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IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,089

ROBERT McLEOD, individually and as personal representative of the Estate of MONZELLE KAY McLEOD,

Petitioner,

vs.

CONTINENTAL INSURANCE COMPANY,

Respondent.

ON DISCRETIONARY REVIEW OF A CERTIFIED QUESTION FROM THE DISTRICT COURT OF APPEAL, SECOND DISTRICT

AMICUS BRIEF OF PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY,

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INTEREST OF AMICUS

Prudential Property and Casualty Insurance Company is an insurer licensed to do business in Florida. Prudential is presently the appellant in the Second District Court of Appeal from a judgment awarding $300,000 in excess of uninsured motorists limits in "bad faith damages" based on rationale of Jones v. Continental Insurance Co., 716 F.Supp. 1456 (S.D. Fla. 1989), question certified, 920 F.2d 847 (11th Cir. 1991), appeal pending as S.Ct. Case No. 77,219, which rationale was rejected in McLeod v. Continental Insurance Company, 15 FLW D 2785 (Fla. 2d DCA 1990). Prudential's appeal in the Second District has been stayed pending a definitive ruling from this Court on the proper measure of damages in a first-party uninsured motorist bad faith case.

Prudential filed an amicus brief in the Jones case in this Court. This brief essentially adopts the arguments in Prudential's prior brief, with additional discussion on page 6 on damages, and on page 13 on the "sanction" argument made by Amicus Academy of Florida Trial Lawyers (AFTL).

STATEMENT OF THE CASE AND FACTS

Prudential relies on the statement of the facts as set forth in the prior opinion in this matter and the briefs of the parties. The particular facts of this case do not affect Prudential's basic concern that this Court adopt a rule of law requiring that the measure of first-party bad faith damages in uninsured motorist cases be based on the damages proximately caused by the insurer's alleged conduct.

ISSUE ON APPEAL

WHAT IS THE APPROPRIATE MEASURE OF DAMAGES IN A FIRST-PARTY ACTION FOR BAD FAITH FAILURE TO SETTLE AN UNINSURED MOTORIST INSURANCE CLAIM UNDER SECTION 624.155(1)(b)(1), FLORIDA STATUTES?

SUMMARY OF ARGUMENT

The Second District Court of Appeal, like appellate courts from outside of Florida, recognized the fundamental distinction between first-party uninsured motorist (UM) bad faith cases and third-party bad faith cases. Calculating damages in a first-party bad faith case as if the insurer's bad faith caused the insured to incur those damages would produce irrational awards, not related to harm caused by any bad faith.

Neither the plain language of the statute nor the "legislative history" compels a lottery-like approach to UM bad faith damages. Even if the statute could be construed in such a manner, it would violate fundamental principles of Florida law which require that a party must have proximately caused such damages before he is held liable for them.

ARGUMENT

FIRST-PARTY BAD FAITH DAMAGES SHOULD BE BASED ON THE DAMAGES PROXIMATELY CAUSED BY THE BAD FAITH.

The Second District determined the proper measure of damages in a first-party bad faith action under §624.155, Florida Statutes (1985) against an uninsured motorist carrier in McLeod v. Continental Insurance Company, 15 FLW D 2785 (Fla. 2d DCA 1990), appeal pending as S.Ct. Case No. 77,089. McLeod held the elements of damage in a first-party bad faith claim include the value of the insured's claim up to the insured's policy limits, and any other damages proximately caused by the insurer's bad faith. It described the latter as "consequential" damages which would include damages such as interest on the unpaid benefits, attorneys' fees, and the costs of pursuing the action.

Jones v. Continental Insurance Co., 716 F.Supp. 1456 (S.D. Fla. 1989), question certified, 920 F.2d 847 (11th Cir. 1991), held that bad faith damages in a first-party uninsured motorist (UM) suit against the insured's own carrier should be calculated in the same manner as an excess judgment in a third-party bad faith case. The method adopted in Jones places no limit on the possible award against the insurer relative to its conduct. The amount of such a bad faith award is a fortuity based on the injury caused by the tortfeasor, not the insurer.

The better reasoned cases from Florida and across the country have rejected this approach. They have recognized the fundamental differences in measuring damages proximately caused by third-party bad faith and first-party bad faith.

The Second District rejected the district court's holding in Jones and the insured's argument that he was entitled to recover the amount by which the underlying tort verdict exceeded his uninsured motorist coverage as bad faith damages. It held those damages were not proximately caused by his insurer's alleged bad faith, but by the tortfeasor.

McLeod is consistent with Judge Fawsett's decision in Cocuzzi v. Allstate Insurance Company, (M.D. Fla. No. 89-613-Civ-Orl, June 5 & June 26, 1990). Judge Fawsett distinguished between bad faith damages in a first and third-party context, and rejected the trial court's rationale in Jones.

