IN THE SUPREME COURT OF FLORIDA

FIDELITY AND CASUALTY COMPANY OF NEW YORK,

Petitioner,

v.

JAMES L. COPE, as Personal Representative of the Estate of Anna L. Cope, Deceased,

Respondent.

Case Number 64,825

DCA Case Number 82 1706

PETITIONER'S INITIAL BRIEF

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STATEMENT OF THE CASE

This case is before this court under Fla. R. App. P. §9.030(a)(2)(A)(vi), the Second District Court of Appeal having certified that its decision is in direct conflict with Kelly v. Williams, 411 So. 2d 902 (Fla. 5th DCA 1982), petition for review denied, 419 So. 2d 1198 (Fla. 1982). The Second District rendered its opinion on January 20, 1984, and Notice to Invoke Discretionary Jurisdiction was duly filed on January 26, 1984.

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.

The parties will be referred to as they stood in the trial court, or by name, or as they stand in this court. R. stands for the record; T. for the transcript of the trial; and A. for the appendix.

STATEMENT OF THE FACTS

On March 30, 1978, Fidelity and Casualty's insured, Brosnan, was, with permission, operating an automobile owned by Gehan, (insured by Hartford), in which Gehan was a passenger. Brosnan ran a stop sign and collided with a vehicle driven by James L. Cope. Cope's wife, Anna L. Cope, was a passenger in the car. Mrs. Cope was killed and Mr. Cope was injured. Ms. Gehan was also injured. Brosnan was charged with DWI and vehicular homicide. (A. 18).

Fidelity had issued a $10,000/$20,000 liability policy to Brosnan. On April 26, 1978, Cope's attorney wrote to Brosnan, informing Brosnan of the attorney's representation of Cope. Brosnan turned this letter over to the lawyer representing him in the DWI/homicide case. On May 2, 1978, the lawyer forwarded the letter to Fidelity and Casualty's adjuster with a request that the case be settled. (A. 18).

On October 9, 1978, a seven day demand letter was sent to Fidelity and Casualty by the attorney who represented both Mr. and Mrs. Cope. [Plaintiff's Exhibit A, R. 5, A. 5]. This letter contained for the first time the medical reports and bills incurred by Mr. Cope and demanded that Fidelity and Casualty pay each Cope $10,000.00, thereby exhausting its policy limits of $20,000.00. (R. 5, A. 5).

On October 16, 1978, Mr. Dan Curtis of Fidelity and Casualty, responded to the attorney stating the following:

> "In reply to your letter of October 9, 1978, I am sure you are aware of our policy limits of 10-20. Also, I understand Hartford, who insures Jacqueline Gehan, has a 10-20 policy; therefore, the total

limit of both policies is $40,000.

> Obviously the injuries sustained by Mr. and Mrs. Cope are severe enough to warrant the policy limits, however, we cannot overlook the fact that Jacqueline Gehan, likewise has sustained very serious injuries and is represented by attorney J. M. Thorpe of 6551 Central Avenue, St. Petersburg, telephone 381-8774, who has put us on notice.
>
> Under the circumstances, it might behoove you to call Mr. Thorpe and work out some sort of settlement which would be amicable to all parties concerned. We at this point are willing to tender our policy limit of $20,000 when a settlement has been worked out between you and Mr. Thorpe.
>
> We will forward you a copy of the declaration sheet when obtained." [Defendant's Composite Exhibit #1, Page 34, A. 15].

The attorney did not reply to this letter until November 22, 1978, when he confirmed a telephone conversation of October 17, 1978, regarding Fidelity and Casualty's exposure to bad faith and advised Fidelity and Casualty that suit had been filed. [Plaintiff's Exhibit B, R. 6, A. 6].

On November 17, 1978, Hartford, Gehan's insurer, had refused to settle. (R. 121). Also, on November 15, 1978, Reserve Insurance Company (Cope's uninsured motorist carrier), refused to approve a settlement. (R. 121.) Cope's attorney filed suit, not because of what Fidelity & Casualty did, but because Hartford, Gehan's insurer and primary insurer, refused to negotiate with him. (T. 57, R. 121, A. 14). Also, Cope's attorney refused to negotiate with Gehan's attorney, as suggested by Mr. Curtis of Fidelity. (R. 121, A. 14).

Suit was filed on November 22, 1978, but was not served until December 26, 1978. (Defendant's Composite Exhibit 1, Page 13).

