

IN THE SUPREME COURT
STATE OF FLORIDA

AUDREY SHAPS

CASE NO. SC01-558

Appellant,

vs.

PROVIDENT LIFE & ACCIDENT
INSURANCE COMPANY and
PROVIDENT LIFE & CASUALTY
INSURANCE COMPANY,

Appellees.

_____ /

APPELLANT'S REPLY BRIEF ON THE MERITS

*An Appeal from the United States Court of Appeals
for the Eleventh Judicial Circuit
on Certified Questions
Circuit Court Case Nos. 99-5500, 99-4028*

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PREFACE

Because the entire Record on Appeal, including the parties' Briefs have been transmitted to this Court pursuant to the Certification by the Eleventh Circuit Court of Appeal, the parties will be referred to as they were in those Briefs and in the Eleventh Circuit Court of Appeal. The Appellant/Plaintiff, AUDREY SHAPS, will be referred to either as the "Plaintiff", "insured", or "or by her name, e.g., "Ms. Shaps". The Appellees/Defendants, PROVIDENT LIFE and ACCIDENT INSURANCE COMPANY and PROVIDENT LIFE and CASUALTY INSURANCE COMPANY will be referred to, collectively, either as "Defendants", "insurer", or as "Provident". References to the record will be preceded by the abbreviation "R.". Following that abbreviation, the volume number, document number and page number(s) to those documents, where necessary, will be referred to. For example, "R.I:2:3". The Trial Transcript is separated and provided in a Supplemental Record. It will be preceded by the abbreviation "TR.". Also, the volume number, document number, where necessary, and page number(s) will be referred to as above. (TR.I:2:3). References made to any material in the Record Excerpts will be preceded by "RE.". References to document and page number(s) will be made where necessary.

ARGUMENT

- I. IS THE BURDEN OF PROOF RULE AS RECOGNIZED IN FRUCHTER v. AETNA LIFE INSURANCE COMPANY, INC., 266 So. 2d 61 (Fla. 3rd DCA 1972), cert. disch., 283 So. 2d 36 (Fla. 1973), PART OF THE SUBSTANTIVE LAW OF FLORIDA, SUCH THAT IT WOULD BE APPLIED IN A CASE WHERE UNDER FLORIDA'S DOCTRINE OF *LEX LOCI CONTRACTUS* THE SUBSTANTIVE LAW OF ANOTHER STATE (NEW YORK) GOVERNS THE PARTIES' CONTRACT DISPUTE?

The question posed by the Court of Appeals as set forth above is directly answered as follows:

In Florida, burdens of proof are part of the procedural law of the State such that the rule as stated in Aetna Life Insurance Co., Inc. v. Fruchter, 266 So. 2d 61 (Fla. 3rd DCA 1972) cert. disch., 283 So. 2d 36 (Fla. 1973) governs the burden of proof in the Federal District Court trial of the cause.

Provident requests this Court to focus on the disability policy language involved in some cases in which there is a clause allowing for presumptive permanent total disability payments to an insured after he or she is totally disabled for a specified time period, as justification for this Court to abandon its public policy of placing the burden upon the insurer once the insured establishes his or her disability. Also, based upon the above, Provident asks this Court to abandon unwaivering precedent that burdens of proof are procedural matters. It will be shown that this contention is in error, since

it is the insurer's acceptance of the insured's total disability status in the first place, not whether the insured eventually is considered permanently totally disabled, which gives rise to the burden of proof shift recognized by this Court and the lower tribunals of this State. In short, it is the initial acquiescence in the insured's status as being totally disabled and commencement of payment based upon that status and the coordinate waiver of premium that triggers the insurer's burden to show that total disability, and not permanency, no longer exists.

In New York Life Insurance Co. v. Lecks, 122 Fla. 127, 137, 165 So. 2d 50, 54 (1936) the focus was on the insured's total disability status, not the permanency of it. The Court stated:

“In this case there was no question of law as to the company's liability under the policy, assuming that the total disability of the insured had not ceased; that is to say, assuming that he had recovered from his injuries to the extent that he was able to engage in any occupation for remuneration or profit. There was only a question of fact. The burden was upon the company to establish the insured's recovery to the degree of ability enabling him to engage in occupation for profit or remuneration.”
Emphasis supplied.

