IN THE SUPREME COURT OF FLORIDA

FIDELITY AND CASUALTY COMPANY OF NEW YORK,	:	
Petitioner,	:	CASE NO. 64,825
vs.	:	DCA Case No. 82-1706
JAMES L. COPE, as Personal Representative of the Estate of ANNA L. COPE, deceased,	:	
Respondent.	:	

RESPONDENT'S BRIEF

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AUTHORITIES CITED

STATEMENT OF THE CASE

Respondent disagrees with so much of the Petitioner's statement of the case which purports to set forth the holding of the Second District Court of Appeal as follows:

> "The Second District affirmed the decision of the trial court (nonjury) and held that a satisfaction of judgment and settlement and release with the insured-tortfeasor by the injured party did not bar a 'bad faith' excess claim against the insurer, even though the insured did not pay any sum in excess of the policy limits to obtain the satisfaction of judgment and release."
> (Emphasis added).

The Second District Court specifically found:

1. That Appellant, Fidelity and Casualty, was not named in the release and did not contribute any money toward securing the release or the satisfaction of judgment;

2. That Appellant's argument that the general language in paragraph 9 of the release was effective to discharge it even though specifically not named was a question of fact which was decided contrary to Appellant by the trial court and held by the District Court to have been supported by substantial competent evidence; and

3. The Appellant insurer's bad faith was a separate tort for which the injured party may release the tortfeasor without discharging the insurer from liability.

The Petitioner, Fidelity and Casualty Company of New York, will be referred to as Fidelity. The Respondent,

James L. Cope, as Personal Representative of the Estate of Anna L. Cope, deceased, will be referred to as Cope. R. stands for the record; T. for the transcript of the trial; and A. for the appendix.

STATEMENT OF THE FACTS

Cope would prefer to adopt as his Statement of the Facts the facts as outlined in the opinion of the Second District Court of Appeal. Although the opinion is contained in the Appendix, it is set forth as follows for the purpose of convenience (A 14-17):

> "The trial court found that appellant had acted in bad faith by failing to settle a claim made against its insured. Judgment in excess of appellant's policy limits was entered against appellant in favor of the claimant. Appellant raises several points on appeal. Those which merit discussion are (1) whether a certain release and satisfaction specifically released appellant, (2) whether appellant as excess insurer could be guilty of bad faith, and (3) whether the complete discharge of appellant's insured bars the claimant's bad faith action against appellant.
>
> "On March 30, 1978, appellant's insured (Brosnan) was, with permission, operating an automobile owned by Gehan and in which Gehan was a passenger. Brosnan ran a stop sign and collided with a vehicle driven by appellee James L. Cope. Appellee's wife, Anna L. Cope, was a passenger in the car. Mrs. Cope was killed and Mr. Cope was injured. Brosnan was charged with driving while under the influence (alcohol) and vehicular homicide.
>
> "Appellant had issued a $10,000/20,000 liability policy to Brosnan. On April 26, 1978, appellee's attorney wrote to Brosnan informing Brosnan of the attorney's representation of appellee. Brosnan turned this letter over to an attorney representing him in the DWI/homicide case. On May 2, 1978, she forwarded the letter to appellant's adjuster with her request that the case be settled.

"By letter dated May 16, 1978, appellant's adjuster advised Brosnan it was 'continuing to handle' the claim. The letter informed Brosnan that it was foreseeable that the damages claimed would exceed Brosnan's policy limits 'The company will, of course, attempt to adjust the loss within the limits and defend any suit and [sic] it's [sic] expense as provided in the policy.' [Emphasis supplied.] Brosnan testified that he never again heard from the adjuster or from appellant.

"On September 27, 1978, appellee's attorney wrote to the adjuster requesting that all future communications regarding the case be directed to the attorney. A second letter followed on October 9, 1978, in which appellee's attorney forwarded all medical reports and bills. Appellee's attorney demanded the full policy limits and expressed his intent to file suit if no response was received within seven days. The adjuster responded on October 16, 1978, admitting that the severity of the injuries warranted payment of the policy limits, however, the adjuster would first require appellee to reach a settlement with Gehan, who had also sustained injuries.