Thereafter, the Anna L. Cope suit went to trial and resulted in a jury verdict of $100,000.00, against Brosnan, [called Vorosman in the transcript], Gehan, Hartford, Fidelity. (Complaint of Plaintiff, ¶13, R. 3, A. 3).

After the jury verdict was obtained, on October 23, 1980, the plaintiff filed a complaint for excess judgment against Hartford. That suit was settled for $50,000.00, "and plaintiff executed a release on May 14, 1981, which released Hartford Accident & Indemnity Company, Jacqueline Gehan and Daniel J. Brosnan from all financial responsibility arising out of of the judgment obtained against them. . ." (Complaint of Plaintiff, ¶16, R. 3-4, A. 3-4).

Thereafter, on June 18, 1981, the plaintiff filed the instant suit against Fidelity & Casualty Company,[1] alleging that the defendant refused to negotiate in good faith; "the Defendant negligently, arbitrarily, unreasonably and in bad faith refused to even negotiate on a settlement of the claim" between October 9, 1978, and November 22, 1978, the date upon which the plaintiff had filed suit. (Complaint of Plaintiff, ¶¶9, 11, R.2-3, A. 2-3). The complaint further alleged that the offer to settle within policy limits had been withdrawn as of the date of the filing of suit. (Complaint of Plaintiff, ¶12, R. 3, A. 3).

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1 After the "bad faith" suit against Fidelity was filed, plaintiff executed a satisfaction of judgment in favor of Fidelity's insured, Daniel J. Brosnan. The satisfaction was executed on July 10, 1981. (R. 200, A. 10).

Therefore, the pleadings limited the period of "bad faith" refusal to settle to the period between October 9, 1978, and November 22, 1978. (Complaint of Plaintiff, ¶¶9 - 12, R. 2-3, A. 2-3). Therefore, what took place before and after the alleged bad faith period was neither pled nor tried by consent. (T. 12, 2, 5, 40).

At the excess trial, the existence of the release and satisfaction of judgment in favor of the insured, Brosnan, was admitted by the plaintiff. (T. 54-55). Further, the record indicates that the reason for filing suit on November 22, 1978, was not because of anything Fidelity did, but rather because Hartford refused to settle. (T.57, Plaintiff's Exhibit 1, R. 121, A. 14).[2]

Further, the evidence at trial established that Fidelity and Casualty Company was at all times willing to tender its policy limits, but was unable to do so because of actions by the plaintiff and Hartford. (T. 62 - 67, 57, 91). In point of fact, Cope did not have permission from his uninsured motorist carrier to settle. (T. 58-59, R. 121, A. 14). Fidelity and Casualty had exposure to both Mr. and Mrs. Cope and Mrs. Gehan and an obligation to Mrs. Gehan. (T. 62-67, A. 15-16).

Further, Fidelity and Casualty as the insurer of the driver, not the owner, was not in charge of settlement negotiations, but was limited by its obligations to the primary insurer, Hartford, the insurer of the owner. (T. 91).

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2 "11/17/78 - Hoke from Hartford called RWH [Holman, Plaintiff's attorney]-- indicated to RWH he was not going to do anything -- just sit back and wait."

Finally, as of July 10, 1981, a year before the "bad faith" trial, Daniel Brosnan, Fidelity's insured, was not exposed to any excess judgment, but rather was completely released and discharged, both a release and satifaction of judgment having been executed in his favor. (R. 200 -203, A. 7 - 10).

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 EXECTED 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.

Assuming arguendo that Fidelity and Casualty acted in bad faith, the settlement and release and satisfaction of judgment barred the "bad faith" claim against Fidelity and Casualty. The crux of this issue is the following reasoning by the Second District at page 6 of its opinion, (A. 22):