In Adams v. Fidelity and Casualty Company, No. 88-0629-CIV-Spellman (Feb. 12, 1990), question certified, 920 F.2d 897 (11th Cir. 1991), the court noted that in third-party suits damages ordinarily include the excess judgment over the policy limits, because the insurer's bad faith has exposed its insured to such a judgment in excess of policy limits. The court distinguished first-party UM cases:

> Damages incurred in suits involving uninsured motorist claims are entirely different. Unlike third-party suits, actual damages in suits involving uninsured motorist claims are limited to the extra costs of going to trial

> and the interest on money that should have initially been paid. Hence, because the first-party insured is not exposed to excess liability, the rationale for allowing recovery in excess of policy limits in third-party suits is inapplicable to suits involving uninsured motorist claims.

Adams at p. 8 (emphasis by the court)

Adams rejects the rationale of the trial court in Jones. The Eleventh Circuit recognized this in Jones at footnote 7 of its opinion.

The Eleventh Circuit does appear to have misread another case in that same footnote, Hollar v. International Bankers Insurance Company, 572 So.2d 937 (Fla. 3d DCA 1990). The facts in Hollar indicate that the insureds were not making a first-party UM bad faith claim, but "sought recovery alleging that while their insurers knew the Hollars' liability for the injury of a third party in an automobile accident was clear and damages were in excess of their policy limits, insurers, in bad faith, failed to accept the injured party's offer to settle her claim within those limits." Thus, Hollar is a traditional third-party bad faith claim and in no way supports plaintiff's argument here.

That Jones stands alone among reported cases in treating first-party bad faith damages in the same manner as third-party bad faith damages is not surprising. Such a view makes no sense. When the insurer fails to act in good faith in a third-party context, its actions subject its insured to an excess judgment. The insured

is damaged by the amount of the excess judgment. In a UM case the tortfeasor, not the insurer, caused the damage to the insured.

It misses the point to argue that the tortfeasor and not the insurer causes the damage in third-party bad faith cases. It is true that in both first and third-party cases the tortfeasor causes the physical injuries. But bad faith focuses on injuries to the insured. In the third-party context, the insurer has damaged its insured by subjecting him to an excess judgment. In the first party (UM) context, the insurer only damages its insured to the extent of the consequential damages - not the excess award.

Jones, cited a California Supreme Court opinion directly on this point, but ignored its rationale. Neal v. Farmers Insurance Exchange, 21 Cal.3d 910, 582 P.2d 980, 988 (1978), observed the principle for calculating a bad faith judgment in a third-party case "clearly has no application" in a first-party UM case. The court noted that in a UM case such damages could not have been proximately caused by the UM carrier:

> In the so-called "third-party" situation, of which Comunale and Crisci are representative, the breach of duty may have as its proximate result the entry of a judgment in excess of policy limits against the insured. In a situation such as that before us, which the parties hereto are pleased to term a "first-party" situation, the injuries of the plaintiff, being sustained prior to the alleged breach, cannot be a proximate result of that breach, and therefore cannot serve as a proper measure of

damages. Only damages proximately resulting from the breach - such as consequent economic loss or emotional distress, for example - are recoverable as compensation therefore.

582 P.2d at 988 (emphasis by the court).[1]

A recent federal appellate decision reaffirmed this sentiment, rejecting the insureds' argument they could recover the unsatisfied portion of their judgment against the tortfeasor from their carrier. The court in Weese v. Nationwide Insurance Company, 879 F.2d 115, 121 (4th Cir. 1989), held:

> The compensatory damages include a claim for $101,000, the unsatisfied portion of their judgment against the uninsured motorist. They cannot recover this item of damages. The uninsured motorist, not Nationwide [the UM carrier], was responsible for this loss. Nothing that Nationwide did, or omitted to do, contributed to the damage the Weeses suffered as a result of the accident.

Plaintiff (at pages 32-33) urges one non-Florida case supports his damage theory. Hembolt v. LeMars Mutual Insurance Company, Inc., 404 N.W. 55 (S.D. 1987). There the UM insurer was also the liability insurer on the underinsured vehicle. The opinion stated that the justification for assessing excess damages against the

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[1] Nothing in §624.155 suggests the Florida statute contemplates damages for mental anguish or emotional distress. Even if one looked to third party bad faith actions for guidance, one would not expect such damages, absent a basis for punitive damages. See Butchikas v. Travelers Indemnity Company, 343 So.2d 816 (Fla. 1976).

insurer in a third-party situation did not exist in the first-party UM context. It found the excess award appropriate "in light of all the facts and circumstances present." Those facts included the insurer acting in bad faith in a third-party context.