The case upon which the Federal Court of Appeal based its certified question, Aetna Life Insurance Co., Inc. v. Fruchter, 266 So. 2d 61 (Fla. 3rd DCA 1972) described the issue thusly:

“The evidence was in conflict on the issue, material to a determination of the case, of whether the total disability of the insured, as previously recognized and acted upon by the insurer, had ceased to exist so as to have entitled the insurer to terminate payments, or continued to require such payments”. *Emphasis supplied.*

The main focus, and indeed the trigger, which places the burden upon the insurance company to prove that the conditions upon which it acted are no longer in existence is the acceptance of the insured’s total disability status, not whether total disability is ever eventually determined to be permanent. The payment of disability benefits begins when the insured establishes she is totally disabled under the policy. As commented upon by this Court in Aetna Life Insurance Co., Inc. v. Fruchter, 283 So. 2d 36 (Fla. 1973):

“The synthesis forming the basis for this review was the trial court’s refusal to give plaintiff’s requested instruction that the defendant insurance company had the burden of proof to show that total disability had ceased, in the instance where the company had previously acknowledged the existence of total disability and then had terminated disability payments.” 283 So. 2d at 37. *Emphasis supplied.*

This Court views the argument of the insurer at bar that the language of the disability insurance policy creates a shift of the burden of proof as erroneous. The burden shift is not dependent upon policy language nor presumptive total disability.

“The language variation in the policy here and in Lecks and

Ewing did not in our judgment change the principle applying.” Id.

Shaps’ contention that once the insured establishes that he or she is totally disabled under the policy, is accepted by the insurer and payments are made, the burden then shifts to the insurer to be relieved of that obligation is supported by Principal Life Insurance Co. v. Martin, 585 So. 2d 474 (Fla. 3rd DCA 1991). In Martin, the Third District Court of Appeal found that the continuation of payments by the insurer amounted to an acquiescence of the insured’s disability requiring Principal Life to show that the insured’s disability no longer existed. The Court did not take into account whether Martin’s disability was permanent or otherwise.

So too in Mizrahi v. Provident Life and Accident Insurance Co., 748 So. 2d 1059, 1060 (Fla. 3rd DCA 1999), the Court stated it is the burden of the insurer to prove that the insured’s total disability ceased. The Third District Court of Appeal viewed the burden of proof rule as applicable when the insurer acknowledges the insured’s total disability, and then terminates payment. As stated by the Court, it viewed the rule thusly:

“Aetna Life Insurance Co., Inc. v Fruchter, 266 So. 2d 61 (Fla. 3rd DCA 1972) cert. disch., 283 So. 2d 36, 37 (Fla. 1973) (holding that where an insurance company has previously acknowledged the existence of a total disability and has terminated the disability payments, the insurance company has the burden of proof to show that the total disability has ceased).” 748 at 1060. *Emphasis supplied.*

As the Third District Court of Appeal viewed the issue, the issue for the trier of fact “the bench” was whether:

“...Mizrahi was no longer totally disabled as defined by the disability policy in question.” Id.

Other authorities affirm Shaps’ view that the burden shifts to the insurer to prove the insured is no longer disabled once it accepts the insured’s status as being totally disabled when commenting upon the relevant decisions of the courts of this state. They too understand the rule to be that it is initial acceptance of the insured’s total disability status which causes the burden to show that the disability ceased is placed on the insurer in order to be relieved of the payment obligation it undertook. Judge Staton of the Court of Appeals of Indiana commented as follows in a concurring and dissenting opinion affirming a doctor’s disability status:

“When Continental Casualty Co. acknowledged Dr. Novy’s disability as a valid claim under the policy and commenced making payments to him, a presumption is created. The presumption is that the disability continues until there is proof of its discontinuance. The burden of this proof is upon Continental Casualty Co. and not Dr. Novy, the insured. In Aetna Life Insurance Co., Inc. v. Fruchter, (1973) 283 So. 2d 36, the Supreme Court held:

‘That once the insurer has acknowledged such disability by proceeding to make disability payments under the policy in a suit upon a discontinuance thereof and demand for resumption of premium payments, the burden

is cast upon the insurer to prove that the disability no longer continues.’ *Emphasis original.* 283 So. 2d at 37.

Continental Casualty had the burden of proof to establish by preponderance of the evidence that Dr. Novy’s disability had discontinued. Upon the pretext that one of its adjusters observed Dr. Novy in his office with patients and without further investigation, Continental Casualty Co. hastily concluded that its obligation to make payments under the policy had ended. This constituted oppressive conduct on the part of Continental Casualty Co.; without a reasonable investigation and without meeting the burden of proof that the disability had discontinued, bad faith is presumed.” Continental Casualty Co. v. Novy, 437 N.E. 2nd 1338, 1359-60 (Ind. Dist. Ct. App. 1982).

As declared in the treatise Couch on Insurance, the insured has the initial burden of proving disability as defined by the policy,

“Once the insured makes a prima facie case that his or her claim is within the terms of the policy, it is incumbent on the insurer to establish any facts exempting it from liability. 10 Couch on Insurance, §147:29 (3rd e.d.).

