IN THE SUPREME COURT OF THE STATE OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO. SC01-2846

BARRY L. BERGES,

Petitioner,

-vs-

INFINITY INSURANCE COMPANY, formerly known as Dixie Insurance Company,

Respondent.

________________________________/

BRIEF OF AMICUS CURIAE ON BEHALF OF PETITIONER ON THE MERITS

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INTRODUCTION

The Academy of Florida Trial Lawyers ("Academy") is a voluntary state-wide association of more than 4,000 trial lawyers, concentrating on litigation in all areas of the law. The members of the Academy are pledged to the preservation of the American legal system, the protection of individual rights and liberties, the evolution of the common law, and the right of access to courts.

This case is of importance to the Academy because it involves the manner of resolving claims involving minors, estates, and an insurer's fiduciary duty to its insured in the investigation and settlement of claims. These issues are significant to the Academy since they involve individuals' rights and liberties, and will have a significant effect on the operation of the judicial system in Florida.

SUMMARY OF ARGUMENT

The Second District erred in ruling that the insurer could not have acted in bad faith because the claimant did not have prior court approval for settlement of the minor's claim, nor did he have letters of administration issued to him in his capacity as Personal Representative. However, the statutory scheme for court approval of minors' claims does not contemplate judicial review of offers of settlement, only actual settlements. Court approval is not a condition precedent to a settlement, but rather a condition subsequent. Accepting the Second District's interpretation creates an unworkable system of reviewing the resolution of minors' claims and would work to the disadvantage of minors.

The Second District also erred in concluding that a survivor under the Wrongful Death Act could not resolve his or her claim prior to the filing of suit without the involvement of an authorized personal representative. The survivor's claims are separate and independent from those of the estate, and there is no impediment to resolving those claims without the necessity of the appointment of a personal representative.

The Second District's erred in ruling that an insurer's fiduciary duty to engage in good faith settlement negotiations does not begin until the claimant provides it with a copy of the order appointing the personal representative or, in the case of a minor,

with prior court approval for an offer. Those are not, in fact, actual impediments, but more importantly cannot be deemed to eliminate the insurer's duty to pursue settlement of claims against its insured in good faith. The determination of whether an insurer has acted in good faith has always been a factual question, and should not be determined as a matter of law based upon technical impediments to a final settlement agreement. Therefore, for the reasons stated above, the decision of the Second District should be quashed.

QUESTION PRESENTED

THE SECOND DISTRICT ERRED IN RULING, AS A MATTER OF LAW, THAT INFINITY COULD NOT HAVE ACTED IN BAD FAITH SINCE THERE WAS NO PRIOR COURT APPROVAL FOR SETTLEMENT OF THE MINOR'S CLAIM NOR LETTERS OF ADMINISTRATION ISSUED TO THE PERSONAL REPRESENTATIVE.

ARGUMENT

The essence of the Second District's holding is that Infinity could not, as a matter of law, have acted in bad faith because it did not have a reasonable opportunity to settle the claims against its insured. The court concluded that since Taylor did not have court approval to bind his daughter to a settlement, nor had letters of administration been issued to him in his capacity as personal representative of the estate, Infinity had no obligation to respond to his settlement offers. Treating those circumstances as an absolute bar to any finding of bad faith is inconsistent with well-established rules governing bad faith, as well as the statutes addressing the settlement of minor's claims and the wrongful death act. For these reasons, the Second District's decision should be quashed.

The Minor's Claim

The Second District specifically determined that Infinity did not have a reasonable opportunity to settle the claim of Taylor's minor daughter, because he had not already obtained court approval to settle her claim and had not been appointed guardian of her property. This holding misconstrues the statutory scheme controlling the settlement of minors' claims, and creates an unworkable situation in which there is no means to effectuate the settlement of a minor's claim.

At common law, parents were natural guardians of their children, however, that status merely granted them authority with respect to the custody and care of the child, and did not give them the right to affect the estate of the minor, see McKinnon v. First National Bank of Pensacola, 82 So. 748, 750 (Fla. 1919); see also 59 Am.Jur.2d *Parent and Child* §40, p. 183. The disposition of minor's property rights, including settlement of claims, was deemed the function of equity courts under the parens patriae doctrine, which granted the state, and more particularly the court, the inherent jurisdiction and responsibility to protect the welfare of minors, see Hancock v. Dupree, 129 So. 822 (Fla. 1930); In Re Brock, 25 So.2d 659 (Fla. 1946); 42 Am.Jur.2d *Infants* §151, p. 117.

