047 w/app.

IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

CONTINENTAL INSURANCE COMPANY,
a foreign corporation,

Petitioner/Appellant.

v.

THOMAS F. JONES, as Personal Representative of the Estate of KAREN SUE JONES, Deceased, THOMAS F. JONES, individually, and MARY ANN JONES, individually,

Respondents/Appellees,
_____/

CASE NO. 77,219

Eleventh Circuit
Case No. 89-5911

ON CERTIFIED QUESTION FROM UNITED STATES
COURT OF APPEALS ELEVENTH CIRCUIT

BRIEF OF AMICUS CURIAE, FLORIDA DEFENSE LAWYERS ASSOCIATION SUPPORTING POSITION OF CONTINENTAL INSURANCE COMPANY

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WHETHER THE INSURED MAY RECOVER THE EXCESS ARBITRATION AWARD IN A FIRST PARTY "BAD FAITH" CASE UNDER SECTION 624.155, FLORIDA STATUTES, SINCE SUCH AWARD IS NOT PROXIMATELY CAUSED BY THE INSURER'S CONDUCT.

STATEMENT OF THE CASE AND FACTS

The Amicus Curiae, Florida Defense Lawyers Association, accepts and adopts the appellant's statement of the case.

The Respondent/Appellees, the Plaintiffs in the proceedings below (the Joneses), will be referred to as the "insureds".

The Petitioner/Appellant, the Defendant in the proceedings below (Continental), will be referred to as the "insurer".

SUMMARY OF THE ARGUMENT

Florida law requires that damages be proximately caused by the tortfeasor's conduct. In accordance with this general requirement and the clear language of the statute, insureds pursuing a claim under Section 624.155 must prove that their damages proximately flow from the insurer's unlawful conduct. The amount by which an arbitrator's award exceeds the available limits of uninsured motorist (UM) coverage is not a damage caused by the insurer's conduct. Consequently, the excess amount should not be recovered.

The unlawful conduct of the insurer does not cause the amount of the arbitration award. The award is based on the seriousness of the physical and emotional injuries suffered by the insureds in the automobile accident. Accordingly, the amount of the arbitration award is directly related to the uninsured motorist's conduct, not the insurer's conduct.

This is a first party "bad faith" action in which the insureds are suing their own insurer claiming the insurer should have settled their UM claim. The insureds and insurer stand in an adversarial relationship. This should be contrasted with a third party "bad faith" claim in which the insured claims that the insurer should have settled a third person's claim against the insured within policy limits. The insured and insurer are in a fiduciary relationship since the insurer controls the defense of its insured. When the insurer breaches its fiduciary duty, it exposes the insured to financial responsibility in excess of the

policy limits. Because the insurer causes a financial injury to the insured, the excess amount is recoverable in a third party "bad faith" action. There is no analogous reason to allow the recovery of the excess in a first party "bad faith" case: the insured and insurer stand in an adversarial, not fiduciary, relationship and the insured does not suffer financial responsibility for the excess amount.

The purpose of compensatory damages is to place the injured party in the position it would have been had no tortious conduct occurred. The insureds do not need to recover the excess amount to be placed in the position they would have been had no unlawful conduct occurred. If no unlawful conduct had occurred, the insureds could have recovered no more than the policy limits. To make the insureds whole, the insureds should recover those litigation costs they incurred in establishing their entitlement to the policy limits. Interest may also be properly recoverable. However, anything in addition to the litigation costs and interest would be a windfall.

ARGUMENT

THE EXCESS JUDGMENT CANNOT BE RECOVERED IN A FIRST PARTY CLAIM UNDER SECTION 624.155

The Florida Defense Lawyers Association (FDLA) submits that the excess award is not a proper element of damages under Florida's Civil Remedy Statute, Section 624.155, Florida Statutes (1982). The Statute does not describe on its face the types of "damages" recoverable under the statute. However, the FDLA submits that damages can be recovered only if they are caused by the insurer's conduct. The 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. Section 626.9541(1)(i)(o), or (x);
> 2. Section 626.9551;
> 3. Section 626.9705;
> 4. Section 626.9706;
> 5. Section 626.9707; or
> 6. Section 627.7282.
>
> (b) By the 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 obligation 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.

Section 624.155(1)(a) and (b), Florida Statutes (1982) (emphasis added).

The FDLA submits that the underscored language of the statute places a distinct limitation on the damages recoverable in accordance with general Florida law. According to the clear language of the statute, the person may bring suit if he has been damaged by the insurer's unlawful conduct. Consequently, the necessary elements of the statutory cause of action are: unlawful insurer conduct, causation and damages. As demonstrated below, the excess arbitration award is not a damage caused by the insurer's unlawful conduct under Florida law.

