

IN THE SUPREME COURT OF FLORIDA

STATE FARM FIRE AND CASUALTY COMPANY,

Petitioner,

v.

EXECUTIVE HEALTH SERVICES, INC.,
and WAYNE O. MONTGOMERY, M.D.,

CASE NO.: 69,897

Respondents.

FILED

SID J. WHITE

JUL 20 1987

CLERK, SUPREME COURT

By _____
On Notice To Invoke Discretionary
Jurisdiction To Review A Decision Of The
Second District Court Of Appeal

PETITIONER'S REPLY BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The parties and the record on appeal will be referred to as they were referred to in State Farm's initial brief. All "App." references in this brief are to the appendix attached to State Farm's initial brief. State Farm's initial brief will be referred to as "SFB". The respondents' answer brief will be referred to as "RB". Although the respondents changed the order of the arguments in their answer brief, State Farm will keep the order found in its initial brief.

ARGUMENT

I.

SECOND DISTRICT'S DECISION APPLYING THE DOCTRINE OF ESTOPPEL TO CREATE COVERAGE SPECIFICALLY EXCLUDED FROM POLICY IS ERRONEOUS AND MUST BE REVERSED.

Although a number of individual points discussed in respondents' answer brief will be addressed below by State Farm, it bears pointing out that respondents' answer brief does not really address most of the arguments found in the State Farm's initial brief.

The main problem with respondents' argument on the estoppel issue is that it fails to address the application of Six L's Packing Co., Inc. v. Florida Farm Bureau Mutual Insurance Co., 276 So.2d 37 (Fla. 1973), and its progeny on this case (SFB 12-20). Respondents simply argue that the cases are distinguishable, without going into specifics (RB 33-34). As conflict between the Second District's opinion and the Six L's line of cases was the basis for this Court accepting jurisdiction, the respondents' failure to squarely address the Six L's line of cases demonstrates the fundamental weakness of their argument.

It is also important to note respondents' treatment of the cases actually relied upon by the Second District in its opinion. 498 So.2d at 1269-70. Rather than providing this Court with any analysis of the Second District's opinion or

the cases relied upon therein, respondents, in the last sentence of their argument, merely assert that the case "... was correctly and justly decided by the Second District in citing Peninsular [sic; should be Crown] Life Insurance Co. v. McBride, 472 So.2d 870 (Fla 4th DCA 1985); Kramer v. United Services Automobile Association, 436 So.2d 935 (Fla. 4th DCA 1983)." (RB 34). Again, it is respectfully asserted that the cases relied upon by the Second District were incorrectly decided, or, if they are held to be applicable to this case, nonetheless compel reversal of the Second District's opinion (SFB 16-20).

Respondents also do not reply to State Farm's argument concerning construction of the term "malpractice" (SFB 20-24), or its policy considerations argument (SFB 24-26), except to state in their conclusion that reversal would send the wrong message to the buying public (RB 35). No rationale for this conclusion is set forth.

In support of their estoppel argument, the respondents state as fact:

... Mr. Quince Cannon has verified to the corporate representatives before the incident and after the subject incident in question that the corporation had full and complete liability coverage (R-132). (RB 2).

The respondents repeat that assertion throughout their brief (RB 24, 30). That statement by itself is erroneous. Coming as it did from the deposition of Executive Health Services' general manager, George French, it must be considered in

context with the rest of Mr. French's testimony. Just prior to the testimony cited above, Mr. French expressly testified that he understood that Executive Health Services had full coverage of everything except medical malpractice (R 131). Mr. Cannon's testimony that Executive Health Services knew that the State Farm policy did not cover professional liability is similarly unrefuted (R 210). Therefore it is patently inaccurate to argue that Mr. Cannon had verified that Executive Health Services had full and complete liability coverage. All parties knew it did not.

Respondents later state:

Furthermore, the representatives of the insurer verified to the insured, prior to purchase, subsequent to purchase, before the accident and after the subject accident, that the insured had full and complete coverage under the terms of the policy in regard to the facts of this case. (RB 11).

First, respondents do not support this assertion with any citation to the record. Second, respondents do not state who the representatives were other than Mr. Cannon. Third, it would have been, of course, impossible to tell Executive Health Services, before the policy was issued and before the Ray accident, that it was covered in regard to the facts of the Ray accident as prior to the accident the facts of this case were not known. The respondents' argument on this point is thus meritless.

Additionally, the respondents state that since the incident involving Mr. Ray occurred, Mr. Cannon assured

Executive Health Services that it was fully covered for any liability coverage with regard to this incident (RB 2, 24, 30-31). However, these statements were based on Mr. Cannon's opinion (as respondents recognize (RB 3)) after the fact that the accident did not occur during the rendition of professional services (R 224, 232). These opinions obviously are not statements of coverage by State Farm, but rather one person's opinion interpreting a given set of facts and a given insurance policy. That is the courts' function, not Mr. Cannon's. This Court, as the Second District did, 498 So.2d at 1269, must reject that argument as a basis for applying the doctrine of estoppel.

