047

IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,089

ROBERT MCLEOD, ETC.,

Petitioner,

vs.

CONTINENTAL INSURANCE CO.,

Respondent.

On Discretionary Review of Certified Question from the Florida Second District Court of Appeals (Case No. 89-02586)

ANSWER BRIEF OF CONTINENTAL INSURANCE COMPANY

MICHAEL M. BELL, ESQUIRE
Florida Bar No. 0458340
HANNAH, MARSEE, BEIK & VOGHT, P.A.
P. O. Box 536487
Orlando, Florida 32853-6487
(407)849-1122

Attorneys for
Continental Insurance Company

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STATEMENT OF THE CASE AND FACTS

Respondent, Continental Insurance Company (hereinafter "Continental") generally agrees with the Statement of the Case and Facts contained in Petitioner Robert McLeod's (hereinafter "McLeod") Initial Brief.

SUMMARY OF ARGUMENT

The Second District Court of Appeal correctly ruled that the excess judgment was not the appropriate measure of damages in this first party "bad faith" action. The Court recognized the fundamental difference between first party and third party "bad faith" cases. This fundamental difference makes the "excess judgment", an appropriate measure of damage in a third party situation, inappropriate in a first party situation. The Court held that damages in a first party situation are limited to those "proximately caused" by the insurer's act(s) of bad faith. The Court's reasoning is thus in accord with well established principles of law governing the determination of damages. The great majority of courts to address the question before this Court support the opinion of the Second District Court of Appeal, which adopted Continental's position.

Further, if the excess judgment is adopted as the proper measure of damages in a first party setting as advanced by McLeod, many illogical results would occur. Insureds who did not obtain an excess judgment would be estopped from pursuing bad faith claims as their damages would be fixed at zero.

It is the position of Continental that its position, which utilizes traditional legal principles should be adopted to insure that insureds can pursue bad faith claims and that insurer's pay only for the damage or injury for which they are responsible.

ARGUMENT

FIRST PARTY BAD FAITH DAMAGES SHOULD BE LIMITED TO THOSE DAMAGES PROXIMATELY CAUSED BY THE INSURER'S ACTS OF BAD FAITH AND SHOULD NOT INCLUDE THE EXCESS JUDGMENT.

The Second District Court of Appeal certified the following question to this Court as one of great public importance:

> WHAT IS THE APPROPRIATE MEASURE OF DAMAGES IN A FIRST-PARTY ACTION FOR BAD FAITH FAILURE TO SETTLE AN UNINSURED MOTORIST INSURANCE CLAIM ?

It is the position of Continental that first party bad faith damages should be limited to those damages proximately caused by the insurer's act(s) of bad faith. The Second District Court of Appeal adopted Continental's position in this case. The Court rejected McLeod's argument that first party bad faith damages are fixed in the amount of the excess judgment.

In the instant case, Monzelle Kay McLeod was killed as a result of an automobile accident that occurred on July 16, 1985. (ROA VII, 1142, ¶15). Prior to trial, the tortfeasor's insurance carriers settled McLeod's claim against the tortfeasor by payment of $550,000.00. (ROA VII, 1149, ¶53, 54). In addition, McLeod's primary U.M. Insurer settled McLeod's claim against it by paying $179,900.00 of the $200,000.00 policy limits. (ROA VII, 1152, ¶72).

Continental, the secondary U.M. Insurer, failed to reach a settlement with McLeod prior to the trial of McLeod's wrongful death action.

McLeod proceeded to trial against Continental Insurance Company and a verdict was returned in the amount of $1,250,000.00 (ROA VII, 1153, ¶77). Following the verdict, Continental tendered $300,000.00 to McLeod, the limits of U.M. coverage under McLeod's policy with Continental.

Having received $1,030,000.00 McLeod continued the action alleging "bad faith" on the part of Continental in not tendering its policy limits to McLeod prior to the underlying trial.