Florida recognizes two kinds of damages: compensatory and punitive. E.g., Tucker v. State Department of Professional Regulation, 521 So.2d 146, 147 (Fla. 5th DCA 1988). Compensatory damages are awarded as compensation for the loss sustained. Id. Such damages compensate for the natural, proximate, probable and direct consequences of the tortfeasor's act. Douglas Fertilizers & Chemical, Inc., 459 So.2d 335, 336 (Fla. 5th DCA 1984).

Under Florida law, the insureds can recover damages which proximately flow from the insurer's conduct. The excess arbitration award should not be recoverable because it does not proximately flow from the insurer's conduct. The amount of the arbitrators' award is based on the arbitrators' perception of the evidence regarding the automobile accident with the uninsured

motorist and the physical and emotional injuries suffered by the insureds in the automobile accident. The purpose of the arbitrators' award is to compensate the insureds for the injuries suffered in the accident. The insurer did not cause the injuries suffered by the insureds in the automobile accident. Thus, the arbitrators' award is based on the uninsured motorist's conduct not the insurer's conduct. The arbitrators are not generally advised as to the insurer's conduct in failing to settle since it is not relevant to the issues being arbitrated. In this case, it does not appear that the arbitrators were even advised as to the amount of uninsured motorist (UM) coverage available.

The excess arbitration award was not proximately caused by the insurer's conduct. The FDLA submits that the amount of the arbitration award would be unchanged if the insurer had acted in "good faith" or "bad faith." Since the insurer has not proximately caused the excess arbitration award, such award does not constitute "damages" the insureds have suffered as a result of the insurer's conduct in violation of Section 624.155, Florida Statutes.

At most, the insurer has caused the insureds to arbitrate their claim rather than settle it within policy limits. At the heart of the insureds' statutory claim is their evaluation, prior to arbitration, that their UM claim was worth more than policy limits. The insurer evaluated the UM claim as within policy limits. The disagreement over evaluation caused the claim to be arbitrated but did not proximately cause the <u>amount</u> of the

arbitration award. As noted above, the amount of the award was caused by other factors unrelated to the insurer's conduct.

Since, at most, the insurer caused the UM claim to be arbitrated, the FDLA submits that the proper element of damages should be those injuries suffered by the insureds as a result of going through arbitration. Such injuries would include increased attorneys fees, additional litigation costs, and interest. Such injuries do not include the excess arbitration award.

It is fundamental that "the purpose of an award of compensatory damages is to make the injured party whole, or to place him in the position in which he would have been had no wrongful act occurred." Phillips v. Ostrer, 481 So.2d 1241, 1246 (Fla. 3d DCA 1986) (citations omitted). The recovery of the excess arbitration award in a statutory action would be inconsistent with the purpose of an award of compensatory damages. The recovery of the excess arbitration award will not put the insureds in the position they would have been had the insurer's wrongful act not occurred. If no "bad faith" had occurred, the most the insureds could have recovered would be the UM policy limits of $600,000. The insureds can be made whole by receiving the $600,000 plus any increased expenses incurred in arbitrating the claim.

If the excess arbitration award is recoverable, the insureds are put in a better position and are made much more than whole than if no "bad faith" had occurred. The insureds are, in essence, receiving more benefits under the policy than they

negotiated for, contracted for, and paid premiums for. The statute should not be read to allow the insureds a windfall. E.g., Kassman v. The American University, 546 F.2d 1029, 1033 (D.C. Cir. 1976) (the purpose of compensatory damages is to make the plaintiff whole, but certainly not more than whole); In re: Washington Public Power Supply System Securities Litigation, 650 F.Supp. 1346, 1355 (W.D. Wash. 1986) (a remedy that would compensate a plaintiff by more than his actual damages is inappropriate).

Furthermore, allowing recovery of the excess arbitration award would lead to absurd results. In cases where the injuries are serious and the available coverage limits are insufficient, the insured is benefitted rather than damaged if the insurer acts in "bad faith". If the insurer acts in "good faith" the insured will not be fully compensated from the uninsured motorist and/or the insured's UM carrier for his serious injuries. In such case, the insured would actually prefer that his UM carrier treat him with "bad faith". Further, unscrupulous insureds may even attempt to "set-up" the UM carrier and force "bad faith" conduct so that they can recover more than the policy limits they selected. The FDLA submits that the statute should not be read to allow for such absurd and unacceptable results.

The FDLA submits that the statute is unambiguous in requiring the damages to be proximately caused by the insurer's unlawful conduct. Even at common law, the plaintiff had to prove the element of causation. "To recover against the insurer, a

Florida insured must produce evidence of the insurer's bad faith conduct and the causal connection between that bad faith and the damages sustained." Cheek Agricultural Insurance Co. of Watertown, New York, 432 F.2d 1267, 1269 (5th Cir. 1970) (emphasis added).