Jones quoted a staff report on §627.155, which stated case law requires insurers to deal in good faith in settling liability claims, but not in uninsured motorist coverage. The report then stated that "The sanction is that the company is subject to a judgment in excess of policy limits. This section would apply to all insurance policies." 716 F.Supp. at 1460.

McLeod easily harmonized this staff report with its holding. UM insurers are subject to a judgment in excess of policy limits if they act in bad faith. As McLeod noted, these damages could include, but are not limited to, interest, attorneys fees and the costs of pursuing the action, any of which could exceed the UM limits.

Plaintiff argues that under the Second District's analysis the enactment of the statute changed nothing - namely there were no new damages not already available to insureds (Plaintiff's brief at p. 34). While not approaching the "jackpot" levels sought by Plaintiff, the statute provides substantial benefits to first-party insureds which would not otherwise be available.

This Court recently clarified that in a typical case against the UM carrier the insured may only recover attorneys' fees for that portion of the suit where the carrier contested coverage. Moore v. Allstate Insurance Company, 570 So.2d 291 (Fla. 1990).

Under §624.155 the first-party insured would recover fees for the entire underlying action, even though it may only have focused on the reasonable amount of a UM award and coverage was never contested. That is, where there is bad faith the insured recovers all of his fees expended in the UM action as damages. The specific reference in Section 624.155(3) to attorneys fees is for fees in the bad faith action itself.

Section 624.155(3) might also allow more favorable interest treatment to first-party insureds. See United Services Automobile Association v. Strasser, 530 So.2d 1026 (Fla. 4th DCA 1988); Cooper v. Aetna Casualty & Surety Company, 485 So.2d 1367 (Fla. 2d DCA 1986).

Nor does the "clarifying" amendment to §624.155 support Plaintiff's argument. The 1990 Legislature added a new subpart to the statute, §624.155(7), Florida Statutes (1990 Supp.) The final sentence in part 7 provides "The damages recoverable pursuant to this section shall include those damages which are a reasonably foreseeable result of a specified violation of this section by the insurer and may include an award or judgment in an amount that exceeds the policy limits." The language that the award may include an amount that exceeds policy limits reiterates the "legislative history" discussed above. As McLeod noted, interest attorneys' fees, and other damages could make the UM judgment exceed policy limits.

The additional language - that the damages are a reasonably foreseeable result of a specified violation - supports McLeod's

construction which does not automatically award the excess of an arbitration award against the UM carrier. Such excess amounts are not "damages which are a reasonably foreseeable result of a specified violation". The excess is the result of the underlying tortfeasor's actions. Nothing that the first-party UM insurer does in handling the claim produces those damages.

Requiring that bad faith damages be a "reasonably foreseeable result" emphasizes traditional Florida law that damages not be awarded against a party unless its conduct proximately causes those damages. Section 624.155 speaks in terms of "damages". Florida law has long required that to recover damages a plaintiff must show the defendant's action caused the damages.
See, e.g. Asgrow-Kilgore Company v. Mulford Hickerson Corporation, 301 So.2d 441, 445 (Fla. 1974); Clausell v. Buckney, 475 So.2d 1023, 1025 (Fla. 1st DCA 1985).

The corollary to a plaintiff being able to recover damages proximately resulting by the defendant's act (Clausell), is that a plaintiff cannot recover sums which do not represent damages proximately caused by the defendant. As discussed above, there is no way that any action by the UM insurer causes damage to a plaintiff/insured in the amount of the underlying tort verdict (or UM arbitration award).

Insurance Company of North America v. Pasakarnis, 451 So.2d 447, 452 (Fla. 1984), observed "that in the field of tort law the most equitable result to be achieved is to equate liability with fault." The Court explained that the rationale for comparative

negligence was to prevent a plaintiff from recovering "only that proportion of his damages for which he is responsible." Id. The same logic applies here. An insurer should be made to pay only for those damages for which its bad faith is responsible or causes. A UM insurer's bad faith does not cause those "damages" by which an UM award exceeds UM limits.

This Court recently broadened liability for damages in the market share context in its landmark decision in Conley v. Boyle Drug Company, 570 So.2d 275 (Fla. 1990). Even then, this Court's opinion reflected the strong preference for equating liability with damages or harm caused by a defendant:

> Only those who contributed to the risk of injury and are therefore to some degree culpable will be held liable. Further, the extent to which each defendant will be held liable will be equivalent to the percentage of harm it actually could have caused within the relevant market.

570 So.2d at 287.

To support an award of damages in a third-party bad faith suit, the claimant must actually have suffered damages caused by the insurer. In Fidelity and Casualty Company of New York, v. Cope, 462 So.2d 459 (Fla. 1985), a third party recovered a judgment against the insured in excess of policy limits after the insurer's bad faith refusal to settle. The third party settled his excess claim with the insured, giving a release and satisfaction of

judgment. The third party then sued the insurer for the amount which remained unpaid on the judgment.