The "bad faith" trial took place in August, 1989 before the Honorable Daniel E. Gallagher in Hillsborough County. By Motion for Directed Verdict, and at the charge conference, McLeod's attorneys argued that his damages were fixed at $200,000.00, the shortfall between all available coverage and the jury's verdict in the underlying action. (ROA VII, 986-991). Continental's attorney's insisted that the jury determine the amount of damages, if any, sustained by the Plaintiff which were proximately caused by "bad faith" on the part of Continental. (ROA VII, 986-991). The trial court agreed with the position of Continental and left the matter of determining McLeod's damages to the jury should they find "bad faith" on the part of Continental. The jury returned a verdict in favor of McLeod finding "bad faith" on the part of Continental and awarded McLeod $100,000.00 in damages. (ROA III, 436, 437).

In his appeal to the Second District, McLeod argued that the trial court erred in refusing to grant his Motion for Directed Verdict or in the alternative in refusing to instruct the jury that

McLeod's damages were fixed at $200,000.00 should the jury find "bad faith" on the part of Continental. McLeod further argued that he need not establish that his bad faith damages were proximately caused by the acts of Continental. The Second District rejected McLeod's arguments and held the excess judgment was not an appropriate measure of his damages. The Second District held that first party bad faith damages included, but were not limited to, interest on unpaid benefits, attorneys fees, and costs of pursuing the action.

An analysis of the legal issue before this Court begins with review of Fla. Stat. §624.155. This statute was enacted to provide insureds with the right to sue their insurer's for failing to settle an insured's claim in good faith. This statute provides:

> (1) Any person may bring a Civil Action against an insurer when such person is damaged:
>
> (a) By a violation of any of the following provisions by the insurer:
>
> 1. §626.9541(1)(i)(o), or (x);
> 2. §626.9551;
> 3. §626.9705;
> 4. §626.9706;
> 5. §626.9707; or
> 6. §626.7282.
>
> (b) By commission of any of the following acts by the insurer:
>
> 1. Not attempting in good faith to settle claims when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward its insured and with due regard for his interests;

2. Making claims payments to insureds or beneficiaries not accompanied by a statement setting forth the coverage under which payments are being made; or

3. Except as to liability coverages, failing to promptly settle claim, when the obligations to settle has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage.

§624.155(1)(a) and (b), Fla. Stat. (1982) (emphasis added).

The underscored language evidences the intent of the legislature that an insured in a first party action establish: unlawful conduct on behalf of the insurer, causation and damages. This intent is in accord with the established principle that damages are to compensate the injured party for the natural, proximate, probable and direct consequences of the tortfeasors act. Douglas Fertilizer and Chemicals, Inc. v. McClung Landscaping, Inc., 459 So.2d 335 (Fla. 5th DCA, 1984).

The legislature's intent was also in accord with the existing common law. At common law, a Plaintiff in a bad faith action had to prove the element of causation. "To recover against the insurer, a Florida insured must produce evidence of the insurer's "bad faith" and the damages sustained." Cheek v. Agricultural Insurance Company of Watertown, New York, 432 F.2d 1267, 1269 (5th Circ. 1970) (emphasis added).

The intent of the legislature enacting Fla. Stat. §624.155, was in accord with established common law principles which required a claimant to prove his damages were caused by the Defendant's actions. The jury's verdict in the underlying wrongful death action was an assessment of the damages sustained by the estate of Mrs. McLeod. The conduct of Continental, was not an issue in that trial, and the verdict rendered was not based on any conduct on the part of Continental. It would be unfair to fix the damages of McLeod or any "bad faith" claimant, to the amount the verdict or arbitration award exceeds available insurance coverage. No other result is logical or fair. If in the underlying wrongful death action, the jury had rendered a verdict less than all available insurance coverage, then following McLeod's argument to its illogical conclusion, he could not maintain an action for bad faith against Continental because his damages would be fixed in a negative amount. This unfair and illogical result that was not intended by the legislature. The only logical and fair solution is to permit the trier of fact to establish what damages have been sustained by the insured which were caused by the acts of bad faith on the part of his insurer. If this position is adopted by the court, then all first party "bad faith" claimants will have a right to proceed against their insurance carriers despite their relative success or failure in the underlying trial or arbitration. The result obtained in the underlying trial by verdict, or in the underlying arbitration by award, would be evidence of bad faith or lack of bad faith, and nothing more.