"Meanwhile, appellee had attempted to negotiate with Hartford with whom Gehan had a $10,000/20,000 liability policy. No agreement was reached.

"Negotiations having failed to produce a settlement with either insurer, appellee filed suit on November 22, 1978, against Brosnan, appellant, Gehan, and Hartford for the wrongful death of his wife and for his own personal injuries. Appellee's individual claim for personal injuries was settled, appellant and Hartford each paying $10,000. Jury trial of the wrongful death action resulted in a $100,000 judgment for appellee. Appellant and Hartford immediately tendered their respective policy limits of $10,000 each. Thereafter, appellee filed a complaint for excess judgment against Hartford, alleging that

Hartford had acted in bad faith by failing to negotiate a settlement. This suit was settled for $50,000. Appellee executed a release and a satisfaction of judgment in connection therewith which discharged Hartford, its insured (Gehan), and its omnibus insured (Brosnan) from any further liability on the $100,000 wrongful death judgment.

"Appellee next sued appellant for the $30,000 balance of the original $100,000 judgment. The complaint alleged that appellant negligently and in bad faith refused to negotiate a settlement of appellee's claim. Appellee prevailed, and judgment for $30,000 was entered against appellant.

"At pretrial conference, appellant moved to amend its affirmative defenses to allege that the release executed pursuant to the settlement appellee reached in his bad faith suit against Hartford also released appellant. It is not clear from the transcript that the trial court specifically granted this motion. However, the final judgment contains the finding that the release and the satisfaction of judgment were not intended to benefit appellant and did not relieve appellant of liability. Obviously, the trial court considered and rejected this additional defense asserted by appellant, and we affirm this finding. Paragraphs 1 and 2 of the release specifically 'release and forever discharge' Gehan, Hartford, and Brosnan. Appellant was not named in the releasing claim nor did it contribute any money toward securing the release of the satisfaction of judgment. Appellant argues that general language in paragraph 9 of the release was effective to discharge it even though not specifically named. This is a question of fact and the trial court's finding that appellant was not released is supported by substantial competent evidence. Cf. Hurt v. Leatherby Insurance Co., 380 So.2d 432 (Fla. 1980)."

ISSUES ON APPEAL

I

IS A LIABILITY INSURER LIABLE TO AN INJURED PARTY FOR AN EXCESS JUDGMENT AFTER THE INJURED PARTY HAS EXECUTED A SATISFACTION OF JUDGMENT IN FAVOR OF ITS INSURED AND, IN FACT, HAS RELEASED ITS INSURED FROM ALL LIABILITY FOR AN EXCESS JUDGMENT?

Discussed in Argument I

II

IS AN INSURER WHICH IS ONLY SECONDARILY LIABLE GUILTY OF "BAD FAITH" WHEN IT TRIES TO PAY ITS POLICY LIMITS, BUT IS UNABLE TO DO SO BECAUSE THE PLAINTIFF AND THE PRIMARY CARRIER WILL NOT SETTLE, PARTICULARLY, AFTER ITS INSURED HAS BEEN FULLY RELEASED AND HAS NO LIABILITY TO THE INJURED PARTY BECAUSE OF THE RELEASE AND A SATISFACTION OF JUDGMENT EXECUTED BY THE INJURED PARTY?

Discussed in Argument II

ARGUMENT I

A LIABILITY INSURER IS NOT LIABLE TO AN INJURED PARTY FOR AN EXCESS JUDGMENT AFTER THE INJURED PARTY HAS EXECUTED A SATISFACTION OF JUDGMENT IN FAVOR OF THE INSURED AND, IN FACT, HAS RELEASED THE INSURED FROM ALL LIABILITY FOR AN EXCESS JUDGMENT AND THE INSURED HAS NOT PAID FOR THE RELEASE AND SATISFACTION.