> "We disagree with Kelly v. Williams, 411 So. 2d 902 (Fla. 5th DCA 1982), petition for review denied, 419 So. 2d 1198 (Fla. 1982)], and hold that appellant, [Fidelity and Casualty], remained liable. Florida law recognizes that an injured party/judgment creditor may maintain suit directly against a tortfeasor's liability insurer for judgment in excess of the policy limits based upon bad faith of the insurer in the conduct or the handling of the original claim. Thompson v. Commercial Union Insurance Co. of New York, 250 So. 2d 259 (Fla. 1971). Hence, it is a separate and distinct cause of action. See, Kelly, 411 So. 2d at 905 (Cowart, J., dissenting). If Brosnan had satisfied the judgment out of his own pocket and obtained a release and satisfaction of judgment, absent a prohibition in the policy, appellant would not have been relieved of liability to Brosnan. C. f., Aetna Casualty & Surety Co. v. Beane, 385 So. 2d 1087 (Fla. 4th DCA 1980). Similarly, we think that where the insurer's bad faith is a separate tort, as here, the injured party may release the tortfeasor from personal liability on the judgment without discharging the insurer from liability for its independent tort. Indeed, Hartford has a duty to both its insureds, Gehan and Brosnan, to seek their discharge from further personal liability as a part of the negotiated settlement of the bad faith claim against Hartford. However, this did not affect appellant's liability for its own bad faith."

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.

Second, the Second District is correct that, if Brosnan had satisfied the judgment out of his own pocket, Fidelity and Casualty would be liable to Brosnan. But, this did not occur. Fidelity and Casualty is not liable to Brosnan or to Cope on a constructive assignment theory as neither had a surviving claim for damages due to Fidelity's claimed bad faith. Brosnan did not satisfy the judgment out of his own pocket. Brosnan did not pay for the full release. Rather Hartford has paid. The obligation was extingusihed by payment and release. Once an obligation is extinguished, then the duty of one person to reimburse another for that obligation is also extinguished.

For example, the assignee of a bond takes subject to defenses which discharge or destroy the obligation, such as payment or release. 7 Fla. Jur. 2d, Bonds, §2. Once the obligation is discharged by settlement or otherwise, the surety is released, Aetna Casualty & Surety Co. v. Crabtree, 383 So. 2d 657 (Fla. 1st DCA 1980).

Similarly, the law of guaranty is the same. "The satisfaction by payment or otherwise of the principal obligation operates to discharge the guarantor." 28 Fla. Jur. 2d, Guaranty and Suretyship, §28 at page 258. The law of suretyship is the same. "Since a surety's obligation is generally coextensive with

that of the principal, the extinguishment of the principal obligation normally extinguishes the obligation of the surety. If the principal debtor pays the debt, of course, the surety is discharged. And, where the creditor releases the debtor from performance of his obligation, the surety is also released although this may not have been the creditor's intention." 28 Fla. Jur. 2d, Guaranty and Suretyship, §46 at page 278.

There can be no constructive assignment of a non-existent claim. If person "A" is not entitled to recover damages from person "B," then person "C," claiming through "A," cannot be entitled to recover damages from "B" on any theory. A non-existent obligation cannot be assigned and, even if it exists when it is assigned, it can be extinguished by discharge: payment, release and satisfaction.

An insurance policy is to be interpreted as other contracts and the discharge of a contract may take place through accord and satisfaction, compromise and settlement, or release. 11 Fla. Jur. 2d, Contracts, §161. To adopt the rule adopted by the district court below is to place insurance contracts in an entirely separate category: that is, unlike any other obligation, the insurer may continue to be obligated even when its insured is not obligated, has not been damaged, and when its insured, in fact, has been discharged from any liability and released and had a judgment against him satisfied.

It is axiomatic that any insurer's duty to settle arises out of contract with its insured, Geico v. Grounds, 332 So. 2d 13 (Fla. 1976). A breach of this contractual duty can only occur

when and if the insured is exposed to liability because of the insurer's action. Once the insured has no exposure, there can be no bad faith. First, the release.

Paragraph 2 of the release dated May 14, 1981, specifically releases the insured, Daniel J. Brosnan, from any liability:

> "2. That Jacqueline A. Gehan and Daniel N. Brosnan, their heirs, executors and personal representatives are hereby released and forever discharged from all financial responsibility arising out of the judgment obtained against them in connection with the civil suit filed in 1978 on behalf of the Estate of Anna L. Cope in the Circuit Court for Pinellas County, bearing Case No. 78-11910-11." (R. 201, A. 7).

The release further releases Mr. Brosnan's insurer, not by name, but by designation, in Paragraph 9:

> "9. That I hereby covenant with each of the parties hereby released, their heirs, executors, administrators, successors, representatives, assigns, principals, agents, servants, insurers and employees for or on account of the matters described herein that this settlement is made in good faith, and that these presents may be pleaded as a defense to any action or other proceeding which may be brought or instituted by me or on behalf of Anna L. Cope's estate against them in breach of this covenant." (R. 203, A. 9).