The Florida Legislature has altered the common law to the extent of providing limited authority for parents, as natural guardians, to settle claims of their minor

children, §744.301, Fla. Stat. Subsection (2) of that statute provides that the natural guardians or guardian of a minor child are authorized to resolve and consummate a settlement of any claim or cause of action accruing to the minor children for damages when the amount involved does not exceed $5,000, §744.301(2), Fla. Stat. When the amount involved is in excess of $5,000 court approval is required, and the statute further provides, §744.301(4)(a):

> In any case where a minor has a claim for personal injury, property damage, or wrongful death in which the gross settlement for the claim of the minor equals or exceeds $10,000, the court may, prior to the approval of the settlement of the minor's claim, appoint a guardian ad litem to represent the minor's interests. In any case in which the gross settlement involving a minor equals or exceeds $25,000, the court shall, prior to the approval of the settlement of the minor's claim, appoint a guardian ad litem to represent the minor's interests.

It is important to note that the statute speaks in terms of court "approval of the settlements," not the approval of an offer to settle. There is also a statutory provision addressing the settlement of a ward's claim by or against the guardian, which also requires court approval for a settlement (not an offer), if the ward is a minor and the settlement exceeds $5,000, §744.387, Fla. Stat.

The Second District's opinion misconstrues these statutes by stating that "Taylor was without authority to make a valid offer to settle" his daughter's claim, 806

So.2d at 510. That statement is inconsistent with the statutory scheme, as well as the well-established case law construing it.

It is clear that §744.301 and §744.387 intend that a settlement would be reached between the natural guardians and the opposing party, and then presented to the court for approval. The statute does not contemplate that a guardian seeks approval from the court to make an offer to settle. The Second District's interpretation would create an unworkable system in which a guardian would have to go to court to get authority to make an offer to settle a minor's claim. However, the court is not authorized to approve an offer and it would be an unworkable system to have the court directly involved in the negotiations. Under the Second District's analysis, if the court did approve an offer to settle but the opposing party did not accept it, the guardian would have to return to the court to obtain approval for a lower offer, and the sequence would continue until a settlement agreement was reached. Clearly, that is not a viable system, and it is not authorized by the relevant statutes. Every case other than the Berges case to address this issue has clearly held that the guardians have authority to enter into a settlement of a minor's claim, and that court approval is a condition subsequent or contingency, not an essential term for purposes of reaching an agreement. For example, in Bateski v. Ransom, 658 So.2d 630 (Fla. 2d DCA 1995),

while noting that the type of release to be given by a minor was an essential term of a settlement, the court specifically held that the court approval was not:

> It is true that while Steven Bateski was a minor, the giving of a release form of any type would not have allowed the parties to conclude the matter since he and his mother would have had to cooperate in obtaining court approval of the settlement. That was not an essential term of any agreement, however, but was a contingency that did not affect the proposal in this instance. *See* Robbie, 469 So.2d at 1385.

See also Baker v. Northwester National Casualty Co., 132 N.W.2d 493, 497 (Wis. 1965) (guardian ad litem and court approval are "conditions subsequent...implicit in any settlement with a minor."). Similarly, in Bodeck v. Gulliver Academy, Inc., 702 So.2d 1331 (Fla. 3d DCA 1997) and Tucker v. Shelby Mutual Insurance Company, 343 So.2d 1357 (Fla. 1st DCA 1977), the courts held that the natural guardians could validly accept an offer of judgment under §768.79, Fla. Stat. on behalf of their minor child, and court approval would be necessary only prior to the entry of the judgment. Clearly, court approval is not a prerequisite to such a settlement.

The Second District's holding not only misinterprets the statutes controlling the settlement of minor's claims, but uses them to the disadvantage of minors, when they were clearly intended to protect them. The court's authority to review settlements of minor's claims is simply one aspect of the parens patriae doctrine which is designed

to protect the rights of minors, not to limit their rights, Phillips v. Nationwide Mutual Insurance Company, 347 So.2d 465 (Fla. 2d DCA 1977); Interest of Peterson, 364 So.2d 98 (Fla. 4th DCA 1978), see also, 42 Am.Jur.2d *Infants* §151, p. 117. However, under the Second District's interpretation, the court approval creates a disability for minors, since insurers would have no duty to negotiate in good faith when there is a minor's claim, because court approval would be a prerequisite to there being any such obligation. This type of result was properly rejected by the First District in Government Employees Insurance Company v. Grounds, 311 So.2d 164, 167 (Fla. 1st DCA 1975) when it stated:

> In addition, appellant [insurer] contends that since Nevils was a minor, his claim could not have been settled without approval of the court. This is correct, but a settlement of a minor's claim could never be accomplished if insurance companies took this attitude. All such settlements must necessarily be subject to court approval.