In a common law third party "bad faith" action, the excess judgment was typically viewed as an injury to the insured caused by the insurer's conduct. The liability contract provides that the insurer will defend the insured in the action brought by a third party. Also, the insurer assumes complete control over the litigation and, therefore, stands in a fiduciary relationship with its insured. E.g., Baxter v. Royal Indemnity Co., 285 So.2d 652, 655 (Fla. 1st DCA 1973). Because of the fiduciary relationship, the insurer could be liable for an excess judgment if it unreasonably failed to settle within policy limits:

> Failure to effect such a settlement would unreasonably risk the danger of a judgment in excess of the policy limits for which the insured would be liable but for which the insurer would not. By taking such an unreasonable risk, the insurer would be gambling with the insured's money to the latter's prejudice.

285 So.2d at 655-56. As in the UM case, the insurer's "bad faith" in a third party case does not directly cause the excess amount of the judgment. However, the insurer does directly cause the insured to be responsible for the excess amount. The insured would have no responsibility whatsoever if the insurer settles within policy limits. Consequently, the insured suffers a

financial responsibility which is an injury directly caused by the insurer's "bad faith" conduct.[1]

The court in Baxter correctly noted that the excess judgment is not a concern in UM cases:

> It is singularly important to also note that regardless of the bad faith of the insurer in refusing to settle a claim against it by its insured under this provision of the policy, such action of the insurer can never result in a judgment against the uninsured motorist for any excess liability.

285 So.2d at 656. The statute appears to have modified Baxter to the extent it allows a cause of action to an insured in UM cases. See Opperman v. Nationwide Mutual Fire Insurance Co., 515 So.2d 263 (Fla. 5th DCA 1987). However, the statute cannot change the logic recognized by the court in Baxter that in a UM case the insurer cannot cause the insured or uninsured motorist to be responsible for an excess judgment.

Also, the statute does not place the insured and insurer in a fiduciary relationship in a first party "bad faith" case arising from a UM claim. In its only published interpretation of the statute, this Court has concluded:

> We have considered the arguments of the parties and amicus curiae and are persuaded that the district court was correct in concluding that an adversarial, not a fiduciary, relationship existed between the parties[.] (emphasis added).

Kujawa v. Manhattan National Life Insurance Co., 541 So.2d 1168, 1169 (Fla. 1989) (first party "bad faith" case arising from claim

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[1] Conversely, in a UM case, the insurer causes neither the amount of the award nor any responsibility on the part of the insured for the excess.

under a life insurance policy). The decision in Kujawa underscores the fundamental difference in first party and third party "bad faith" claims; thus, the damages recoverable in each claim are and should be different.

The standard urged by the FDLA was recently adopted by the court in Cocuzzi v. Allstate Insurance Company, Case No. 89-613-CIV-ORL-19 (M.D. Fla. 1990). In Cocuzzi, the insured obtained a judgment against his uninsured motorist (UM) insurer in excess of policy limits. In the subsequent "bad faith" action pursuant to Section 624.155, the insured attempted to recover the excess UM judgment. Both parties moved for summary judgment on the issue of recoverable damages. The insured argued that the excess UM judgment was recoverable on the basis of the District Court's opinion in the instant action. The insurer argued that the excess UM judgment was not recoverable since it was not a damage proximately caused by the insurer's unlawful conduct. The court refused to follow the District Court's opinion in Jones and held that the excess UM judgment was not recoverable. The court's holding is well-reasoned and worthy of quotation:

> In a bad faith claim based on a statute, the court 'should determine the damages recoverable...according to normal damages principles.' F. Ashley, Bad Faith Actions, Liability and Damages Section 9.10 (1984). The general rule is to compensate the insured for the harm caused by the conduct of the insurer to the extent that the insured would be compensated in a tort case. Id. at Section 8.01. In a tort case, a 'plaintiff may recover all damages which are a natural, proximate, probable or direct consequence of that act, but do not include remote consequences.' Douglas Fertilizers & Chemical, Inc. v. McClung Landscaping, Inc., 459 So.2d 335, 336 (Fla. Dist. Ct. App. 1984). See also F. Ashley, Bad Faith Actions, Liability and Damages

> Section 8.03 (1984) (in bad faith action 'insurer should receive compensation for any such harm that flows directly or foreseeably from the insurer's wrongful conduct').
>
> Thus, 'the law of insurer bad faith permits the plaintiff to force the insurer to pay for as much damage as the insurer's conduct is proven to have caused. The only recognized limitation in most cases of insurer bad faith is the legal limitation inherent in the doctrine of proximate cause.' D. Wall, Litigation and Prevention of Insurer Bad Faith Section 13.01, at 400 (1985).
>
> In third-party bad faith claims, an excess judgment is an injury proximately caused by the conduct of the insurer. The wrongful act of the insurer, the refusal to settle for a reasonable amount, proximately causes the injury to the insured, exposure to personal liability on an award that exceeds the policy limits. In a first-party bad faith claim, however, an excess judgment is not an injury proximately caused by the conduct of the insurer: it is the measure of the damages caused by the wrongful conduct of the uninsured motorist from which damages the amount of the insured's insurance coverage has been deducted. The insured is not exposed to personal liability on an award that exceeds his policy limits. 'Hence, because the first-party insurer 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.'

