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).

PETITIONER ROBERT MCLEOD's REPLY BRIEF

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SUMMARY OF ARGUMENT

In its Answer Brief, CONTINENTAL continues to maintain that the excess award is not a proper element of damage in a first-party bad faith action. CONTINENTAL continues to be mired in an inapplicable causation analysis. At the same time, CONTINENTAL argues recent amendments to §624.155 support its position when, in fact, those amendments simply underscore the strength of MCLEOD's argument. CONTINENTAL also seeks to rely on other authority that is neither persuasive or controlling. Nothing CONTINENTAL advances in its brief changes the fact that the excess judgment is an appropriate item of damage in a first-party bad faith action.

IN VIEW OF LEGISLATIVE INTENT, PUBLIC POLICY, AND THE WEIGHT OF APPLICABLE AUTHORITY, THE EXCESS JUDGMENT SHOULD BE AN ITEM OF DAMAGE IN A FIRST-PARTY BAD FAITH ACTION

Seizing upon the District Court's opinion in this case, CONTINENTAL continues to argue that in the context of a first-party bad faith action, an insurer is only liable for the damages it "caused." CONTINENTAL then argues that because it did not "cause" injury giving rise to the underlying jury verdict, it could not have "caused" the excess judgment. As such, CONTINENTAL argues, it cannot be held responsible for the excess judgment in a subsequent first-party bad faith action.

CONTINENTAL's argument attempts to find support in a discussion of the differences between a first-party and third-party bad faith action at pre-1982 common law. However, in attempting to distinguish the two species of actions CONTINENTAL ignores the fact that the statutory scheme implemented in 1982 applies to <u>both</u> first and third-party bad faith actions. Except for §§624.155(1)(b)3 and

624.155(2)(b)4, the statute makes no distinction between first and third-party bad faith actions. It certainly does not make the distinction between the elements of proof or the damages recoverable in a first and third-party action urged by the District Court below and by CONTINENTAL here. Instead, the legislative history makes clear that the statute was designed to make the "sanction" of the excess judgment theretofore available in third-party actions, also available in first-party actions. Hollar v. International Bankers Ins. Co., 572 So.2d 937 (Fla. 3d DCA 1990); Opperman v. Nationwide Mut. Ins. Co., 515 So.2d 263 (Fla. 5th DCA 1987), rev. denied, 523 So.2d 578 (Fla. 1988). The enactment of §624.155 did not change the measure of damages due an insured once bad faith is proven. Rather, the enactment of §624.155 simply codified a cause of action for bad faith and expanded those entitled to recover to include to first-party claimants. Hollar, 572 So.2d at 939.

Although §624.155's definition of "damages" may not have been altogether clear,[1] recent amendments have resolved any confusion. On June 21, 1990, the Florida legislature amended §624.155 to, among other things, clarify legislative intent with respect to the definition of damages under §624.155 and to provide legislative

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[1]But see, Note, The Availability of Excess Damages in First-Party Bad Faith Cases: A Distinction Without a Difference, 15 Nova L. Rev. 297 (quoting Eric Tilton, Esq., Editor-In-Chief of 1982 enactment and member of the drafting committee for the 1990 amendments)(statute could not be clearer; the measure of damages is the same in both first and third-party actions).

intent with respect to civil remedies. See, Ch. 90-119, Preamble, Laws of Florida. The amendments added a new subsection:

> (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 the 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 a specified violation of the section by the insurer and may include an award or judgment in an amount that exceeds the policy limits.

Chapter 90-119 became effective on October 1, 1990. However, this Court has long recognized the propriety of considering subsequent legislation in arriving at the proper interpretation of a prior statute. Lowry v. Parole and Probation Comm'n, 473 So.2d 1248, 1250 (Fla. 1985). The reasons for referring to this subsequent amendment are even more compelling where, as here, the amendments begin by suggesting their purpose was to clarify and supply legislative intent. State v. Lanier, 464 So.2d 1192, 1193 (Fla. 1985).[2]

Reference to the amendment confirms the Legislature's intent to dispose of the distinctions between first and third-party actions at common law. These antiquated distinctions serve as the cornerstone to CONTINENTAL's argument before this Court and the District Court's opinion below.

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[2]Although presented and discussed below, the Second District Court's opinion is devoid of any reference to these amendments.

In §624.155(7), the Legislature clearly states that a common law cause of action is available to "any person." The use of "any person" clearly contemplates both first and third-party claimants. Opperman, 515 So.2d at 266. This is clearly a departure from the pre-1982 case law. E.g., Baxter v. Royal Indemnity Ins. Co., 285 So.2d 652 (Fla. 1st DCA 1973), cert. dismissed, 317 So.2d 725 (Fla. 1975).

