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SUPREME COURT OF FLORIDA

CASE NO. 76,243

DONALD E. BLANCHARD, JR.,
and PATRICIA S. BLANCHARD,

Appellants,

-vs.-

STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY,

Appellee.

ON CERTIFIED QUESTIONS FROM THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF THE AMICUS CURIAE, ACADEMY OF FLORIDA TRIAL LAWYERS

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ADOPTION OF STATEMENT OF THE CASE AND OF THE FACTS

The Amicus Curiae, ACADEMY OF FLORIDA TRIAL LAWYERS (AFTL) hereby adopts and incorporates the Statement of the Case and of the Facts contained in the Appellants' Initial Brief, as if set forth at length herein.

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SUMMARY OF THE ARGUMENT

AFTL agrees with the position of the Plaintiffs/Appellants that their Complaint was erroneously dismissed. While this Brief addresses the issues from a different perspective than do either of the parties, the result sought by the BLANCHARDS is the correct and just result that the law should recognize.

There is no basis for a determination that a cause of action for bad faith under the applicable statute always accrues prior to the entry of judgment on an underlying suit for benefits under an uninsured motorist policy. To the contrary, there are situations in which such a claim cannot arise until at the time of entry of such an underlying judgment, or thereafter.

In the case at bar, the Complaint alleged facts from which it could be found that the bad faith claim accrued after the trial of the case for UM benefits. The procedural law of both Florida and the U.S. courts permits alternative and even inconsistent pleading. Therefore, it should not have been determined on a motion to dismiss that the bad faith claim had been improperly split from the UM claim.

However, too much moment is made of the timing of accrual of such a claim, for it is upon different ultimate facts that the two causes of action are based. Therefore, even in those possible situations in which a claim for bad faith accrues before the first suit terminates, it is a distinct claim which will not be barred by the doctrine against splitting causes of action.

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Permissive joinder, on the other hand, should be recognized as an available option, where, in the sound discretion of the trial court, joinder will further the goal of justice. Consistency in determinations of preliminary fact and in ruling upon related questions of law--as well as the interests of judicial economy and efficiency--should be weighed against any claim of prejudice from trying the two types of claims together.

The Certified Questions should be answered in such a manner as will permit prosecution of the Plaintiffs' claim for bad faith.

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ARGUMENT

I.

THIS COURT SHOULD ANSWER QUESTION NO. 1 AS FOLLOWS: AN INSURED'S CLAIM AGAINST AN UNINSURED MOTORIST CARRIER UNDER §624.155 (1)(b)1., FLA. STAT., FOR ALLEGEDLY FAILING TO SETTLE THE UNINSURED MOTORIST CLAIM IN GOOD FAITH DOES NOT NECESSARILY ACCRUE BEFORE THE CONCLUSION OF THE UNDERLYING LITIGATION FOR CONTRACTUAL UNINSURED MOTORIST INSURANCE BENEFITS.

At the outset of this Amicus Curiae Brief, it should be noted that AFTL fully supports the position of the Plaintiffs/Appellants that their Complaint was erroneously dismissed, and supports their argument that a lawsuit making a claim under §624.155(1)(b)1., Fla. Stat., should not be held to be barred by the doctrine against the "splitting" causes of action, for failure to raise such a claim in the underlying proceedings for benefits under the uninsured motorist (UM) policy. However, AFTL views the issues somewhat differently than do the parties, and urges the Court to reach the result sought by Plaintiffs/Appellants using a different analysis.

AFTL respectfully submits that the Eleventh Circuit and the parties have oversimplified the first question into an "all-or-nothing" proposition that a cause of action for bad faith either does or does not--always and without exception--accrue before the entry of judgment in the underlying lawsuit for benefits under the policy. Without too great a stretch of the imagination, sets of facts can be summoned-up to support the accrual of statutory bad faith claims both before and after the entry of judgment in the

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underlying case. AFTL will provide an illustrative example of a case of each type: one in which the bad faith claim does not accrue until after entry of the underlying judgment; one in which it will accrue before that judgment in entered.

At one end of the hypothetical spectrum lies the type of case in which there can be no bad faith until the underlying judgment is entered, because there is no attempt made on the part of the plaintiff to settle within the policy limits until after that judgment. Envision the scenario in which the plaintiff puts her insurer on notice of a claim, but does not communicate the severity of her injuries or the absence of question as to the liability of the uninsured motorist. While it is the exception rather than the rule (and while AFTL does not encourage the practice), there are cases in which an accident occurs, notice[1] is given, and a lawsuit is filed without negotiation between the injured party and her insurer[2]. In such a case there can be no accrual of a bad faith

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[1]AFTL submits that notice sufficient to satisfy an insured's duty as a condition precedent to filing suit under a policy is met upon a far lesser showing than that which would give rise to bad faith for failure to offer the policy limits.

[2]While we ordinarily would be critical of a plaintiff who files suit without attempting settlement, there would appear to be no legal barrier to such a course in a UM case. For that matter, it is conceivable that a plaintiff justifiably could want the jury to decide liability and damages and not rely upon his or her own presuit evaluation of the claim.

