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 REPLY BRIEF

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STATEMENT OF THE CASE

The Respondent's statement of the case is argumentative. The petitioner does not agree with the Respondent's statement of the case, particularly insofar as the statement of the case evades the fact that a satisfaction of judgment was executed.

Although bad faith refusal to settle may be a separate tort, the essence of Respondent's argument in the statement of the case is that this so-called independent tort survives a release and discharge, as well as a satisfaction of judgment.

STATEMENT OF THE FACTS

Petitioner has no disagreement with the District Court's facts insofar as the District Court found them.

It is a pure question of law, even on the facts as found by the District Court.

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 THE INSURED AND, IN FACT, HAS RELEASED THE 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 A 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.

The Respondent, as well as the trial court, as well as the District Court, miss the point. The point is simple:

> "Once an obligation is discharged, liability may not be found upon that obligation."

If the holding below is affirmed, the law of suretyship, guaranty, insurance, assignment, release, and the validity and effectiveness of satisfactions of judgment, all are overturned. This is nowhere addressed by the respondent.

A release conclusively resolves all claims prior to the date it is executed. Florida law favors the finality of settlements. Pettinelli v. Danzig, 722 F. 2d 706 (11th Cir. 1984). Further, a release, plain and unambiguous on its face, may not be modified by parole evidence as to intent; testimony by a signatory as to unexpressed intent is not competent evidence, Gendzier v. Bielecki, 97 So. 2d 604 (Fla. 1957). Compare Hurt v. Leatherby Insurance Company, 380 So. 2d 432 (Fla. 1980).

The Respondent argues that, once the excess judgment had been entered, the cause of action accrued and, unexpressed, but

implicit in Respondent's argument is that that cause of action, once having accrued, could not be released, settled or satisfied, except under terms and conditions established solely by the Respondent. This is not the law; this has never been the law; this cannot be the law. It was Cope that executed the satisfaction of judgment discharging the obligation. It was Cope that executed the release discharging the obligation. It is now Cope claiming that even though he executed the release and satisfaction of judgment to discharge the obligation, that this discharge was not effective because Cope didn't want it to be effective. In other words, Cope is saying he could keep the claim open against Fidelity & Casualty as long as he wanted, regardless of what he did and whether or not he released the insured and discharged the insured from any obligation under the judgment. This is absurd, misleading and a virtual fraud on the court.

Again, this is just plain, common sense and settled law. If an obligation cannot be discharged by a satisfaction of judgment in 1984 in the State of Florida, then no judicial activity is final, no guarantor, indemnitor or obligor, can be released or discharged once a cause of action accrues; and, no court file can be closed. Again, the result the Respondent urges is absurd.

Whether Fidelity & Casualty paid for the release and satisfaction of judgment is beside the point. The fact is that

Fidelity's insured was completely discharged. Aetna Casualty and Surety Company v. Beane, 385 So. 2d 1087 (Fla. 4th DCA 1980), is completely distinguishable, even if that opinion is correct. Similarly, Alexander v. Kirkham, 365 So. 2d 1038 (Fla. 3d DCA 1979), is completely distinguishable.

The release and the satisfaction of judgment discharged this claim.

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 A RELEASE AND A SATISFACTION OF JUDGMENT EXECUTED BY THE INJURED PARTY.

Again, the Respondent misses the point. The hallmark of bad faith refusal to settle is trying to save on the policy limits. Fidelity made no effort to save on the policy limits, and in fact, tried to pay them, reserved the case at the policy limits, and wanted to pay them. Although the argument about what Fidelity did and when it did it is outside the pleadings, the fact is that Fidelity had no medical records on Cope until October, when the demand letter was received. It is being argued implicitly here that a liability insurer has some obligation to seek out an injured party and pay its limits. That is not the case. The obligation of the insurer is to its insured, who in this case, was completely released and discharged.

The fascinating thing is that if this District Court of Appeal opinion is not set aside, the law in Florida is going to be that a liability insurer exercises bad faith even when it tries to pay its policy limit, its insured has been completely released and discharged, a satisfaction of judgment has been entered in favor of the insured, and this liability may be

imposed on an excess carrier which is not even in control of the negotiations or the lawsuit in any event.

Interestingly, since the briefing began in the Supreme Court in this case, the author of this brief has been confronted with an almost identical situation to this case. On behalf of another client, an excess carrier and its insureds, we have tried to pay the excess insurer's policy limits in a situation in which the primary insurer has refused to settle. As of this date, we have concluded that there is no ethical or legal method to effectuate such a settlement in which the excess carrier would fulfill its obligation to fully protect the insureds. We have the money, we want to pay it, but we can't. Just like Fidelity in the case at bar.

With 20/20 hindsight, of course, we can say Fidelity should have done this, that or the other. But, with 20/20 hindsight, we also know that the insured, Brosnan, was completely released and discharged and the maintenance of this bad faith action requires us to adopt fiction upon fiction upon fiction, which the settled law of Florida plainly does not allow, Kelly v. Williams, 411 So. 2d 902 (Fla. 5th DCA 1982). Fidelity tried to settle the case, but was unable to do so - now its insured is completely released and discharged.

CONCLUSION

Interestingly, Respondent, in its conclusion, contrary to the District Court of Appeal, determines that there is no conflict in the instant decision and other decisions of district courts. Plainly, the one thing the District Court below was right about was that there was express and direct conflict between its decision and Kelly v. Williams, supra. In addition, there is conflict with the settled principles of the law of guaranty, suretyship, assignment, the efficacy of judgments, and the finality of releases and settlements.

It is respectfully submitted that the decision below should be quashed. Plainly, the law cannot allow full satisfactions of judgment to be negated and voided by the party who executed the full satisfaction of judgment.

Respectfully submitted, this 30th day of March, 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 30th day of March, 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