The only reported case to have adopted the position advanced by McLeod in this appeal is the case of Jones v. Continental[1], 670 F. Supp. 937 (S.D. Fla. 1987).

In Jones v. Continental, the Plaintiff filed suit against Continental on a first party "bad faith" claim. The jury returned a verdict finding "bad faith" on the part of Continental, but found that the Plaintiff had not been damaged by Continental's acts of "bad faith". Despite the jury's verdict, the District Court granted Plaintiff's Motion for judgment notwithstanding the verdict, and entered judgment in favor of Mr. and Mrs. Jones in the amount of $366,750.00, the shortfall between available insurance coverage and the underlying arbitration award.

The court in Jones relied upon the legislative history to Fla. Stat. §624.155 which provides:

> ... [§624.155] requires insurer's to deal in good faith to settle claims. Current case law requires the standard in liability claims, but not in uninsured coverage; the sanction is that the company is subject to a judgment in excess of policy limits. This section would apply to all insurance policies.

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[1] McLeod also claims support from three trial Court rulings:

Fidelity & Casualty Ins. Co. of New York v. Taylor, No. 84-1884 (11th Fla. Cir. Ct., November 4, 1988); Wahl v. Insurance Co. of North American, No. CL-87-1187-CA-17 (19th Fla. Cir. Ct., June 6, 1989); Prudential Property & Casualty Insurance Co. v. Cook, No. CA89-2345 (6th Fla. Cir. Ct.)

Further, McLeod claims support from two additional cases, however an examination of these cases reveals that they involve third party "bad faith" claims rather than first party "bad faith" claims. See: Hollar v. International Bankers Ins. Co., 15 FLW D2888 (Fla. 3d DCA, November 27, 1990); and Helmbolt v. LeMars Mutual Insurance Co., Inc., 404 N.W. 2d 55 (S.D. 1987).

Based on the aforementioned legislative history, the court in Jones held that the purpose of §624.155 was to provide the same remedy in both first party and third party "bad faith" claims, i.e., the excess of the award over available coverage.

Following the ruling of the District Court in Jones, the legislature amended Fla. Stat. §624.155 (1990). Amended subsection (7) provides:

> (7) The civil remedy specified in this section does not preempt any other remedy or cause of action provided for pursuant to any other statute or pursuant to the common law of this state. Any person may obtain a judgment under either the common law remedy of bad faith or this statutory remedy but shall not be entitled to a judgment under both remedies. This section shall not be construed to create a common law cause of action. The damages recoverable pursuant to this section shall include those damages which are a reasonably foreseeable result of the specified violation of this section by the insurer and may include an award or judgment in an amount that exceeds the policy limits. (Emphasis added)

The amendment appears to reiterate the legislature's intent that damages in a first party bad faith setting are limited to those caused by the insurer's act, instead of those caused by the tortfeasor as awarded by the Court in Jones.

In this case, the Second District Court of Appeal rejected the Jones decision, holding that the District Court in Jones had erroneously interpreted the legislative history of Fla. Stat. §624.155. The Second District noted:

> We note that in Jones v. Continental Insurance Co., 716 F. Supp. 1456 (S.D. Fla. 1989), the federal district court came to the opposite

> conclusion and held that Florida law requires applying the third-party bad faith measure of damages to first-party bad faith actions. In doing so, the district court relied in part upon the statute's legislative history, which states:
>
> [Section 624.155] requires insurer's to deal in good faith to settle claims. Current case law requires this standard in liability claims, but not in uninsured motorist coverage; the sanction is that the company is subject to a judgment in excess of policy limits. This section would apply to all insurance policies.
>
> Jones, 716 F. Supp. at 1460 (quoting Staff Report, 1982 Insurance Code Sunset Revision (HB 4F; as amended HB 10G) (June 3, 1982)). This history does not conflict with our interpretation of the statute.
>
> Rather, the history indicates that Section 624.155 extends the requirement of dealing in good faith, which was already required of liability insurer's, to all insurance policies. In saying "the sanction is that the company is subject to a judgment in excess of policy limits," it is merely stating that an uninsured motorist insurer may be liable in excess of its policy limits in cases where the insured's underlying tort claim exhausts his policy limits and the insurer become liable for additional consequential damages. (McLeod at pp. 10-11).