The treatise does not believe, as Provident does, that permanency must occur before the insurer has the burden to prove the insured’s disability ceased. In fact, Provident has not cited any authority to support its argument that the burden shift to the insurer only applies in permanent total disability cases.

As noted by Judge Staton in Novy, the purpose of the burden shift is to protect

insureds from the pretextual and oppressive cessation of the payment of disability benefits by the insurer. This protection applies to insureds who sustain total disability whether or not permanently so.

Next, Provident argues that the burden of proof shift in this case is substantive, and not procedural. It argues that the burden of proof rule is actually an interpretation of the terms of the insuring agreement. This is an improper attempt to blend two distinct concepts. One concept is the interpretation of the insurance contract governed by New York law. The second is the burden of proof rule which is governed by the procedural law of the forum. The burden of proof rule is not utilized to interpret the contract. Instead, it allocates who has the burden to produce evidence in its favor.

The insurer concedes straight away that the burden of proof is controlled by law of the forum, Florida. The insurer further concedes that both New York and Florida generally consider burden of proof rules to be procedural. (Provident's Brief at p.35). However, the basis upon which Provident's argument rests is absent, that is, the burden of proof is merely an interpretation of the insuring agreement. To be sure, in Lecks and Mutual Life Insurance Co. of New York v. Ewing, 10 So.2d 316 (1942) involved insureds who were permanently totally disabled within the meaning of the policies under consideration by those courts. However, contract interpretation, if any,

was tangential.

The insurer asks this Court to abandon years of decisions by this, and other appellate courts, that have constantly held burdens of proof to be procedural. The insurer asserts that this is a special case involving disability insurance policy language which governs the burden of proof. This assertion presents no meaningful distinction because every burden of proof sets forth the mechanism through which the substantive rights and duties are redressed, whether founded on contract, common law, tort, or otherwise. The burden of proof at bar neither creates nor defines the parties' rights. Only the contract of insurance does that. See, e.g. Walker & LaBerge, Inc. v. Halligan, 344 So. 2d 239, 242 (Fla. 1977); City of Clermont v. Rumph, 450 So. 2d 573, 575 (Fla. 1st DCA 1984). *rev. den.* 458 So. 2d 271 (Fla. 1984).

Provident's attempt to seize upon the word "inception" used by Justice Adkins offers no support. The insurer urges that there may be cases where an insurance company contests whether it initially accepted the insured's status as disabled. Using this logic, no burden of proof would be procedural since it is conceivable that a directed verdict can be entered in almost any case because a party may fail to present a prima facie case. The concept as applied in Florida jurisprudence under the facts at bar is that the prima facie case of the insured is established once the insurance company accepts the insured's totally disabled status and commences payment

thereon. It would be anticipated the insurance company would be entitled potentially to a directed verdict if the insured never established his or her prima facie case as being totally disabled.

Justice Adkins described practice and procedural rules as “...the machinery of the judicial process as opposed to the product thereof.” In Re: Florida Rules of Criminal Procedure, 272 So. 65, 66 (Fla. 1973). The disability insuring agreement sets forth the rights and obligations of the parties. How those rights would be enforced through the application of burdens of proof is the machinery to which the substantive issues are processed.

Provident misstates Shaps’ position when it states it is Shaps’ position that this Court’s ruling in Fruchter should not be followed. Shaps’ actual position is, and remains, that this Court’s comment that the burden of proof under consideration at bar is “substantive” has no precedential value. This is so since the statement is contained in an opinion in which the merits of the cause were not reached. Southern Bell Telephone & Telegraph v. Bell, 115 So. 2d 617, 619 (Fla. 1959).

Provident next argues that the burden of proof should not be applied because it creates an absurd result under the law of New York which governs the parties rights under the policy. (Insurer’s Brief at p.41). However, even New York recognizes that burdens of proof are procedural and the law of the forum must apply. Goldfields

American Corp. v. Aetna Casualty & Assurity Co., 173 Misc. 901, 902 661 N.Y. 2d 948, 949 (1997).

Regarding the argument that the burden shift goes against New York law and the disability policy, which requires the submission of monthly proofs of loss by the insured, the Eleventh Circuit Court of Appeals has already held that Provident's policy is ambiguous in that regard in light of Panepinto v. New York Life Ins. Co., 90 N.Y. 2d 717, 665 N.Y.S. 2d 385, 688 N.E. 2d 241 (1997). The Federal Court of Appeals held:

“The Court in Panepinto did hold, in the context of determining the limitation period on the plaintiff's claim, that ‘disability does not mean a monthly segment of the disability, but rather the entire period of disability for which benefits are available under the policies’. The Panepinto Court did not, however, consider a provision like the one in Shaps' policy providing that “[a]fter receiving written proof of loss, we pay monthly all benefits then due for disability”. (*Emphasis added.*) This language in Shaps' policy is ambiguous, and could be fairly interpreted to mean that written proof of loss is indeed required in the manner Provident suggests.”