Fidelity predicates its argument on the assumption that the release and the satisfaction of judgment relieved Fidelity of any liability on the "bad faith" claim instituted by Cope. (A 1-3, A 4)

This premise completely ignores the holding of the trial court (A 11):

> "2. That the plain language of both the release and the Satisfaction of Judgment show that neither was intended to accrue to the benefit of the Defendant, Fidelity and Casualty Company of New York, and that the execution of these instruments did not relieve the Defendant of its liability."

and the opinion of the District Court at page 5 (A 17):

> ". . .Appellant (Fidelity) was not named in the releasing claim nor did it contribute any money toward securing the release or the satisfaction of judgment. Appellant argues that general language in paragraph 9 of the release was effective to discharge it even though not specifically named. This is a question of fact and the trial court's finding that appellant was not released is supported by substantial competent evidence. Cf. Hurt v. Leatherby Insurance Co., 380 So.2d 432 (Fla. 1980)."

An examination of the release agreement readily indicates that it was not the intent of the releasor, Cope, to confer a

benefit upon Fidelity. (A 1-3)

Fidelity is nowhere mentioned by name in the release agreement, but attempts to become a donee beneficiary, without contribution, of the release agreement by asking this Court to encompass it within the general language of paragraph 9 of the release, something which both the trial court and the District Court declined to do. (A 1-3)

Fidelity argues at page 9 of its brief that:

> "The Second District has misapprehended the applicable law. First, Thompson v. Commercial Union, supra, holds that a judgment creditor may maintain a bad faith suit. Cope was not a judgment creditor, (nor was Brosnan a judgment debtor), rather the judgment had been satisfied."

and further concludes this argument at page 12 as follows:

> ". . . Further, the liability of the '. . . insurance company does not arise in tort, but arises out of contract, and does not accrue until after [Plaintiff] has . . . a judgment against the alleged Defendant tortfeasor to whom . . . [the insurance company] issues its policy of . . . insurance.' Clemons v. Flagler Hospital, Inc., 385 So. 2d 1134, 1136 (Fla. 5th DCA 1980), citing Davis v. Williams, 239 So. 2d 593, 595 (Fla. 1st DCA 1970)."

Cope would submit that it is Fidelity that has misapprehended the law or at least the facts in this case as applied to the law which it argues.

In this case, an excess judgment was entered against Fidelity's insured, Brosnan, at the conclusion of the jury trial. (A 11-12) The release and the satisfaction of judgment

were executed only after the subsequent proceedings were initiated against Hartford, the other carrier involved. (A 1-3, A 4) Therefore, once the excess judgment had been entered against Fidelity's insured, Fidelity had breached its duty to its insured and the insured was exposed to an excess judgment. The cause of action for a bad faith claim had accrued. (A 5-10)

As specifically set out in Kelly v. Williams, 411 So.2d 902 (Fla. 5th DCA 1982) at page 904:

> "However, a cause of action for bad faith arises when the insured is legally obligated to pay a judgment that is in excess of his policy limits."

Cope would further submit that under these circumstances, this case is distinguishable from Kelly v. Willliams, supra, wherein the court also recites at page 904:

> ". . . Under the arrangement stipulated to by the parties in this case, the insured could not be exposed to an excess judgment under any circumstances."

In these proceedings, the excess judgment had been entered against Fidelity's insured, the insured become exposed and the cause of action had accrued. (R 136-137).

A further distinguishing element warrants consideration. In the Kelly case, Allstate, the insurer, negotiated and paid the consideration for the release. In this case, Fidelity did not participate and paid nothing, but attempts now to portray itself as a benefactor.

Fidelity also has repeatedly argued that the liability of Fidelity depends upon the liability of its insured, Brosnan; that an insurer's obligation extends only to the legal obligations of the insured, and that the satisfaction of judgment against its insured effectively released Fidelity. These same issues were presented in the case of Aetna Cas. & Sur. Co. v. Beane, 385 So.2d 1087 (Fla. 4th DCA 1980) wherein the Court ruled directly contrary to Fidelity's present position.