In rejecting Jones, the Second District found that the excess judgment was not the appropriate measure of damages to an insured as it represents a loss the insurer did not cause. The Second District stated:

> We find nothing in this statute which evidences an intent on the part of the legislature to require an insurer to pay for a "loss" it did not cause. (McLeod at p. 10).

The Second District found that the appropriate measure of damages in a first party case:

> ... include, but are not limited to, interest on the unpaid benefits, attorney fees, and costs of pursuing the action. (McLeod at p. 9).

Other Courts in this state have reached the same conclusion as the Second District in McLeod and have specifically rejected the District Court's rationale in Jones.

In Cocuzzi v. Allstate Insurance Company, (M.D. Fla. No. 89-613-CIU-ORL, June 5 & June 26, 1990) the Court specifically rejected Jones and followed traditional principles of law governing damages. The Court stated:

> This Court declines to apply Jones to the instant case. Section 624.155 permits an insured to recover damages that are proximately caused by the wrongful conduct of the insured. In a first party bad faith claim, the amount of the excess judgment is not, as a matter of law, the measure of damages to be awarded to the insured. The excess judgment does not necessarily represent the measure of damages proximately caused by the conduct of the insurer. This conclusion is in accord with the general principles of insurance and tort law. (Emphasis added). (Cocuzzi at p. 7-8).

Further support for Continental's position is found in Adams v. Fidelity and Casualty Company, (S.D. Fla. No. 88-0629, February 12, 1990). In Adams, the District Court specifically rejected the rationale of Jones. The Court noted:

> "Damages incurred in suits involving uninsured motorist claims are entirely different. Unlike third-party suit, 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 added by the Court).

The issue that faces the court in the instant case is a novel and important issue. Few other courts in this nation have addressed the measure of damages recoverable in a first party "bad faith" action. However, those courts that have addressed this issue have ruled that the excess judgment is not an element of damage and that the insured's damages must be proximately caused by the acts of "bad faith" alleged.

In Wesse vs. Nationwide Insurance Company, 879 F. 2d 115, (4th Cir. 1989) the Fourth Circuit Court of Appeals noted:

> The compensatory damages include a claim for $101,000.00, the unsatisfied portion of their judgment against the uninsured motorist. They cannot recover this item of damages. The uninsured motorist, not Nationwide [the U.M. carrier] was responsible for this loss. Nothing Nationwide did, or omitted to do, contributed to the damages the Wesse's suffered as a result of the accident.
> 879 F.2d at 121.

In Neal vs. Farmers Insurance Exchange, 582 P.2d 980 (Ca. 1978), the insureds sued for U.M. benefits and recovered a verdict far in excess of policy limits. The California Supreme Court held that there was sufficient evidence in the record to support the jury's finding of "bad faith". The court further held that the insurer's breach of its duty of good faith rendered it "liable to

pay compensatory damages for all detriment proximately caused by that breach." 582 P.2d at 986 (emphasis added). The court specifically found that the verdict rendered by the jury was not proximately caused by the insurer's "bad faith":

> In the so called third party situation of which Comunale and Crisci are representative, the breach of duty may have as it's proximate result the entry of a judgment in excess of the 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. (Emphasis added) 582 P.2d at 988.

Also see Brandt vs. Superior Court, 693 P.2d 796 (Ca. 1985). Where the California Supreme Court again held that an insurance company is liable for damages proximately caused by the breach of its duty to deal fairly and in good faith with its insureds.

Some courts have refused to permit any recovery in first party "bad faith" situations, even where the verdict or arbitration award rendered exceeds policy limits. In McCall vs. Allstate Insurance Company, 310 S.E.2d 513 (Ga. 1984), the Georgia Supreme Court stated:

> Hence, where a person injured by the insured offers to settle for a sum within the policy limits, and the insurer refuses the offer of settlement, the insurer may be liable to the insured to pay the verdict rendered against the insured even though the verdict exceeds the policy limit of liability. The reason for this rule is that the insurer "may not gamble" with the funds of the insured by refusing to settle within the policy limits.