This Court held there was no longer a bad faith claim against the insurer in light of the satisfaction - because there was no damage. Discussing prior bad faith decisions, the Court observed "the basis for an action remained the damages of an insured from the bad faith action of the insurer which caused its insured to suffer a judgment for damages above his policy limits." 462 So.2d at 461 (emphasis added). It then held, "An essential ingredient to any cause of action is damages." 462 So.2d at 461.

Thus, if the insurer does not cause the damages or if the damages are somehow alleviated, there is no bad faith cause of action against the insurer for those "damages". In Cope, the third party had still suffered damages. But the insured -the party as to whom damages are relevant in a bad faith analysis- no longer faced the excess judgment. Thus, there were no longer any damages proximately caused by the insurer's bad faith. In the UM context the insured may still suffer "damages", but they are not caused by any conduct of his insurer.

The dicta in Cope also bears directly on this case. In a footnote the Court stated that even if it were to recognize a duty from an insurer directly to a third party to settle a claim within policy limits, the damages would be "entirely different" from those of the insured. "At best such damages would be the extra cost of going to trial and loss of the money that earlier should have been paid." Id. at n. 5. That is, because the insurer did not cause the

damages to the third party which are represented by the excess award, the insurer is not liable for them. It would be liable only for the consequential type damages which McLeod holds an insurer is liable for under in a first-party bad faith action.

Even Jones' superficial reliance on third-party cases to calculate bad faith damages breaks down upon closer examination. Cheek v. Agricultural Insurance Co. of Watertown, New York, 432 F.2d at 1267 (5th Cir. 1970), affirmed a Florida federal district court's refusal to enter an excess judgment in a third-party bad faith case. The court held that "to recover against the insurer, a Florida insured must produce evidence of the insurer's bad faith and the causal connection between the bad faith and the damage sustained." 432 F.2d at 1269 (emphasis added).

Plaintiff and Amicus AFTL understandably avoid any discussion of the Legislature's intent as reflected through the 1990 Amendment requiring that bad faith damages be a reasonably foreseeable result of the bad faith. Instead, Amicus AFTL focuses its argument on one word in the cited one paragraph legislative history of the statute which describes the statute as providing a "sanction".

The consequential damages discussed above (including attorneys fees where they would not otherwise be available) do constitute a sanction - they would not otherwise be recoverable, but for the insurer's bad faith. If the Legislature had wanted to say that an insurer who acted in bad faith was automatically liable for the amount of the excess judgment, it would have been a simple matter for it to say so in those words. The Legislature did not do so in

the original statute and did not do so in the 1990 revision, despite the pending cases presenting the issue at that time.

The failure to require a causal connection between a first-party insurer's bad faith and the damage award would result in a completely irrational application of the statute. Damages would not be awarded under §624.155 based on the amount of harm caused by a violation (or whether they were a reasonably foreseeable result), but on the fortuity of the amount of injury the insured incurred through the fault of the underlying tortfeasor. Such an irrational construction would violate due process and equal protection guarantees, and render the statute unconstitutional.[2] It would also violate common sense. See McLeod, Cocuzzi, Adams, Neal and Weese.

CONCLUSION

Prudential requests this Court answer the certified question by adopting a measure of damages under §624.155 based on damages proximately caused by the insurer's bad faith, as the Second District specified in McLeod.

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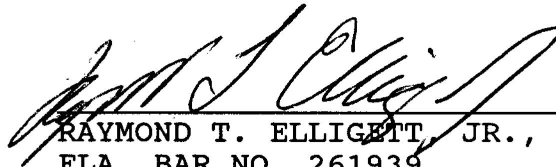
[2] Prudential defers to Continental's brief in Jones on these constitutional issues, and other issues regarding the applicability of §624.155 to first-party insurance claims in this context. See also Driscoll, "The Defense of First-Party Bad Faith Actions in Florida", Vol. 9 No. 4 Trial Advocate Quarterly 12 (October 1990).

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to: ROY D. WASSON, ESQ., Suite 402 Courthouse Tower, 44 West Flagler St., Miami, Florida 33130; JOEL D. EATON, ESQ., Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin, P.A., 25 West Flagler St., Suite 800, Miami, Florida 33130; HUGH SMITH, ESQ., Smith & Fuller, P.A., P. O. Box 3288, Tampa, Florida 33601, Attorneys for Petitioner; GEORGE A. VAKA, Fowler, White, Gillen, Boggs, Villareal & Banker, P.A., Post Office Box 1438, Tampa, Florida 33601; and to MICHAEL M. BELL, ESQ., Hannah, Marsee, Beik & Voght, P.A., P. O. Box 536487, Orlando, FL 32853, Attorney for Respondent, by U. S. Mail, this 13th day of March, 1991.

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