While expressing an intent to expand the common law remedy to "any person," the Legislature was careful to warn that §624.155 "shall not be construed to create a common law cause of action." The only way to harmonize these sentences is to recognize that the Legislature intended to broaden the common law cause of action to include first-party claimants. Sarko v. Fireman's Ins. Co. of Newark, New Jersey, 16 F.L.W. D476 (Fla. 4th DCA, February 13, 1991). All of the elements of a common law third-party bad faith cause of action, including the recognition that the appropriate measure of damages includes the excess award, remain viable in a first-party action. Hollar, 572 So.2d at 939.

The rest of §624.155(7) also supports MCLEOD's position. The last sentence of that provision mandates that damages which are a reasonably foreseeable result of the insurer's bad faith shall be recoverable. Where, as here, an insurer evaluates a claim in an amount in excess of policy limits but nonetheless refuses to offer to settle, an excess judgment is most certainly "reasonably foreseeable." The fact that in some cases the insured does not actually recover an excess judgment does not make the possibility

of excess judgment any less foreseeable. In fact, an excess judgment is probably the most easily identifiable, and therefore most reasonably foreseeable, element of damage in a first-party bad faith action.

The fact that an excess judgment was "reasonably foreseeable" in the instant case cannot be seriously disputed. Cen-Com and Simmons, the tortfeasors, and FIGA as an insurer for MCLEOD, had settled. (ROA VII, 1151-1152, paragraphs 67-73). CONTINENTAL's own attorneys evaluated MCLEOD's claim in excess of all amounts received by MCLEOD and in excess of all available coverage including that provided by CONTINENTAL. (ROA IV, 605-610). CONTINENTAL's own attorneys requested settlement authority and warned that the failure to settle might result in a subsequent bad faith action. (ROA III, 470-471; ROA IV, 564). Foreseeability was not an issue in this case. An excess judgment was foreseen and therefore should have become a mandatory element of damages upon the jury's finding of bad faith.

That the excess judgment is an appropriate item of damage is manifest in the last sentence of §624.155(7) which identifies an "award or judgment" as an appropriate item of damage. An "award or judgment" necessarily presupposes a prior proceeding (whether arbitration or trial) whereat damages are quantified. This is the situation existing in the third-party context and existing in the instant case. The use of the permissive "may" in §624.155(7) only recognizes that not every bad faith action will include, as an item of damage, an excess award. Stated differently, the absence of an

excess award (whether in a first or third-party situation) will not preclude an action for bad faith. However, where such an award or judgment exists, it becomes an item of damage that "shall" be awarded upon a showing of bad faith.

The last sentence of §624.155(7) effectively addresses CONTINENTAL's concerns that taking MCLEOD's "argument to its illogical conclusion" a first-party bad faith action could not be maintained unless an insured obtains an excess judgment. While admittedly the damages would be different without an excess judgment, an insured could still sue and recover punitive damages. See, §624.155(4); See also, Ault v. Lohr, 538 So.2d 454 (Fla. 1989)(punitive damages recoverable even in the absence of an award of nominal damages). Upon a showing of bad faith, attorney's fees and costs are also recoverable under the statute. Additional damages might also be available under a theory of intentional infliction of emotional distress. See, Metropolitan Life Ins. Co. v. McCarson, 467 So.2d 277 (Fla. 1985).

To say that a first-party bad faith action is not legally foreclosed where there is no excess judgment is not to suggest that the absence of an excess judgment as an item of damage does not have the practical effect of limiting §624.155's deterrent effect. A cause of action for punitive damages under §624.155(4) requires a financial commitment by the plaintiff and, hence, might be cost prohibitive. An action for intentional infliction of emotional stress, while available, presents significant evidentiary burdens

and a high degree of uncertainty. Lashley v. Bowen, 561 So.2d. 406 (Fla. 5th DCA 1990).

An action under §624.155 to simply recover attorney's fees and costs previously expended might be futile. See, Moore v. Allstate Ins. Co., 570 So.2d 291 (Fla. 1990)(only fees associated with denial of coverage are recoverable). To recover attorney's fees and costs incurred in the initial action an insured would have to incur additional fees and costs. See, Blanchard v. State Farm Mut. Auto. Ins. Co., 16 F.L.W. S203 (Fla., March 14, 1991)(§624.155 action must be brought in separate proceeding after resolution of underlying suit). This itself might make pursuing a bad faith action less attractive.