> On the other hand, where, as here, the insured is making a claim against the insurance company for injuries to the insured under the uninsured motorist provisions of the policy, the insurance company is not, by refusing to settle with the insured, gambling with funds of the insured.
>
> In defending against the claims of a person injured by the insured, the insurer's duty to protect the interests of the insured arises because the liability of the insured is not fully protected by the terms of the liability policy. In defending against the claims of the insured under the uninsured motorist provisions of the policy, the insurer is not under a duty to protect the interest of the uninsured because the insured has no exposure for liability. 310 S.E.2d at 515.

In summary, the only support McLeod can claim for his argument is premised on the District Court's opinion in Jones. On the other hand the decision below, and the decisions in Adams and Coccuzzi, the very language of Fla. Stat. §624.155, the law of Florida's sister states and established principles of the law governing damages support Continental's position.

As expressed by the Second District Court of Appeal in this case, the proper measure of damages in a first party bad faith case:

> ... include, but are not limited to, interest on the unpaid benefits, attorneys fees, and costs of pursuing the action.

McLeod argues under that under the District Court's analysis as to first party bad faith damages, the enactment of Fla. Stat. §624.155 changed to nothing. McLeod has apparently overlooked the very language of the District Court's opinion, "... but are not limited to...". It was under this category that the jury in the

bad faith action assessed the damages sustained by McLeod, which were proximately caused by Continental, at $100,000.00.

The proper measure of damages in a first party bad faith action, should adequately compensate the insured for damages he has sustained as a result of his insurer's actions. These damages should not be artificially set by an underlying jury or arbitration award. While the damages awarded by the jury in the underlying "bad faith" case were less than the excess verdict, they reflected the jury's assessment of McLeod's damages that were caused by Continental's actions.

In summary, it is the position of Continental that damages awarded in a first party "bad faith" action should be limited to those damages proximately caused by the acts of "bad faith" on the part of the insurer. To rule otherwise would be to provide a windfall to claimants when the arbitration award or verdict exceeds available coverage establishing damage without regard to the acts of "bad faith" on the part of the insurer. Further, to rule otherwise would preclude many claimants from asserting a first party "bad faith" claim, in the event the claimant's verdict or arbitration award did not exceed available coverage.

The position urged by Continental in the instant case adheres to well established case law requiring that any damages assessed be proximately caused by the acts of the party against whom the action is brought. The position of McLeod requires a departure from this well established standard by artificially fixing the insured's

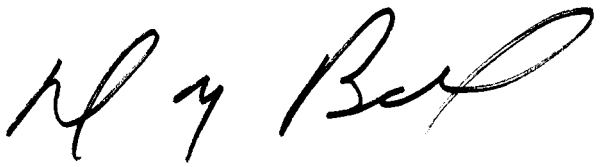
damages without relation to the acts of "bad faith" on the part of the insured.

CONCLUSION

For the foregoing reasons, Continental respectfully requests this Court affirm the District Court's opinion and answer the Certified Question by holding that the appropriate measure of damages in a first party bad faith action includes only damages proximately caused by the insurer's acts and does not include the excess judgment.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Hugh N. Smith, Equire, and David S. Nelson, Equire, Smith & Fuller, P.A., Post Office Box 3288, Tampa, FL 33601; Roy D. Wasson, Esquire, Suite 402, Courthouse Tower, 44 W. Flagler Street, Miami, FL 33130; and Raymond T. Elligett, Jr., Esquire, Schropp, Buell & Elligett, P.A., NCNB Plaza, Suite 2600, 400 North Ashley, Tampa, FL 33602, this 12th day of March, 1991.



MICHAEL M. BELL, ESQUIRE
Fla. Bar No.: 0458340
HANNAH, MARSEE, BEIK & VOGHT, P.A.
Post Office Box 536487
Orlando, Florida 32853
(407) 849-1122

Attorneys for
Continental Insurance Company