This release is not a "form" or "boilerplate" release of the type criticized in Hurt v. Leatherby Ins. Co., 380 So. 2d 432 (Fla. 1980). Rather, an examination of the release itself, which is in the appendix to this brief, establishes that it was specifically prepared and negotiated, there having been interlineations by plaintiff's counsel, in the release itself. Therefore, this release should be enforced according to its

terms. Parole evidence is inadmissible to show intent or vary its terms. Gendzier v. Bielecki, 97 So. 2d 604 (Fla. 1957).

The plaintiff prior to this action executed a release specifically in favor of the insured, Daniel J. Brosnan, and his "insurers." The consideration for the release, as expressed on the face of it, is $50,000.00. There having been ample consideration, it is plain that the release specifically releases the insured and his insurers, including the appellant/defendant here, Hernandez v. Aguiar, 433 So. 2d 54 (Fla. 3d DCA 1983); Lipman v. Ahearn, 374 So. 2d 605 (Fla. 3d DCA 1979).

Where a release is unambiguous and there is no contention that it was obtained by fraud, mistake or misrepresentation, testimony by a signatory as to unexpressed intent is not competent evidence, Gendzier v. Bielecki, supra, Pan-American Life Ins. Co. v. Fuentes, 258 So. 2d 8 (Fla. 4th DCA 1971). The intent of the parties is gathered from a construction of the release, Prescott v. Kraeher, 123 So. 2d 721, 728 (Fla. 2d DCA 1960). A general release may not be avoided unless there was a mistake as to a past or present material fact at the time of the execution of the release. D. F. S., Inc., v. Beasley Crane Service & Sales, Inc., 251 So. 2d 727, 729 (Fla. 2d DCA 1971).

It is settled that the liability of the insurer is purely derivative; the insurer is not liable unless and until its insured is liable. 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).

This fundamental principle has been most recently expressed in Kelly v. Williams, 411 So. 2d 902 (Fla. 5th DCA 1982), in which the tortfeasor agreed to accept a specific sum in settlement pursuant to a stipulation but sought, nonetheless, to pursue a bad faith claim against the insurance company. The Fifth District quite properly held, 411 So. 2d at 904:

> "The essence of a 'bad faith' insurance suit (whether it is brought by the insured or by the injured party standing in his place), is that the insurer breached its duty to its insured by failing to properly or promptly defend the claim (which may encompass its failure to make a good faith offer of settlement within the policy limits) - all of which results in the insured being exposed to an excess judgment. Under the arrangement stipulated to by the parties in this case, the insured could not be exposed to an excess judgment under any circumstances. If one was obtained, the insured was entitled to a complete satisfaction of it, as soon as the judgment became final or enforceable. The stipulation completely safeguarded the insured, and therefore it completely discharged the insurer's duty to its insured."

Kelly v. Williams, should be contrasted with Aetna Casualty & Surety Co. v. Beane, 385 So. 2d 1087 (Fla. 4th DCA 1980). Beane, which was not a bad faith refusal to settle or pay case, involved the part payment of a jury verdict by one of two insurers following a jury verdict in exchange for a full and final release, an assignment of judgment, and a satisfaction of judgment. In that case, Aetna, an excess insurer, was required

to pay its $50,000.00 in coverage as the release and satisfaction of judgment in favor of American States entered into after the jury verdict, but before the final judgment, did not inure to its benefit. The parties to the settlement in Beane had no intention of releasing Aetna, said the court, as demonstrated by the assignment of judgment.

In the instant case, there was no assignment of judgment and the liability of Fidelity and Casualty, if any, rests solely upon bad faith refusal to settle resulting in exposing its insured to liability. As its insured is not exposed to liability, there can be no liability of Fidelity and Casualty Company. This is particularly evident as the release not only specifically releases the insured, but also all of his "insurers." Hence, Aetna Casualty & Surety Co. v. Beane, is distinguishable and not on point; Kelly v. Williams, and the other cases cited are. Bad faith liability is dependent upon exposure of the insured; there is no such exposure nor can there be after execution of a release.