The practical hurdles associated with an action under §624.155 make an expanded definition of "reasonably foreseeable" even more necessary. Without the threat of exposure to the excess judgment, the statute's intended deterrent effect is emasculated. Insurers can withhold payment of benefits and gamble that the insured obtains an underlying jury verdict within policy limits. The insurer can then defend the subsequent bad faith action by claiming that its conduct was reasonable. Even if the underlying jury verdict exceeds policy limits, the insurer can gamble that the insured will forego the additional inconvenience and expense of bringing a subsequent bad faith action and, that if he does, the jury will hold that the insured has collected enough. The insurer can take these risks and force its insureds to trial. However, it is clear that in contracting for insurance an insured buys

protection, not a lawsuit. Escambia Treating Co. v. Aetna Cas. and Surety Co., 421 F.Supp. 1367, 1369 (N.D.Fla. 1976)(recognizing that bad faith laws reflect this policy). Yet to accept CONTINENTAL's argument and the reasoning of the District Court below means additional litigation is guaranteed. The Legislature could not have envisioned such a counterproductive and impotent statute.

Not surprisingly, CONTINENTAL seeks to distinguish Jones v. Continental Ins. Co., 716 F. Supp. 1466 (S.D. Fla. 1989)(Jones II). CONTINENTAL's attempt to characterize Jones II as a minority opinion[3] and in direct opposition to express legislative history is left wanting because the Court's opinion contains not only a cogent analysis of the relevant legislative history, but a prime example of why the excess judgment should be an item of damage as a matter of law.

In Jones II, the jury found that CONTINENTAL had acted in bad faith but refused to award damages. The jury accepted the argument that while CONTINENTAL's conduct was reprehensible and in violation of statutory responsibilities the insureds had collected enough. This is as much as CONTINENTAL could have hoped for. It had

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[3]While Jones II is the only reported opinion expressly allowing the recovery of the excess judgment, several circuit courts have so held. See, Wahl v. Ins. Co. of North America, No. CL-87-1187 (Fla. 19th Cir. Ct., June 6, 1989); Fidelity & Cas. Ins. Co. v. Taylor, No. 84-1884 (11th Fla. Cir. Ct., November 4, 1988); Prudential Property & Cas. Ins. Co. v. Cook, Case No. CA89-2345 (Fla. 6th Cir. Ct., July 3, 1990). Additionally, two reported Florida opinions imply the result. In Blanchard, supra, this Court held that an action to recover an excess judgment is cognizable under Florida law albeit in a separate proceeding. Similarly, in Opperman, supra, the Fifth District Court of Appeal denied a motion to dismiss a complaint seeking the excess award.

unreasonably denied a claim without suffering additional expense. The precedent was established. CONTINENTAL could withhold payment of policy benefits, collect interest, force an insured into two trials with all of the attendant costs and effects, and then walk away unscathed.

If §624.155 was meant to deter anything, it was meant to deter the abusive practices meted out by CONTINENTAL in Jones II and in the instant case. The statute's purpose is lost if CONTINENTAL's argument in Jones II and CONTINENTAL's argument in the instant case is accepted. As the District Court noted:

> It would be an illogical anomaly to permit an insurance company to proceed to arbitration even though it knew prior to arbitration that it had no reasonable defense to payment, while holding another insurance company liable for bad faith for proceeding to trial when it knew prior to trial that liability was reasonably clear. The damages to the insured would be the same in either case and the policy reasons for imposing bad faith liability would be easily thwarted.

Jones II, 716 F. Supp. at 1460, citing, Jones v. Continental Ins. Co., 670 F. Supp. 937, 945 (S.D.Fla. 1987)(emphasis supplied); See also, Baxter v. Royal Indemnity Ins. Co., 317 So.2d 725, 731 (Fla. 1975), (Dekle, J. dissenting)(questioning policy that requires more responsiveness to the interests of third parties than to premium-paying insureds).

The same reasons for rejecting CONTINENTAL's argument and allowing for the recovery of the excess award were considered by the South Dakota Supreme Court in Helmbolt v. LeMars Mut. Ins. Co., 404 N.W. 2d 55 (S.D. 1987). There the court recognized:

> The justification for imposing liability upon the insurance company equal to the amount in which the

> judgment exceeded policy limits [in a third-party context is] that the company's bad faith failure to settle resulted in its insured being subject to liability for this excess amount. [citations omitted]. In the present case, it is the tort victims who are suing their own insurance company. The same justification for assessing damages equal to the excess liability does not exist because the insured plaintiffs are not subject to a judgment in that amount. However ... if an insurance company were not required to pay the excess liability amount "its responsiveness to its well-established duty to give equal consideration to an... insured's interest would tend to become meaningless." [citations omitted]. This concept applies with equal force to an insurer's duty to the purchaser of under insurance. 404 N.W.2d at 60. (emphasis added).