However, the Second District's decision has now created that situation, turning statutes that were designed to protect minor's rights into statutes that deprive minors of rights. Clearly, that result cannot be countenanced.

The Personal Representative's Authority

The Second District's ruling that Infinity had no obligation to negotiate until a personal representative was appointed (and issued Letters of Administration) is similarly problematic. A review of the relevant statutory provisions and case law compels the conclusion that there is no legal impediment to a wrongful death survivor negotiating and settling his or her claim independent of the personal representative. In fact, the personal representative does not have authority to bind survivors to a settlement. This is clear from the statutory provisions of the Wrongful Death Act and the case law construing it.

A claim for wrongful death was not recognized at common law and, therefore, is solely a creature of statute in Florida, Hess v. Hess, 758 So.2d 1203, 1204 (Fla. 4th DCA 2000). Section 768.19, Fla. Stat., creates a "right of action," and this Court has held on numerous occasions that the Act creates in the named survivors (defined in §768.18(1), Fla. Stat.) an entirely new cause of action which is separate, distinct, and independent from that which might have been sued upon by the injured person (had he or she lived), Ake v. Birnbaum, 25 So.2d 213, 218 (Fla. 1945); Epps v. Railway Express Agency, 40 So.2d 131, 133 (Fla. 1949); Nissan Motor Co., Ltd. v. Phlieger, 508 So.2d 713 (Fla. 1987).

While the statutory scheme only authorizes the decedent's Personal Representative to bring a wrongful death action, case law is clear that the personal representative is a nominal party who brings suit on behalf of the decedent's survivors and the estate, who are the real parties in interest, §768.20, Fla. Stat.; Ding v. Jones, 667 So.2d 894, 898 (Fla. 2d DCA 1996); Morgan v. American Bankers Life Assurance Co. Of Florida, 605 So.2d 104 (Fla. 3d DCA 1992); Florida Emergency Physicians v. Parker, 800 So.2d 631, 633 (Fla. 5th DCA 2001). Each survivor is the real party in interest as to his or her own claim, see Dudley v. Mccormick, 799 So.2d 436, 439-40 (Fla. 1st DCA 2001). The Personal Representative is the sole party authorized to bring the action, not as a result of any substantive rights he or she may possess, but to eliminate the possibility of a multiplicity of suits and a race to judgement by competing beneficiaries, see Funchess v. Gulfstream Apartments at Broward County, Inc., 611 So.2d 43, 45 (Fla. 4th DCA 1992).

The independence of the survivors' claims is evident from the Act itself, which provides that each survivor should be identified in the complaint, §768.21, Fla. Stat., and that the verdict must separately identify the amounts awarded to each survivor, §768.22, Fla. Stat. Additionally, the Act provides that if any survivor objects to a proposed settlement, such a settlement can only be effective if it is approved by the

court, §768.25, Fla. Stat. The independence of the survivor claims is further demonstrated by the provision in §768.20, Fla. Stat., which states:

> A defense that would bar or reduce a survivor's recovery if she or he were the plaintiff may be asserted against the survivor, but shall not affect the recovery of any other survivor.

Case law has consistently analyzed survivors' claims as being entirely separate and distinct rights of action, see Shiver v. Sessions, 80 So.2d 905, 908 (Fla. 1955); Enterprise Leasing Co. v. Alley, 728 So.2d 272 (Fla. 2d DCA 1999). There is no impediment in the Wrongful Death Act that prevents a survivor from settling his or her claim presuit without any involvement of the personal representative. In fact, in Williams v. Infinity Insurance Co., 745 So.2d 573, 576 (Fla. 5th DCA 1999), the court stated:

> Cases involving the wrongful death context have noted settlements prior to the filing of a suit where the sole beneficiary is involved or, where there is more than one beneficiary, the settlement does not prejudice the recovery of other claimants.