Further, it is plain that the satisfaction of judgment in favor of the insured bars this claim. Even though an injured party may directly sue an insurer for bad faith settlement, the law requires that there be some continuing liability of the insured to support the bad faith allegation. The case creating the direct action against the insurer, Thompson v. Commercial Union Insurance Co., 250 So. 2d 259 Fla. 1971), specifically holds:

> "Accordingly, we adopt the language set out above from the concurring opinion of Wigginton, J., in Canal Insurance Co. of Greenville, S. C. v. Sturgis, supra, and hold that a judgment creditor may maintain suit directly against tortfeasor's liability insurer for recovery of the judgment in excess of the policy limits. . ." [250 So. 2d at 264] [emphasis added].

The plaintiff in this case, Cope, is not a judgment creditor. The insured, Daniel J. Brosnan, is not a judgment debtor. As the liability of the insurer is purely derivative, once the insured is discharged from liability, there can be no further liability imposed on the insurer. The policy issued to Mr. Brosnan itself provides:

> "Part A. Liability Coverage. We will pay damages for bodily injury or property damage for which any covered person becomes legally responsible because of any auto accident. . . "

Mr. Brosnan has both been released and had a satisfaction of judgment executed in his favor; he is not legally responsible for any damages. Therefore, both under the insurance policy (the contract), and the case law, the insurer is not obligated to pay as a matter of law. There is no exposure or potential liability or legal responsibility of the insured; he has been released and the judgment against him has been satisfied.

It is basic hornbook law, as stated in 33 Fla. Jur. 2d, Judgments and Decrees, §468, that, "The satisfaction of a judgment againt one of several persons jointly and severally liable, discharges the liability of the others. The rule obtains even though a judgment has not been rendered against the other." Also, even with the result in Aetna Casualty & Surety Co. v.

Beane, supra, the case law is still to the same effect, Walker v. U. Haul Co., Inc., 300 So. 2d 289 (Fla. 4th DCA 1974).

> "Appellant contends, alternatively, that his satisfying the judgment obtained against Humphrey and U-Haul Company of North Carolina, Inc., was intended to release only those defendants and not all joint tortfeasors and under the authority of Talcott v. Central Bank & Trust Company, Fla. App. 1971, 247 So. 2d 727 (cet. disch. Fla. 1972, 262 So. 2d 658), such satisfaction of judgment should be considered only as a pro tanto release under Section 768.041, F. S. Appellant also relies upon the case of Mathis v. Virgin, Fla. App. 1964, 167 So. 2d 897 (cert. den. Fla. 1965, 174 So. 2d 30). Both of these cited cases are readily distinguishable on the facts, and no question is raised in the instant case but that the satisfaction of the prior judgment which appellant obtained against Humphrey and U-Haul Company of North Carolina, Inc. was on its face free from any qualifications, restrictions or limitations. We also reject appellant's suggestion that the failure to construe Section 768.041, F. S. so as to include satisfactions of final judgments as well as releases and covenants not to sue renders the statute constitutionally infirm.
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> Concluding that the court correctly entered summary judgment in favor of appellees, such judgment is affirmed."

See also, Weaver v. Stone, 212 So. 2d 80 (Fla. 4th DCA 1968). As stated in Watson v. Domecki, 436 So. 2d 1036, 1037, (Fla. 4th DCA 1983):

> "A party may not maintain a cause of action that inherently impeaches the validity of a prior satisfaction without first setting aside the satisfaction by a direct challenge to its validity. This principle is essential to safeguard the dignity and effectiveness of prior judgments and orders. To hold otherwise would be to sanction covert challenges to the integrity of prior judicial labor."

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 and Casualty, which was only secondarily liable and not in control of the settlement negotiations, did all it could do. It tried to settle and exercised the utmost good faith to its insured. In fact, its insured was completely released and discharged.

Hartford, as the insurer of the Gehan vehicle, was the primary insurer. Roth v. Old Republic Ins. Co., 269 So. 2d 3, (Fla. 1972); Ranger Ins. Co. v. Travelers Indemnity Co., 389 So. 2d 272 (Fla. 1st DCA 1980). Fidelity was excess, not primary, §324.151, Fla. Stat. As stated in General Accident Fire & Life Assurance Corp. v. American Casualty Co., 390 So. 2d 761, 765 (Fla. 3d DCA 1980):

> "The primary insurer assumes the duty of negotiating to settle in good faith by virtue of its control of its insured's defenses. See generally, Boston Old Colony Ins. Co. v. Guiterrez, 386 So. 2d 783 (Fla. 1980)."