New York law holds that ambiguities in insurance contracts are construed against the drafter, the insurer, under New York law. Morales v. Allcity Insurance Co., 275 A.D. 2d 736, 713 N.Y.S. 2d 227, 228 (2000).¹

¹ This issue will be addressed in the Circuit Court on rehearing following remand.

In summary, the burden of proof shifts to the insurer who accepts the insured's totally disabled status to show that total disability no longer exists when it seeks to be relieved of payment. This is a procedural matter and the Federal District Court, sitting in diversity, must apply the procedural burden of proof as required by Florida law. Accordingly, the certified question must be answered in the negative.

II. WOULD REQUIRING THE INSURED TO PROVE DISABILITY IN THIS CONTEXT VIOLATE THE PUBLIC POLICY OF FLORIDA SUCH THAT THE BURDEN OF PROOF MUST BE PLACED ON THE INSURER? SEE, GILLEN V. UNITED SERVICES AUTOMOBILE ASSN., 300 So. 2d 3 (Fla. 974).

Under this point, Provident seeks to minimize the importance that public policy plays in not only deciding the issue at bar, but deciding the issues of burdens of proof in general.² What Provident overlooks is that the assignment of burdens of proof are statements of public policy either assigned by the legislature or the courts of this state.

Policy considerations govern the allocations of the burdens of proof. See, McCormick on Evidence, §§336-337 (3rd e.d.). Florida courts have recognized this principle. Burns v. GCC Beverages, Inc., 502 So. 2d 1217, 1219 (Fla. 1986) [Public policy in favor of termination of litigation dictates plaintiff's heavy burden of proof in malicious prosecution claims]. See also, Heller v Doe, 509 U.S. 312, 323 113 S.Ct.

² Apparently the Appellate Panel sitting in and for the Eleventh Circuit Court of Appeal found this issue important enough to refer to this Honorable Court.

2637, 2644, 125 L.ED. 2d 257 n.1 (1993) [The state is free to adopt any burden of proof that meets or exceeds constitutional minimum requirement of due process based on any rational policy choice].

For over sixty-five (65) years, this Court has consistently held an insurance company responsible to prove that an insured is no longer disabled within the meaning of its policy once it accepts him or her as totally disabled. This reflects the public policy choice that the burden should be placed on the insurer who assented to the insured's disability status to prove a change in the facts which it once accepted, to show that those facts are no longer true in order to withhold further disability payments. The insurer can clearly place an onerous burden upon an insured where the insurer, with little or no facts and based upon pretext, can alter its obligation under the contract. Florida's public policy as expressed in Fruchter is of utmost importance in the instant case. Public policy concerns prevent the application of the New York burden of proof, repugnant to the burden of proof adhered to in this state, on the issue at bar. Gillen v. United Services Automobile Assn., 300 So. 2d 3 (Fla. 1974). Adherence to New York law would harm Shaps, a Florida citizen at the time of the breach of contract, and frustrate established public policy of this state.

Accordingly, the second question certified from the Court of Appeals should be answered in the affirmative. Florida's expression of public policy by assigning the

burden of proof to the insurer in circumstances such as that at bar, is not furthered by the actions of Provident, who now attempts a post hoc rationalization for the discontinuation of benefits based upon information learned through the litigation process, rather than from proof it had when it decided to terminate Ms. Shaps' benefits. Provident's actions in the instant case are repugnant to the policy expressed by Florida's courts which require the insurer to prove the insured's disability no longer exists once it accepts the insured's disabled status. The Federal District Court erred by applying New York's burden of proof which offends the public policy of Florida.

CONCLUSION

WHEREFORE, due to the foregoing, it is respectfully requested that this Court find that Florida's burden of proof rule applies to disputes between the insurer and insured under the disability policy in question and that, in any event, Florida's public policy requires that the burden of proof announced by the Florida Supreme Court in Lecks, Ewing, and Fruchter apply in this case.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U. S. Mail to **Jeffrey M. Landau, Esq.**, Attorney for Appellees, SHUTTS & BOWEN, 201 S. Biscayne Boulevard, 1500 Miami Center, Miami, Florida 33131; and **Howard Grossman, Esq.**, Counsel for Appellant/Plaintiff, GROSSMAN & GOLDMAN, 1098 NW Boca Raton Boulevard, Boca Raton, FL 33432 on July 9, 2001.

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CERTIFICATE OF COMPLIANCE

WE HEREBY CERTIFY that the Appellee's Reply Brief On The Merits is printed in 14-point, Times New Roman, proportionally-spaced typeface.

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