hollywood, FL 33021; Sharon Stedman, Esq., 1516 E. Hillcrest St., Suite 108, Orlando, FL 32802; Karen Barnett, Esq., 201 E. Kennedy Blvd., Suite 1518, Tampa, FL 33602; Philip M. Burlington, Esq., Suite 3A, Barristers Bldg., 1615 Forum Place, W. Palm Beach, FL 33401; Dale Swope, Esq., 1234 E. 5th St., Tampa, FL 33605; and Louis K. Rosenbloum, Esq., 4300 Bayou Blvd., Suite 36, Pensacola, FL 32503.

_____
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CERTIFICATE REGARDING FONT

The undersigned certifies that this brief uses 14-point Times New Roman type in compliance with Fla. R. App. P. 9.210(a)(2).

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DAVID B. PAKULA