

IN THE SUPREME COURT OF FLORIDA

**CASE NO. SC08-1
L.T. No. 4D06-4039
Consolidated with 4D06-4306**

**MARK FREEMAN, M.D., and
RAPHAEL RODRIGUEZ, M.D.,**

Defendants/Petitioners

vs.

**BLOSSOM COHEN and
ABRAHAM COHEN,**

Plaintiffs/Respondents.

**ON DISCRETIONARY REVIEW OF AN OPINION OF THE
FOURTH DISTRICT COURT OF APPEALS**

PETITIONERS' BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

This Petition seeks review of an affirmance by the Fourth District Court of Appeals of a Final Order confirming and enforcing a settlement arrived at by a medical malpractice insurance carrier, MedPro, and the Plaintiffs who are the Respondents in this medical malpractice action. See *Freeman v. Cohen*, 2007 Fla. App. LEXIS 18561 (Fla. 4th DCA 2007)(rehearing denied January 2, 2008)(App. A).

The decision below notes that the settlement was negotiated by a single adjuster acting on behalf of the two named defendant physicians, who are the Petitioners seeking review, and the practice that employed those physicians, but was never made a party to the action. (A.1-2) The Petitioners were only informed of the settlement after it had been consummated between MedPro and the Respondents, with the Petitioners never having been given the opportunity to participate in the settlement negotiations, thus precluding them from participating in how the settlement, even if permissible, was to be apportioned among the three policies that have limits of \$250,000.00 each.¹ (A.2-4) The total settlement is for \$335,700.00. (A.2)

¹The decision below mistakenly reported the limits as being \$225,000.00 per coverage which is a fact none of the parties would dispute.

SUMMARY OF THE ARGUMENT

The Fourth District's affirmance of the trial court's order enforcing a settlement that was reached by one adjuster negotiating on behalf of two physicians that have opposable interests directly conflicts with this Court's holding in *Shuster v. South Broward Hospital District*, 591 So.2d 174 (Fla. 1992). *Shuster* posits that despite the lack of veto power of a physician regarding the settlement of a medical malpractice claim, the settlement of a claim is still governed by the principles of good faith, which is directly implicated when dealing with the so-called "multi-defendant exception." This exception prevents a carrier from settling when to do so would negatively impact the physician's rights under the policy in juxtaposition to other defendant physicians named in the suit. The requirement of persistent good faith is violated when one adjuster negotiates on behalf of two physicians and allocates fault by apportioning the settlement payment between or among the separate policy coverages. A settlement amount in excess of any one policy limit necessarily impacts at least one other policy, and potentially the remaining two, if the carrier is permitted to arbitrarily decide where the funds are to be drawn.

Furthermore, by not addressing the allocation issue in advance of enforcing the settlement, the Fourth District's decision also offended the principles announced in *Berges v. Infinity Insurance*, 896 So.2d 665 (Fla. 2004) by forever precluding the Petitioners from participating in the settlement process, which necessarily includes the allocation of fault between or among the policy coverages. *Berges* recognizes a physician/insured's right to participate in the settlement process so that, if *Shuster* exceptions exist, they can be meaningfully addressed, which means being represented without the presence of a conflict of interest. The Fourth District's mandate of payment renders the allocation issue forever moot. Once paid, the source of the funds at that instant would be ipso facto revealed, making the apportionment, and hence the allocation of fault, a fait accompli.

ARGUMENT

To apply the principle that a physician lacks veto power over a settlement that has been reached in principle by a single adjuster negotiating on behalf of two physicians who have insurance with the same carrier and who have inherently opposable interests regarding fault is to totally misapprehend and misapply this Court's decision in *Shuster. Supra.*

Notwithstanding the long recognized lack of veto power by a physician over a settlement by his or her insurance carrier, which the Fourth District misapplied in the instant case, the physician's veto power is resurrected when multiple defendants exist and the rights of the settling physician would otherwise be negatively impacted by the claims of other named physicians. Obviously, the most readily observable negative impact comes on a vertical plane where the non-settling, non-related physician claims indemnification from the settling physician exposing the latter to excess claims above the policy limits. The potential negative impact contemplated in the latter scenario, under the *Shuster* decision, is indeed a monetary one that could possibly be borne by the physician alone, which is a risk that is contained within the policy limits.

The *Shuster* Court's exception is indeed justified, not only as demonstrated on the vertical level, but likewise when viewed horizontally in situations where the physicians are covered under the same policy. The allocation of fault—undeniably a risk contemplated within the policy by definition—directly challenges the transcendent good faith requirement, which always comes into conflict on a horizontal plane when apportionment

of the settlement is mandated by the amount of the settlement versus policy limits (being per physician less than the overall gross settlement amount).