The Beane case involved serious injuries received by a minor Plaintiff riding as a passenger in an automobile being operated by a Matthew Carroll. American States Insurance Company afforded primary coverage and Aetna Casualty & Surety Company was an excess insurer. Trial of the case resulted in a jury verdict in excess of American States Insurance Company's limits whereupon American States paid to the Plaintiffs its policy limits in consideration of a full and final release, an Assignment of Judgment and a Satisfaction of Judgment. Included in the release and Satisfaction was Matthew Carroll.

Aetna then took the position that the release of Matthew Carroll, its insured, and Satisfaction of the Judgment against him had the effect of extinguishing any liability that might otherwise have accrued against Aetna.

At page 1089 the Third District Court of Appeal found:

". . . Appellant (Aetna) contends that

since the liability of an insurer depends upon the liability of its insured and that an insurer's obligation extends only to the legal obligations of the insured, the release of Aetna's insured effectively extinguished Aetna's liability.

"The flaw in the logic of appellant's position is that the liability of the insured arises in the context of commission of a tort whereas the insurer's liability arises by virtue of third-party beneficiary principles of contract. While the insurer and the insured are not joint tort-feasors, neither are they joint obligors under a contract. . . Because the parties are neither joint tort-feasors nor joint and several obligors, neither the statute nor the common-law rule offers support to appellant's position on this point.

"Had Aetna's insured personally satisfied the judgment against him and obtained a release and satisfaction of judgment, absent some prohibition in the policy, Aetna would not thereby have been relieved of liability. The right of plaintiff under the judgment would enure to the insured's benefit and entitle him to recover against the insurer.

"What happened in the instant case is little different in fact and no different in legal effect. Aetna remains liable."

Cope would also cite the case of Alexander v. Kirkham, 365 So.2d 1038 (Fla. 3d DCA 1979) wherein the Court held, at pages 1040 and 1041 as follows:

"It must be pointed out that the defendants in this case were neither parties to the release agreement, gave any consideration for it, nor changed their position in any

> way in reliance upon its terms. . . They simply seek to be the donee beneficiaries of an enormous benefit, freedom from tort liability, gratuitously placed in their laps through the inadvertence of third parties. On these facts there is therefore no legal or equitable reason to interfere with the effectuation of the conceded intention of the parties to the agreement themselves . . ."

In this case, Fidelity likewise seeks to be the donee beneficiary of a release agreement for which it paid nothing and to which it was not a party and both the trial court and the District Court so concluded.

Assuming arguendo that the trial court erred in holding that the plain language of the release did not include Fidelity and that the District Court improperly affirmed this holding, testimony relative to the intent of the parties was presented at trial and was considered by the trial court as follows (T 44):

> "Q. Okay, Was there ever an intention to release Fidelity and Casualty Insurance?
>
> A. No, They had hadn't paid any money on it. There was no intention to release them."

In addition, Cope submitted the affidavit of Judith W. Simmons, the attorney representing Hartford, who actually negotiated and prepared the release and who stated in her affidavit that Fidelity was deliberately not specifically named in the release. Ms. Simmons also recollected in her affidavit that a release on behalf of Fidelity was not bargained for between or on behalf of the parties. (R 48

and 49; R 73 and 74)

Accordingly, for the purpose of argument, if it could be said that the release agreement did include Fidelity in its broad definition as an insurer, on the evidence presented to the trial court, Cope would have been entitled to reformation of same.

As reflected at page 4 of the District Court's opinion Fidelity did not plead the release until the time of pretrial conference when it then moved to amend its affirmative defenses to plead the release as an affirmative defense. (A 16)

The trial court did admit the release in evidence, but also allowed the testimony as stated above relative to the intent of the parties to the release.

Therefore, it is apparent that if the trial court had not found the release clearly did not include Fidelity, it is also apparent that it would have or should have allowed reformation.