CONTINENTAL's reliance on Cocuzzi v. Allstate Ins. Co., Case No. 89-613-Civ-Orl-19 (M.D. Fla. 1990), to counter these policy considerations is inapposite for the same reasons that CONTINENTAL's disregard for Jones II is unwarranted. Jones II was decided on July 21, 1989 and was the only reported interpretation of §624.155's damage provisions during the time in which the Legislature was considering the amendments to §624.155. It is axiomatic that the Legislature is presumed to be aware of interpretations placed upon statutes by courts when it amends statutes and is presumed to adopt those judicial interpretations absent any clear expression to the contrary. Gulfstream Park Racing Ass'n, Inc. v. Department of Professional Regulation, 441 So.2d 629 (Fla. 1983). Thus, it can be reasonably assumed that the Legislature's amendment of §624.155 was intended to subsume the court's decision in Jones II. The same cannot be said for the District Court's opinion in Cocuzzi, which was decided one week after the enactment of the amendments to §624.155 and rests on inapplicable and out-dated common law distinctions.

CONTINENTAL's reliance on Adams v. Fidelity and Cas. Co., Case No. 88-0629 (S.D. Fla. 1990), is likewise inapposite. In Adams, the District Court held that:

> Damages incurred in suits involving uninsured motorists claims are entirely different. Unlike third-party suits, actual damages in suits involving uninsured motorists claims are limited to the extra cost of going to trial and the interest on money that would have initially been paid. (emphasis added).

Even the Second District Court's opinion in the instant case places no such limitation on a recovery in a bad faith action. McLeod v. Continental Ins. Co., 15 F.L.W. D2785, 2786 (Fla. 2d DCA, November 14, 1990). Nor does §624.155 impose the artificial limitations the Adams court found circumscribes recovery in a first-party bad faith action. If Adams is dispositive of anything, it is of the widespread misunderstanding of §624.155 and its intended goal of deterring abusive insurance practices. See, Adams v. Fidelity and Cas. Co. of New York, 920 F.2d 897 (11th Cir. 1991)(recognizing uncertain contours of §624.155).

CONTINENTAL's reliance on out-of-state authority is also misplaced. In each instance, the applicable law bears no resemblance to the carefully crafted provisions of §624.155. For instance, in Weese v. Nationwide Ins. Co., 879 F.2d 115 (4th Cir. 1989), the Court of Appeals dealt with a West Virginia statute devoid of any provision for, or definition of, damages. Additionally, the statutory scheme was devoid of any cause of action in tort; the insured's remedies were limited to an action for breach of contract. Id. at 120. Of course, the Florida statutory scheme provides an extra-contractual remedy sounding in

tort. Opperman, 515 So.2d at 267. The concepts of "foreseeability" and "sanction" present under Florida's statutory scheme, have no place in West Virginia's contract remedies. Similarly, Weese has no place in defining the contours of §624.155.

CONTINENTAL also attempts to find solace in Neal v. Farmer's Ins. Exchange, 582 P.2d 980 (Cal. 1978) and McCall v. Allstate Ins. Co., 310 S.E.2d 513 (Ga. 1984). Once again, CONTINENTAL's reliance is misplaced. Unlike Florida, California has no statutory first-party cause of action for bad faith. See, Moradi-Shalal v. Fireman's Fund Ins. Co., 758 P.2d 58 (Cal. 1988). Hence, there was no legislative history to guide the Neal Court in delineating the appropriate measure of damages in a first-party bad faith action. On this basis alone Neal is distinguishable.

As evidenced by McCall, Georgia has a statutory scheme. However, the Georgia statutory scheme limits recovery to a statutory penalty and attorney's fees. No such restriction was imposed by the Florida Legislature when enacting §624.155 and CONTINENTAL does not appear to be arguing that such a restriction be imposed by this Court. Hence, McCall is clearly inapplicable.

The key distinction between a cause of action for bad faith in California and Georgia and one brought in Florida is the protection afforded insurers by the 60-day notice requirement. As the statute makes clear, any action for bad faith must be proceeded by a 60-day advance written notice. See, §624.155(2). During the 60-day period, the insurer is given the opportunity to weigh the risks associated with being sued later for bad faith including

responsibility for an excess judgment. Within 60 days the insurer can respond to the written notice, pay damages, and avoid subsequent liability for its bad faith. See, Clauss v. Fortune Ins. Co., 523 So.2d 1177 (Fla. 5th DCA 1988); Hollar, 572 So.2d at 939-40. Absent a response within 60 days, however, a first-party bad faith action can be brought by an insured against his insurer. It is this protection found in §624.155(2) that distinguishes the Florida statute from a bad faith cause of action existing elsewhere and allows the insurer to directly "cause" the underlying award. The insurer's failure to respond within 60 days causes the underlying trial which results in the excess judgment.