The Second District's decision can only be construed as stopping that practice, which is inconsistent with the well-established public policy of encouraging settlement of claims. Moreover, as noted above there is no legal impediment to survivors settling their claims prior to suit in a wrongful death context, nor is the personal representative

a necessary party to such negotiations. Therefore, the Second District's decision is erroneous on this basis as well, and its decision is detrimental to the public interest by unjustifiably discouraging settlements.

Bad Faith

In addition to the problems discussed above, the Second District's decision erroneously states the law of bad faith, especially with respect to the duty of an insurer to negotiate in good faith. The Second District's holding is essentially that the insurer's fiduciary duty to its insured to settle does not even begin until the claimant provides it with a copy of the order appointing the personal representative or, in the case of a minor, with prior court approval for an offer. This clearly is not the law, see Hartford Accident & Indemnity Co. v. Mathis, 511 So.2d 601 (Fla. 4th DCA 1987) (judgment against insurer for bad faith upheld where it failed to respond to presuit demand to settle minor's claim).

As discussed above, the impediments to a settlement agreement perceived by the Second District did not, in fact exist. However, even where there may be an obstacle to an immediate settlement, this should not eliminate any duty on the part of the insurer to negotiate on behalf of its insured. In fact, it has been held that an insurer has an affirmative duty to initiate settlement negotiations, where the facts dictate that

to be in the interest of the insured, see Powell v. Prudential Property and Casualty Insurance Company, 584 So.2d 12 (Fla. 3d DCA 1991).

The Second District's decision implies that if the circumstances do not allow for an immediate and conclusive settlement, the insurer has no duty, as a matter of law, to negotiate in good faith. This is contrary to the most basic principles governing an insurer's duty. In Boston Old Colony, Inc. v. Gutierrez, 386 So.2d 783 (Fla. 1980), this Court held that an insurer handling liability claims has a fiduciary duty to its insured and must exercise the same degree of care and diligence as a reasonable person would in handling their own affairs. This includes an obligation to investigate the facts, give fair consideration to settlement offers that are reasonable, and to settle the claims where a reasonably prudent person faced with the prospect of paying the total recovery would do so, Ibid.

In a situation where there was a clear liability wrongful death claim and only $10,000 in coverage, would a prudent person simply refuse to negotiate with a surviving spouse/personal representative, simply because letters of administration had not been issued? Certainly not, especially since the issuance of letters of administration are deemed to relate back to the date of the deceased's death, thereby validating any actions taken on behalf of the estate prior thereto, see Griffin v. Workmen, 73 So.2d 844 (Fla. 1954).

Even under a more general analysis, would anyone who could possibly settle a clear liability wrongful death case for $10,000 allow technical and remediable impediments prevent a settlement agreement? Certainly not, and clearly such a situation does not warrant a determination, as a matter of law, that the insurer could not have acted in bad faith. The question of a failure to act in good faith with due regard to the interests of the insured is classically a factual question for the jury, Boston Old Colony, supra. The impediments to a settlement agreement perceived by the Second District in this case do not justify carving out an exception to that well-established principle.

CONCLUSION

For the reasons stated above, the decision of the Second District should be quashed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing was furnished to ELIZABETH C. WHEELER, ESQ., P.O. Box 2266, Orlando, FL 32802-2266; CHARLES W. HALL, ESQ., P.O. Box 210, St. Petersburg, FL 33731; TRACY RAFFLES GUNN, ESQ., P.O. Box 1438, Tampa, FL 33601; JAMES KAPLAN, ESQ. and MICHAEL FOSTER, ESQ., 100 S.E. Second St., Miami, FL 33131; DAVID M. HOLMES, ESQ. and JEREMY A. STEPHENSON, ESQ., 120 N. LaSalle St., Chicago, IL 60602; STEPHEN E. DAY, ESQ. and RHONDA B. BOGGESS, ESQ., 50 N. Laura St., Ste. 3500, Jacksonville, FL 32202; LOUIS K. ROSENBLUM, ESQ., 4300 Bayou Blvd., Ste. 36, Pensacola, FL 32503; ROBERT J. MAYES, ESQ., 517 Deer Point Dr., Gulf Breeze, FL 32561; MICHAEL S. RYWANT, ESQ., 109 N. Brush St., Ste. 500, Tampa, FL 33601; and LEFFERTS L. MABIE, III, ESQ., P.O. Box 499, Tampa, FL 33601-0499, by mail, on January 30, 2003.

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