As stated by Judge Lehan in his concurring opinion: (A 24):

> "The record establishes beyond doubt that the parties to the release did not intend to release appellant. Therefore, elements of a reformation action by reason of mutual mistake exist. But under the circumstances of this case and consistent with Hurt, there is and should be no formalistic, technical requirement that a reformation action be a condition precedent to relief. See Alexander v. Kirkman, 365 So. 2d 1038 (Fla.

3d DCA 1979), which involved reformation of a release which had mistakenly released an insurer who had paid nothing for the release."

ARGUMENT II

AN INSURER WHICH IS ONLY SECONDARILY LIABLE IS NOT GUILTY OF "BAD FAITH" WHEN IT TRIES TO PAY ITS POLICY LIMITS, BUT IS UNABLE TO DO SO BECAUSE THE PLAINTIFF AND THE PRIMARY CARRIER WILL NOT SETTLE, PARTICULARLY, AFTER ITS INSURED HAS BEEN FULLY RELEASED AND HAS NO LIABILITY TO THE INJURED PARTY BECAUSE OF THE RELEASE AND A SATISFACTION OF JUDGMENT EXECUTED BY THE INJURED PARTY.

Fidelity's second argument is best epitomized by reference to two statements contained in its brief.

At page 17, the brief states:

> ". . .It [Fidelity] tried to settle and exercised the utmost good faith to its insured."

and at page 21:

> "Although not dispositive to the issue on appeal, it is important to point out that the finding of bad faith was unsupported by the evidence and that, in fact, there was no bad faith by Fidelity and Casualty."

Fidelity fails to consider properly or to present the actual facts as they occurred and the findings of both the trial and appellate courts in these proceedings.

The accident occurred on March 30, 1978 resulting in the death of Anna Cope. Within a period of approximately five weeks, Underwriters Adjusting Company, which was representing Fidelity, became aware that the Cope family was represented by the firm of Hammond and Holman. (R 100)

Approximately one month later, Fidelity or its agent, Underwriters Adjusting Company, was in possession of

inter-office communications indicating that its insured ran a stop sign and was DWI. (R 101 through 106A)

Fidelity made no attempt to contact the attorneys representing the Cope family until after it received a letter from Hammond and Holman dated October 9, 1978 unconditionally offering to settle the claim within the policy limits of $10,000. (R 108)

After receiving the October 9, 1978 letter demanding the policy limits, some six months after the death of Mrs. Cope, Mr. Curtis, adjuster for Fidelity, made his first and only attempt to negotiate the claim by letter dated October 16, 1978 suggesting that Plaintiff's attorney work out a settlement with the attorney representing another claimant who was an owner-passenger in the vehicle being driven by its insured. (R 109)

On October 17, 1978, the day the letter was received, Plaintiff's attorney called Mr. Curtis of Fidelity and advised that he did not intend to negotiate the Copes' claim with another claimant's attorney and further, that Plaintiff's attorney felt Fidelity was handling this serious claim very nonchalantly; that Fidelity could settle Mrs. Cope's claim in good faith regardless of the number of claimants involved. Mr. Curtis agreed to consult with his house counsel and again contact Plaintiff's attorney. (T 38 and 39)

From the date of the telephone conversation until suit was

filed on November 22, 1978 neither Fidelity nor its agents attempted to contact Plaintiff's attorney. (T 39 and 40)

In addition, Fidelity's own insured testified at the time of trial that Fidelity never made any attempt to advise him of any settlement negotiations. (T 23-25)

In light of the foregoing, Fidelity represents in its brief that it "exercised good faith to its insured," and that "the finding of bad faith was unsupported by the evidence." Yet, the trial court specifically found (A 11):

> "1. The failure of the Defendant, Fidelity and Casualty Company of New York, to settle the claim against its insured when it could and should have done so and the further failure to notify its insured or keep him advised of negotiations or offers to settle the claim constituted 'bad faith' on the part of the Defendant, Fidelity and Casualty Company of New York."

and this finding was affirmed by the Second District Court, citing Boston Old Colony Insurance Co. v. Gutierrez, 386 So.2d 783, 785 (Fla.), cert. denied, 450 U.S. 922 (1980).