CONTINENTAL concludes by suggesting that to allow an insured to collect an excess judgment in a first-party bad faith action would be to provide insureds with a "windfall." The facts of this case expose the fallacy of that argument.

In the instant case, it was CONTINENTAL that could have reaped a windfall if it had acted reasonably towards MCLEOD. At the time CONTINENTAL's attorneys were encouraging settlement and warning that MCLEOD's damages were evaluated "conservatively" at an amount in excess of all coverages, (ROA IV, 605-610), MCLEOD offered to settle with all Defendants for an amount that would have cost CONTINENTAL less than policy limits. (ROA VII, 1149, paragraph 52). Had it acted reasonably and participated with the other Defendants, CONTINENTAL could have discharged its responsibility to MCLEOD while retaining the difference between the amount paid and policy limits. CONTINENTAL could have further retained the entire amount

of interest accrued while the benefits were being unreasonably withheld. CONTINENTAL could have saved the expenses of the underlying claim and the attorney's fees and costs associated with the subsequent bad faith action. Had CONTINENTAL acted reasonably and fulfilled its contractual and statutory responsibilities, it could have reaped a windfall.

In reality, CONTINENTAL reaps a windfall if the excess judgment is not an item of damage in a first-party bad faith action. Without the sanction of exposure to an excess judgment CONTINENTAL and other insurers can rest content in knowing that they can collect premiums for what is essentially mandatory uninsured motorist coverage and then stubbornly refuse to pay benefits when legitimate claims are made. CONTINENTAL can ignore the law of Florida and when called upon to justify their conduct shift blame to their attorneys for providing bad advice. CONTINENTAL can transform its conduct in the instant case and in Jones II into a company policy of selfish indifference knowing that in practice its conduct will go largely unsanctioned.

Florida's §624.155 was enacted to encourage insurers to act in good faith towards their insureds, Hollar, 572 So.2d at 939, and is unquestionably a remedial statute enacted in the public interest. See, Adams v. Wright, 403 So.2d 391 (Fla. 1981)(defining "remedial"). It is well established that remedial statutes enacted in the public interest are to be construed liberally to give effect to their underlying public policy considerations. Department of Environmental Regulation v. Goldring, 477 So.2d 532, 534 (Fla.

1985). Accordingly, even if confusion exists as to the measure of damages under §624.155, a liberal interpretation is warranted.

CONCLUSION

The instant case has all the trappings of classic bad faith. It is uncontroverted that CONTINENTAL failed to investigate MCLEOD's claim. CONTINENTAL ignored the evaluations and advice of its own counsel. CONTINENTAL approved MCLEOD's settlement with the other insurers while, at the same time, arguing that those settlements were improper. CONTINENTAL refused to contribute to a settlement pool that would have involved a fraction of its coverage. CONTINENTAL ignored an unequivocal provision of Florida law and remained steadfast in the blind protection of a subrogation right it never possessed. In the final analysis, CONTINENTAL failed to consider its own best interests, much less the best interests of MCLEOD. It forced two trials where even one trial was unnecessary and now seeks to escape the statutory sanction for its conduct.

The only way to discourage such abusive practices is to put certainty and substance into the damage provisions of §624.155. For that reason, the excess judgment must be an item of damage in a first-party bad faith action. Public policy, legislative history, and now expressed statutory language, require this result. Accordingly, MCLEOD respectfully requests this Court answer the certified question by holding that the excess judgment, if any, is a recoverable item of damage in a first-party bad faith action brought pursuant to §624.155.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been provided to MICHAEL BELL, ESQUIRE, Hannah, Marsee, Beik & Voght, P. O. Box 536487, Orlando, FL 32853, ROY WASSON, ESQUIRE, Suite 402 Courthouse Tower, 44 W. Flagler Street, Miami, FL 33130, JOEL EATON, ESQUIRE, Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin, P.A., 25 W. Flagler Street, Suite 800, Miami, FL 33130 and to RAYMOND ELLIGETT, ESQUIRE, Schropp, Buell & Elligett, P.A., NCNB Plaza, Suite 2600, 400 N. Ashley Drive, Tampa, FL 33602, this 29th day of March, 1991.

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