In anticipation of the question of how there can be a suit for breach of the contract of insurance, absent a demand for payment of something in benefits thereunder and a refusal by the insurer, AFTL submits that § 627.727, Fla. Stat. creates a statutory cause of action for UM benefits, which action requires no "breach" in the contractual sense.

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claim, at least until sometime after the Complaint is filed and discovery is underway.

Taking this hypothetical one step further, it is imaginable that there are cases in which the insurer's bad faith refusal to settle for the policy limits does not occur until after judgment is rendered in the underlying case. For example, take the case in which a verdict far in excess of the policy limits is rendered, then the insurer in bad faith refuses its first opportunity to settle within the limits, prompting a needless appeal to delay paying anything on the claim.

Thus, there are indeed cases in which a categorical "NO" can be the only answer to the question of whether a bad faith claim accrues prior to judgment in the underlying lawsuit. Insofar as the Plaintiffs in the present case alleged bad faith occurring after the trial of the underlying action, this case is one of those cases.

On the other hand, it is possible to imagine a case of the other type. Sometimes the insurer will have knowledge of all the facts well in advance of the underlying suit for UM benefits being filed. Envision the case of catastrophic injuries well known to the insurer before the first suit is filed; clear liability on the part of the judgment-proof uninsured motorist; absolute innocence on the part of the injured plaintiff; minimal UM limits; but a pre-suit demand within those limits, rejected without good-faith basis. AFTL submits that in such a case a complaint for bad faith filed

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in advance of the underlying judgment is not premature[3].

The Plaintiffs/Appellants the BLANCHARDS, in their Complaint in the present case, set forth facts from which it could be found that their cause of action for bad faith did not accrue until after the end of the trial of their claim for UM benefits. While there were other allegations from which it could be argued that the claim for bad faith accrued before the judgment in that underlying case, both the Florida and the Federal Rules of Civil Procedure permit the use of alternative, and even inconsistent, pleading, "and the pleading is not made insufficient by the insufficiency of one or more of the alternative statements." Fla. R. Civ. P. 1.110(g); Fed. R. Civ. P. 8(e)(2). Therefore, it was necessary to have viewed the Complaint as having pleaded the accrual of the bad faith claim after the first case was over, and this Court should answer the question on that point to recognize the possibility of accrual of such claims after the underlying judgments.

WHEREFORE, in light of the foregoing analysis, the Amicus Curiae, AFTL, respectfully urges this Court to answer Certified Question No. 1 as follows: AN INSURED'S CLAIM AGAINST AN UNINSURED MOTORIST CARRIER UNDER §624.155 (1)(b)1., FLA. STAT., FOR ALLEGEDLY FAILING TO SETTLE THE UNINSURED MOTORIST CLAIM IN GOOD FAITH DOES NOT NECESSARILY ACCRUE BEFORE THE CONCLUSION OF THE UNDERLYING LITIGATION FOR CONTRACTUAL UNINSURED MOTORIST INSURANCE BENEFITS.

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[3]As will be shown in a subsequent argument, though, while it can be said that a bad faith claim does accrue in advance of a judgment in such a case, such a possibility does not give rise to a defense of splitting the causes of action where the bad faith claim is not joined with the underlying UM action.

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II.

THIS COURT SHOULD ANSWER QUESTION NO. 2 AS FOLLOWS: WHERE AN INSURED'S CLAIM AGAINST AN UNINSURED MOTORIST UNDER §624.155 (1)(b)1., FLA. STAT., DOES ACCRUE BEFORE THE CONCLUSION OF THAT UNDERLYING LITIGATION, JOINDER OF THAT CLAIM IN THE UNDERLYING LITIGATION IS PERMISSIBLE.

In those instances where the bad faith claim accrues prior to the termination of the action for UM benefits, it would appear that joinder is appropriate. For example, this Court did not disapprove of such joinder in Kujawa v. Manhattan Nat'l Life Ins. Co., 541 So. 2d 1168 (Fla. 1989), where, at page 1169, the Court noted that the "Petitioner sued on the policy and for bad faith processing of the claim under section 624.155(1)(b)1, Florida Statutes (1985)." (emphasis added). See also, United Services Auto. Ass'n v. Grant, 555 So. 2d 892 (Fla. 1st DCA 1990); Royal Ins. Co. v. Zayas Men's Shop, Inc., 551 So. 2d 553 (Fla. 3d DCA 1989); Allstate Ins. Co. v. Melendez, 550 So. 2d 156 (Fla. 5th DCA 1989) (all holding that abatement of bad faith claim joined with coverage claim no longer required in light of Kujawa).

AFTL submits that any potential difficulties with permitting joinder of the bad faith claim with the coverage action are best left to the trial courts to resolve on a case-by-case basis. In a case in which the party opposing joinder can persuade the trial court that such problems will be unfairly prejudicial, the court can exercise its discretion to deny joinder, to sever already joined cases, or to otherwise fashion relief which will best serve

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justice under those particular facts.