Therefore, because Hartford as the insurer of the vehicle was primary and Fidelity and Casualty as the insurer of the driver was secondary or excess, Fidelity could not settle unless the primary insurer settled. See General Accident Fire &

Life Assurance Corp. v. American Casualty Co., supra. The evidence at trial was that the primary insurer would not settle. Fidelity & Casualty attempted to settle, but could not because neither Hartford nor plaintiff would settle.

Further, Fidelity had to take into account the potential interest of Gehan as a potential additional ominibus insured and tort claimant. Although generally, an insurer may settle with each claimant as claim is made Harmon v. State Farm Mutual Automobile Ins. Co., 232 So. 2d 206 (Fla. 2d DCA 1970), that ability to settle separately is limited to situations where the damages are fixed and such individual settlements do not place the insurer in a bad faith posture.[3]

It was to avoid being placed in such a bad faith posture that Fidelity sought to settle all claims, rather than settle the Cope claims individually. Again, it must be pointed out that Fidelity never attempted to save any money. It had reserved the case at its maximum exposure of $20,000.00, and was simply trying to protect its insured, Brosnan, remembering also its duties to a potential tort claimant and omnibus insured, Gehan.

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3 The rule in Harmon v. State Farm Mutual Automobile Ins. Co., 232 So. 2d 206 (Fla. 2d DCA 1970), was distinguished in Unigard Ins. Co. v. Yerdon, 417 So. 2d 713 (Fla. 4th DCA 1982), as the Harmon rule involved an insurer whose exposure was a fixed amount. Therefore, although an insurer in a multi-claim situation may make reasonable settlements with some of the claimants even though in so doing the insurance coverage is exhausted and other claimants are not paid, an insurer may not do so to exhaust the limits of its coverage in bad faith.

In addition, the plaintiff's complaint alleges refusal to settle within policy limits until suit was filed. Specifically, it alleges refusal to settle for a period between October 9, 1978, and November 22, 1978, or a period of roughly five or six weeks. There was no evidence to establish bad faith during this period.[4] All of the actions taken by Fidelity after or before suit was filed are immaterial as outside the pleadings.

The facts establish that the plaintiff (not defendant) was unwilling to settle. The facts establish that Fidelity exercised the utmost good faith to its named insured, Brosnan, and its potential additional tort claimant and/or omnibus insured, Gehan. During the only material period of time (before suit was filed), the primary insurer, Hartford, and plaintiff, would not settle. Fidelity did all it could do in view of plaintiff's and Hartford's position. See, Canadian Universal Ins. Co. v. Employer's Surplus Lines Ins. Co., 325 So. 2d 29 (Fla. 3d DCA 1976), cert. denied, 336 So. 2d 1180 (Fla. 1976). The facts clearly establish that there was no bad faith refusal to settle by Fidelity & Casualty. It never refused to negotiate, confer or attempt settlement. It was limited because it was secondary.

Interestingly, the case cited by the lower court in support of the proposition that Fidelity and Casualty, as excess

4 The Second District disagreed that the trial court's finding was limited to that time span. (A. 26). That is precisely the point: a party should not be found guilty on issues not framed by the pleadings or tried by consent, T. 12, 25, 40, Trawick, Fla. Prac. & Proc. §14-6 and cases cited therein.

insurer, could be held liable for bad faith, actually supports the position of Fidelity and Casualty. Aetna Casualty and Surety Co. v. Buckeye Union Casualty Co., 105 N. E. 2d 568 (Ohio 1952), involved a situation in which the primary carrier refused to pay and, therefore, the excess carrier paid the claim. The court quite properly held that the excess carrier was not a volunteer, but had discharged the obligation of the primary carrier and, therefore, was entitled to reimbursement from the primary carrier.

Hence, Buckeye Union Casualty Co., not a bad faith case, merely stands for the proposition that one who pays a debt which is properly the debt of another, but has an interest to protect and a legal obligation to pay is entitled to reimbursement from that other.

In this case, however, no debt has been paid by Brosnan vesting in Brosnan a right to recover on that debt from Fidelity and Casualty. If, in fact, Fidelity and Casualty had committed a wrongful act, which it has not, Hartford Insurance Company, which settled and paid the excess judgment and in return received a complete release and full satisfaction of judgment would have the right to sue.[5]

In short and in sum, the Second District has created a cause of action in favor of an insured's constructive assignee where the insured has no cause of action and where the assignee

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5 Plainly, Hartford hasn't sought reimbursement from Fidelity because it was Hartford's wrongful refusal to settle which precipitated the underlying litigation.

has no cause of action because the obligation has been extinguished by settlement and release and the full and complete discharge by a satisfaction of judgment.