Respondents further argue that what State Farm gave on one hand (liability coverage), it took away on the other (professional liability exclusion)(RB 26). They argue this created an ambiguity in the policy as to what events were ever to be covered (RB 26-28). Respondents argue that State Farm knew Executive Health Services in the medical business, and therefore its failure to provide coverage for medical services is somehow State Farm's fault. This argument is facetious. The policy issued by State Farm was a comprehensive insurance policy which provided coverage for, among other things, property damage, bodily injury, premises medical payments, and personal injury. The fact that it excluded professional liability coverage does not detract from the clear fact that a large number of other coverages were provided. It is beyond

dispute that State Farm and Executive Health Services contracted for the liability policy received, and the professional liability exclusion received. The exclusion operated over an area of possible coverage distinct from the coverages actually contracted for. There is no ambiguity in either the coverages contracted for or in the exclusion contracted for. See Hess v. Liberty Mutual Insurance Co., 458 So.2d 71, 72 (Fla. 3d DCA 1984) (fact that analysis of insurance contract is required does not mean policy is ambiguous). Once Executive Health Services knew that State Farm would not provide it with professional liability coverage, Executive Health Services should have sought to obtain such coverage elsewhere. It operated its medical clinic fully aware that it did not have professional liability coverage. To find State Farm liable for Executive Health Services' failure to obtain professional liability coverage would therefore turn logic in its head.

In their estoppel argument, respondents rely on New Amsterdam Casualty Co. v. Knowles, 95 So.2d 413 (Fla. 1957) (RB 28-30). However, Knowles concerns the interpretation of a professional liability exclusion (SFB 31-32). It in no way applies, discusses or even mentions the doctrine of estoppel.

Respondents argued that:

... it would be total (sic) unjust to permit the Plaintiff insurance company to sell a policy of comprehensive liability insurance to a health care provider where said policy appears to offer full coverage and then after a claim is brought before

the policy, to use our Florida Courts to enforce an exclusionary provision of said policy and deny coverage to its own insured. (R 32).

The State Farm policy at issue does not "appear" to offer full coverage, since the professional liability exclusion was 1) bargained for, 2) understood by all parties to be part of the contract, 3) attached at all times to the policy actually issued, and 4) unambiguous. The correct rule of law which respondents recognized (RB 32), but do not see fit to apply to this case, is that the terms of an insurance policy must be construed to promote a reasonable, practical and sensible interpretation consistent with the intent of the parties. The intent of the parties at all times in this case was that professional liability would be excluded. That is what the Executive Health Services' policy provided. Therefore, this Court must uphold and enforce these specific provisions of the professional liability exclusion and deny coverage to Executive Health Services and Dr. Montgomery. Coleman v. Valley Forge Insurance Co., 432 So.2d 1368, 1371 (Fla. 2d DCA 1983).

II.

SECOND DISTRICT CORRECTLY RULED THAT PROFESSIONAL LIABILITY EXCLUSION PRECLUDED COVERAGE.

The respondents' contention that there exists a genuine issue of material fact (RB 13-20) is belied by the record on appeal and by the respondents' brief itself. All parties admit that State Farm issued an insurance contract to Executive Health Services, that the policy attached to State Farms' Amended Petition For Declaratory Decree is the policy that was in effect on January 25, 1982 (SFB 2-3; RB 8-10, 14). There is also no dispute as to the facts underlying the incident (SFB 27; RB 8). No party has contested Dr. Montgomery's version of the accident. Despite the agreement on these points, respondents now contend that there is a genuine issue of material fact they contend that a jury could determine that Dr. Montgomery had not yet begun to render professional services at the time of the accident (RB 16).

The respondents' argument contradicts their position previously asserted in the trial court. In their motion for summary judgment, respondents conceded:

1. A review of the pleadings and of the depositions taken in this cause would reveal the fact that there is no genuine issue of material fact in dispute between the parties. (R 144).

It is improper, and unfair to the trial court, for the respondents to take a position in the appellate court opposite to that taken in the trial court. The respondents' concession

below precludes their argument to this Court that a genuine issue of material fact exist. See Vaprin v. State, 437 So.2d 177 (Fla. 3d DCA 1983). Additionally, the respondents, in their estoppel argument in this appeal (RB 33, 35), urge this Court to enter a summary judgment on their behalf. In order to make the argument that they are entitled to summary judgment, respondents implicitly concede, as they explicitly did in the trial court, that no genuine issue of material fact exists. Thus respondents' own brief belies their contention that a genuine issue of material fact exists. Since there is no issue of material fact, summary judgment for State Farm was proper. Holl v. Talcott, 191 So.2d 40, 43 (Fla. 1966).