Cope would respectfully submit that Florida law has consistently recognized the liability of an insurance company for an amount in excess of its policy limits when claims involving great exposure to insureds have not been properly settled. An insurance company has a duty to protect its insured and utilize that degree of care and diligence that a person of ordinary care and prudence should exercise in the management of his own business. Auto Mutual Indemnity Co. v.

Shaw, 184 So. 852 (Fla. 1938). This duty has been recognized because insurance companies in the State of Florida have seized all control of the handling of claims which includes decisions with regard to how the claim will be handled and settled, and insurance companies have a duty to exercise their control in their decision making process with due regard for the interests of their insureds. There can be no doubt that the duty of an insurance company includes the obligation to advise properly its insureds of settlement opportunities, to advise the insureds as to the probable outcome of litigation if the matter is not settled, to warn the insureds of the possibility of an excess judgment, and to advise an insured of any steps that may be taken to avoid such situation. Liberty Mutual Insurance Co. v. Davis, 412 Fed.2d 475 (5th Cir. 1969); Ging v. American Liberty Insurance Co., 423 Fed.2d 115 (5th Cir. 1970).

Florida law clearly recognizes that there is an obligation upon an insurance company to not only investigate claims which are made against its insureds, but there is a requirement that the insurance company settle if possible such claims where a reasonable prudent person would do so if faced with the prospect of paying the total amount of any judgment. Government Employees Insurance Co. v. Grounds, 311 So.2d 164 (Fla. 1st DCA 1975); Boston Old Colony Insurance Co. v. Gutierrez, 386 So.2d 783 (Fla. 1980).

The concept of the "duty of good faith" certainly involves

diligence and care in the investigation, evaluation and handling of claims against insureds, and Florida law clearly recognizes that any neglience on the part of an insurance company is certainly relevant to the question of whether an insurance company has operated properly. Boston Old Colony Insurance Co. v. Gutierrez, 386 So.2d 783 (Fla. 1980); American Fidelity and Casualty Co. v. Greyhound Corp., 258 Fed.2d 709 (5th Cir. 1958); DeLaune v. Liberty Mutual Insurance Co., 314 So.2d 601 (Fla. 4th DCA 1975).

CONCLUSION

In conclusion Cope would respectfully submit, first, that the Kelly case, supra, is actually distinguishable in that:

1. No judgment was ever entered against the insured in Kelly, whereas in these proceedings Fidelity's insured did become liable for an excess judgment;

2. In Kelly, the insurer negotiated and paid for the release whereas Fidelity was neither a party to negotiation of the release nor paid the first dime in consideration therefor; and

3. In Kelly, the court commented that there was no attempt, at the trial court level, to show mistake in execution of the release so as to entitle Plaintiff to reformation, whereas in the Cope case evidence was presented at the trial court level relative to the intent of the parties in execution of the release.

Accordingly, it should be determined that no conflict exists and the District Court of Appeal should be affirmed.

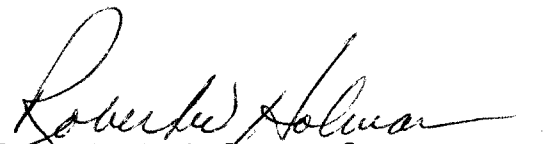
Secondly, the specific findings of facts made by the trial court:

1. That the release did not include Fidelity, and

2. That Fidelity's actions constituted "bad faith," were well founded, entitled to a presumption of correctness

and should be affirmed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Respondent's Brief has been served by mail upon Jonathan L. Alpert, Esq., of Fowler, White, Gillen, Boggs, Villareal & Banker, Attorneys for Petitioner, Post Office Box 1438, Tampa, Florida 33601 this 19th day of March, 1984.

Robert W. Holman