The policy of the law encourages settlements, encourages the finality of final judgments and satisfactions thereof. Thompson v. Commercial Union Ins. Co., supra. There is no policy favoring the adoption of a rule holding an insurer liable to a third party after its insured has been discharged, released, and the judgment against him satisfied.

Further, Fidelity and Casualty's policy does not obligate it to pay sums of money which the insured is not legally obligated to pay. Neither a theory of constructive assignment of a nonexisting debt nor "bad faith" requires payment under these circumstances.

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.

The hallmarks or touchstones of bad faith simply are not present. The elements as established by the cases simply were not met, Boston Old Colony Insurance Co. v. Guiterrez, 386 So. 2d 783 (Fla. 1980). An insurer is not required to be perfect. Faced with the conflicting claims and demands of one death, two seriously injured claimants, refusal by the primary carrier to cooperate, refusal by the plaintiff's attorney to negotiate, Fidelity actually tried to pay its limits to protect its insured. The complexity of the case is illustrated by the potential and actual claims and demands attached as Appendix Page A. 30. And,

Fidelity's insured was completely released and the judgment against him completely satisfied before the excess trial below. Are we now to hold insurers liable in bad faith following complete release and discharge? Plainly, if the Second District is correct, the settled law of Florida will have to be changed in the following respects:

1. An excess insurer commits "bad faith" when the primary insurer refuses to settle;

2. An excess insurer, faced with conflicting claims in excess of its policy limits, commits "bad faith" when it had no reasonable opportunity to settle and would breach its contract with its insured by doing so;

3. An excess insurer commits "bad faith" when it tries to settle and pay its policy limits but is unable to do so because neither the primary insurer nor the plaintiff's attorney will allow it to settle;

4. An insurer commits "bad faith" refusal to settle when its insured has been completely released and discharged by the plaintiff;

5. An insurer commits "bad faith" when its insured has had the judgment against him completely satisfied and discharged by the execution of a satisfaction of judgment by the plaintiff;

6. An insurer is liable for "bad faith" refusal to settle on any basis which the plaintiff cares to present to the trial court, whether framed by the pleadings or not; and

7. An insurer owes a direct duty to persons injured by its insured, which duty is continuing and is not discharged when all claims against the insured are discharged, satisfied and released;

8. One may constructively assign a non-existent or extinguished obligation if it is against an insurer, or;

9. The discharge of a principal will not release a surety or guarantor, or, if it does,

10. The discharge, satisfaction, and release of an insured will not release or discharge an insurer, which is no longer derivatively liable but directly liable to injured third parties.

Rather than being a bad faith case, this is a good faith case.[6] Just because Brosnan did not have $100,000.00 liability limits, does not mean that Cope is entitled to $100,000.00 from Brosnan's insurer. Brosnan has been released and completely discharged. He had no continuing damage or claim or potential damage or claim to constructively assign to Cope.

How can this possibly be bad faith under Florida law? This is not a situation where the insured had to pay the judgment to get the satisfaction, in which case, he would have a contract action against Fidelity and Casualty; this is a case in which Hartford, the real wrongdoer, paid and settled with the plaintiffs and got a full satisfaction of judgment and now after that settlement, the plaintiffs are saying that Fidelity and Casualty should pay more, even though its insured is completely discharged and released. Who is kidding who?

6 Twenty-twenty hindsight may indicate that Fideltiy should have done this or that. In retrospect, one can always do better. But, 20-20 hindsight conclusively establishes that the insured has been completely released and discharged.

CONCLUSION

For the reasons stated, it is respectfully submitted that Kelly v. Williams, 411 So. 2d 902 (Fla. 5th 1982), petition for review denied, 419 So. 2d 1198 (Fla. 1982), correctly expresses the law of Florida, and it is respectfully requested that this court quash the opinion of the Second District Court of Appeal and remand with appropriate instructions.

Respectfully submitted, this 24th day of February, 1984.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief has been furnished this 24th day of February, 1984, by mail, to G. Robert Schultz, Esq., Post Office Box 417, St. Petersburg 33701, and to Robert W. Holman, Esq., 4930 Park Boulevard, Pinellas Park 33565.

Attorney