Respondents argue that the professional liability exclusion only applies to paramedics and pre-employment exams (RB 10, 17). However, that is clearly not the case. The exclusion states "It is agreed that with respect to any operations described above [i.e., paramedic and pre-employment exams] or designated in the policy as subject to this endorsement the insurance does not apply . . ." (App. 16). The SMP liability insurance provisions (App. 11) are clearly designated on the professional liability exclusion endorsement as being modified by that endorsement (App. 16). Therefore, it is clear that the SMP liability insurance form, in addition to paramedic and pre-employment examinations, was subject to the professional liability exclusion endorsement.

The respondents' primary argument on this issue is that

the professional liability exclusion does not apply to this case because Dr. Montgomery was not rendering medical services until he began examining Mr. Ray's splinter, after the examining table had collapsed (RB 7, 10, 17). It is absurd to argue that the rendition of medical services did not begin before that time. Clearly, Dr. Montgomery began rendering services well before that. Upon entering the professional examination room, he reviewed the nurse's chart, he asked Mr. Ray what his problem was, and he issued the instruction to lie down on the table, all before the accident had occurred. Any one of these three items must be considered rendition of professional services. It is true that actually looking at Mr. Ray's splinter would be the rendition of a professional service, but rendition had already begun before that time. Looking at the splinter was merely one part of a continuing service by Dr. Montgomery.

Respondents rely in part on Hirst v. St. Paul Fire & Marine Insurance Co., 683 P.2d 440 (Idaho App. 1984). The bottom line in Hirst is that the determination of whether a particular act is of a professional nature depends on the act itself, not the title or character of the party performing the act. Id. at 444. That is exactly what mandates affirmance of the Second District's decision on the exclusion issue. Looking to the act itself, it is clear that a professional medical doctor was performing professional medical services for a medical patient. In the course of complying with the

doctor's professional instructions, Mr. Ray was injured due to the failure of professional equipment, i.e. the examining table. There is a great deal of difference between Mr. Ray's accident and one in which a chair in the waiting room or the ceiling in an examination room collapses (RB 10). In the latter two situations no professional activity whatsoever surrounded the accident.

Respondents seek to distinguish Florida cases cited by State Farm on this issue (SFB 29-31) on the basis that those cases do not discuss the applicability of a professional liability exclusion but rather discuss the medical malpractice statute of limitations or whether a claim must be referred to a medical malpractice mediation panel (RB 21). That distinction is valid. However, respondents apparently fail to recognize, and do not choose to address, that in making the determinations in those cases the district courts had to determine whether the underlying cause of action was based on medical malpractice. For example, in Neilinger v. Baptist Hospital of Miami, Inc., 460 So.2d 564 (Fla. 3d DCA 1984), the Third District, in ruling that the plaintiff's cause of action was time barred by the two year statute of limitations for medical malpractice, explicitly ruled that the hospital was performing medical services at the time of the alleged injury. Id. at 566.

Additionally, respondents quote a portion of what they imply is the opinion of "the Court" in Norton v. South Miami

Hospital Foundation, Inc., 372 So.2d 42 (Fla. 3d DCA 1979) (RB 22). In fact, what is quoted is Judge Schwartz' specially concurring opinion, not the Third District's majority opinion, in which Judge Schwartz stated that he did not believe that the mechanical failure of a special table during an examination was a claim for malpractice (RB 22). What the respondents so neatly omit is that Judge Schwartz, while registering his disagreement, did concur with the majority because he was bound by a prior Third District opinion directly on point.

Respondents attempt to distinguish State Farm's out-of-state cases by arguing that in those cases the defective instrumentality was a specialized instrument used during a specialized professional treatment (RB 23). Contrary to the respondents' argument (RB 23), the table in question was a specialized instrument. It was undisputed that the table was used solely for medical examinations on patients (R 94). It therefore does occupy the same status as the osteopathic table in Harris v. Fireman's Fund Indemnity Co., 42 Wash.2d 655, 257 P.2d 221 (1953), as the treatment chair in American Policyholders Insurance Co. v. Michota, 156 Ohio 578, 103 N.E.2d 817 (1952), as the heat lamp in Antles v. Aetna Casualty and Surety Co., 221 Cal.App.2d 438, 34 Cal.Rep. 508 (1963), and as the hair dryer in Knorr v. Commercial Casualty Insurance Co., 171 Pa.Super. 488, 90 A.2d 387 (1952) (SFB 32-35).

In summary, as the Second District noted, there can be "no question" that Mr. Ray's accident came within the professional liability exclusion. 498 So.2d at 1269.

CONCLUSION

Based upon the arguments and authorities set forth in this brief and in State Farm's initial brief, this Court must reverse the Second District's decision on the estoppel issue, affirm the Second District's decision on the policy exclusion issue, and remand with directions that judgment for State Farm be reinstated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of this brief has been furnished by U. S. Mail this 16th day of July, 1987, to CLIFFORD J. SCHOTT, ESQUIRE, Post Office Box 1808, Lakeland, Florida 33802.

By:



TERRENCE E. KEHOE