No greater conflict of interest exists than when one adjuster represents two physicians during negotiations that conclude in a settlement which automatically leads to an apportionment of fault between the parties that reflects how the settlement proceeds are allocated between or among the separate policy coverages. This misapplication and misapprehension of *Shuster* provides this Court with Jurisdiction under *Fla. R. App. P. 9.030(a)(2)(A)(iv)*. See *Robertson v. State*, 829 So.2d 904 (Fla. 2002) wherein discretionary review based on conflict was accepted when the District Court's decision misapplied or misapprehended the law.

Jurisdiction is likewise provided on the basis of the Fourth District's opinion conflicting with this Court's decision in *Berges v. Infinity Insurance*, 896 So.2d 665 (Fla. 2004) which held that a physician, notwithstanding his general lack of veto power over settlements, nonetheless had the absolute right to participate in all phases of the settlement process. It goes without saying that this right to participate must be meaningful, which means not only that the physician be represented without conflict, but that he or she be heard on a *Shuster* exception when one arises under the facts.

The Fourth District, in its decision, noting that although an apportionment of funds should have been made previously, nevertheless affirmed the order despite there being no apportionment. The allocation of fault, which directly implicates the *Shuster* “multi-defendant” exception to the lack of veto power, will automatically be made with no input by the Petitioners once the mandate of the Fourth District has been enforced through the payment of the settlement. The mere fact of any payment being made necessarily brings with it an apportionment of funds between policy coverages, any one of which has limits less than the total gross settlement amount. As such, the Petitioners will be forever deprived of any meaningful participation in this most important part of any settlement process; to wit: not just the decision to settle, but from whom and to what extent the settlement payment is to be made. This permanent deprivation of the Petitioner’s right of participation places the Fourth District’s affirmance of the settlement in direct and express conflict with the principles announced in *Berges*. See *Ford Motor Co. v. Kikis*, 401 So. 2d 1341, 1342 (Fla. 1981) wherein the Court determined that conflict exists, even though the case in which conflict derives is not specifically referenced, so long as its overriding principle is offended.

Petitioners are well aware that, although jurisdiction exists to review this matter, such review is still discretionary. However, the Court's decision to review and reconcile this matter impacts not only this case but will set forth a definitive method on how to address this horizontal concern in the future. With rising health care costs and with the notion of strength in numbers when dealing with managed care, the day of the single practitioner is rapidly declining. In response to such concerns, Managed Service Organizations (MSOs), which integrate primary care and specialty groups along with multi-man practices in general, are rapidly becoming the new trend in health care. With one umbrella policy covering many physicians in one related practice, no doubt this clash of coverages will continually raise apportionment and allocation issues in every malpractice case presented. Sound jurisprudential reasoning would suggest that dealing with this issue now will stem a tidal wave of confusion and appeals in the very near future.

CONCLUSION

The Petitioners respectfully request that this Court exercise its jurisdiction to accept review of this matter so that, through a briefing on the merits, a methodology can be formulated to address this conflict, one that will allow insurers to settle as authorized under existing law, but one that

gives physicians meaningful access, as mandated by *Berges*, to the exceptions afforded to them under *Shuster*.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a correct copy of this Notice has been mailed by regular mail on this 14th day of January 2008 to: Anna D. Torres, Esq., trial counsel for Defendant/Respondent, Raphael Rodriguez, M.D., P.O. Box 21289, West Palm Beach, Florida 33416; Alvin N. Weinstein, Esq., counsel for Plaintiffs/Respondents, 19 West Flagler Street, Suite 1400, Miami, Florida 33130; Brian R. Hersh, Esq., co-counsel for Plaintiffs/Respondents, 19 West Flagler Street, Miami, Florida 33130; Michael Mittlemark, Esq., trial counsel for Defendant/Petitioner, Mark Freeman, M.D., 621 NW 53rd Street, Suite 420, Boca Raton, Florida 33487; Michelle Nelson, Esq., counsel for MedPro, 1645 Palm Beach Lakes Blvd., Suite 700, West Palm Beach, Florida 33402; Richard H. Willits, Esq., 2290 10th Avenue North, Suite 404, Lake Worth, Florida 33461.



MICHAEL R. PRESLEY, ESQ.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that this NOTICE complies with the Font requirements of Fla. R. App. P. 9.210 (a)(2).



MICHAEL R. PRESLEY, ESQ.

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APPENDIX

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- A. Conformed copy of the Fourth District Court of Appeals opinion affirming the Final Order enforcing settlement in favor of Plaintiff/Respondents