WHEREFORE, there being no discernible basis for an across-the-board prohibition against discretionary joinder of related actions, it being in the interests of justice to have the same court rule on related matters and thereby avoid the danger of inconsistent adjudications of similar issues, and it being in the interests of judicial economy and expediency to permit related matters to be heard by judges already familiar with the facts and circumstances, the Amicus Curiae respectfully requests this Court to answer the Eleventh Circuit's Certified Question No. 2 as follows: WHERE AN INSURED'S CLAIM AGAINST AN UNINSURED MOTORIST UNDER §624.155 (1)(b)1., FLA. STAT., DOES ACCRUE BEFORE THE CONCLUSION OF THAT UNDERLYING LITIGATION, JOINDER OF THAT CLAIM IN THE UNDERLYING LITIGATION IS PERMISSIBLE.

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III.

THIS COURT SHOULD ANSWER QUESTION NO. 3 AS FOLLOWS: WHERE JOINDER OF THE CLAIM UNDER § 624.155(1)(b)1., FLORIDA STATUTES, IS PERMISSIBLE, JOINDER OF THAT CLAIM WITH THE CONTRACTUAL CLAIM IS NOT MANDATORY

Simply stated, nonjoinder of a bad faith claim under § 624.155 (1)(b)1., Fla. Stat. with a claim for coverage under a UM policy should not be held to constitute splitting a cause of action such as to bar the bad faith claim, because the two actions are distinct legal claims involving different elements. While it sometimes is conceptually difficult to determine what is the same "cause of action" as that involved in a previous suit, "one of the principal tests is the identity of the facts essential to the maintenance of each action." 1 Fla. Jur. 2d, Actions §57 (1977).

"Identity of the facts" as used above should not be held to mean that any two cases arising out of the same set of underlying facts must be joined in one action. What is important is what facts must be proven to prevail in the two cases, as held below:

> The doctrine of res judicata does not . . . bar a cause merely because the actions arose from the same factual situation. . . .
>
> Identity of the causes of action is established where the facts which are required to maintain both actions are identical.

Cole v. First Dev. Corp., 339 So. 2d 1130, 1131 (Fla. 2d DCA 1976).

It is useful to distinguish between basic facts and ultimate

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facts in deciding whether two claims arising from the same events are the same "cause of action" for purposes of this analysis. For example, ultimate facts which must be established in a bad faith case under the statute include a determination by the jury of the lack of "good faith," which would include a consideration whether the insurer has "acted fairly and honestly toward its insured and with due regard for his interests." §624.155(1)(b)1., Fla. Stat. (1986). The ultimate facts which must be established in the action for UM benefits are those of negligent operation of a motor vehicle and damages caused thereby.

Granted that the basic facts which are introduced in a claim for UM benefits also are relevant to establish the ultimate facts of bad faith. For example, the speed and position of the vehicles is relevant to establish the uninsured motorist's negligence; the medical testimony is necessary basic evidence to establish the ultimate fact of damages. In the second suit for bad faith, those basic facts would be the same[4], but their relevance is different: to establish the ultimate fact that the insurer should have settled the claim.

Having drawn this distinction between basic facts and ultimate facts, AFTL suggests that it is the latter which must be the same in two cases to raise the barrier of "splitting a cause of action." When the ultimate facts are the same in each case, must the claims

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[4]It should be noted that not <u>all</u> of even the basic facts would be the same; for example, in a bad faith suit evidence of opinions, abilities, and experience of the insurer's representatives might be material, but could not be so in the suit for UM benefits.

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be joined. That is not the situation in the case at bar.

WHEREFORE, there being no identity of material facts needed to establish the two subject claims, and hence, there being no splitting of causes of action by bringing suit separately, the Amicus Curiae, AFTL, respectfully requests the Court to answer the Eleventh Circuit's Certified Question No. 3 as follows:

WHERE JOINDER OF THE CLAIM UNDER § 624.155(1)(b)1., FLORIDA STATUTES, IS PERMISSIBLE, JOINDER OF THAT CLAIM WITH THE CONTRACTUAL CLAIM IS NOT MANDATORY.

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CONCLUSION

WHEREFORE, it having been demonstrated that a claim for bad faith under the statute in question does not necessarily accrue in advance of the entry of judgment on the underlying suit for UM benefits; joinder of a statutory bad faith claim with a claim for UM benefits being a matter which should be permitted with the sound discretion of the trial courts; and there being different ultimate facts to be proven in the two types of claims--two causes of action rather than one--and joinder, therefore, not being mandatory, the Certified Questions should be answered as aforesaid.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true copies hereof were served by mail upon: C. Rufus Pennington, III, Esq., MARGOL & PENNINGTON, P.A., Suite 1702 American Heritage Tower, 76 S. Laura St., Jacksonville, FL 32202; and upon Stephen E. Day, Esq. and Ada A. Hammond, Esq., DAY & RIO, 10 South Newman St., Jacksonville, FL 32202, on this, the 24th day of August, 1990.

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