Opinion at pp. 8-9 (emphasis added)(Appendix). The FDLA submits that the reasoning of the decision in Cocuzzi should be adopted by this Court since such decision recognizes the difference between third-party and first-party cases and emphasizes the element of "proximate cause" which is inherent in every claim under Florida law. The position of the insureds would blur the distinction between third-party and first-party cases and ignore the element of "proximate cause".

The FDLA anticipates the insureds' reliance on Section 624.155(7), Florida Statutes (1990), which provides:

> (7) The civil remedy specified in this section does not preempt any other remedy or cause of action provided for or 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 this section by the insurer and may include an award or judgment in an amount that exceeds the policy limits.

The language regarding damages in the subsection (7) appears to be related only to concerns in third-party cases. This is supported by the Senate version of this legislation. In the Senate's version, damages recoverable were "those damages which are a reasonably foreseeable result of a specified violation by the insurer, including an award or judgment entered against the plaintiff as a result of the violation, which award or judgment is in an amount that exceeds the limits of his insurance policy." Act Relating to the Civil Liability of Insurers (SB 1158)(1990)(emphasis added)(Appendix). Further, the Senate, in its summary, indicated that the legislation "provides that an insured may recover for reasonably foreseeable damages that result from certain specified violations by the insurer, including an award or judgment against him, which award or judgment exceeds the policy limits." Senate Summary (SB 1158)(1990)(emphasis added)(Appendix). The unambiguous intent of this legislation, based upon the Senate's legislative history, is to clarify that the excess judgment against the insured is recoverable in a third-party case under the statute. There is no

indication in either the final version of the legislation, or in any legislative summaries or comments, that the Legislature addressed or even considered the recovery of the excess judgment in a first-party case under the statute.

Even if subsection (7) applies to first party claims, the subsection provides only that "damages may include an award or judgment in an amount that exceeds the policy limits." This language merely indicates that the insured may recover all proximately caused damages against the insurer even if such proximately caused damages exceed the policy limits. This is the result reached by the court in Cocuzzi, discussed above:

> Although Mr. Cocuzzi is free to prove that his damages proximately caused by the conduct of Allstate are in excess of the UM policy limits, as a matter of law the excess judgment from the prior action against Allstate is not a measure of the damages that are proximately caused by the conduct of Allstate.

Appendix at p. 10. Accordingly, even under subsection (7), the insureds would be permitted to recover only those damages proximately caused by the insured's wrongful conduct (even if such proximately caused damages exceed the policy limits).

Subsection (7) does support the position urged by amicus curiae and the insurer. By including the "reasonably foreseeable result" language, the Legislature has expressly included a proximate cause standard. Since the excess arbitration award is not a proximately caused damage, it should not be recoverable as a matter of law.

Courts in other states have held that the excess amount on a UM claim is not recoverable in a "bad faith" case. For

example, in Neal v. Farmers Insurance Exchange, 148 Cal. Rptr. 389, 582 P.2d 980 (Cal. 1978), the insured sued for UM benefits and recovered a verdict far in excess of the 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 the 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 excess amount was not proximately caused by the insurer's breach:

> 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 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.

582 P.2d at 988. See also Brandt v. Superior Court, 201 Cal. Rptr. 211, 693 P.2d 796 (Cal. 1985) (en banc) (insured may recover damages proximately caused by the tort of "bad faith"); McCall v. Allstate Insurance Co., 310 S.E.2d 513 (Ga. 1984)

The FDLA recognizes that the court in Neal opined that appropriate damages would include consequent economic loss or emotional distress. 582 P.2d at 988. FDLA agrees that consequent economic loss such as increased litigation costs and interest should be recovered. However, FDLA submits that under Florida law damages for emotional distress are not recoverable. This Court held in Butchikas v. Travelers Indemnity Co., 343

So.2d 816 (Fla. 1977), that damages for mental anguish are not recoverable in a third party "bad faith" case. By analogy, FDLA submits that Butchikas would preclude the recovery of damages for emotional distress or mental anguish in a first party "bad faith" case.

To be recoverable under Florida law, the excess arbitration award must constitute either compensatory or punitive damages. Compare Tucker v. State Department of Professional Regulation, 521 So.2d 146, 147 (Fla. 5th DCA 1988) ("damages are of two kinds, compensatory and punitive"). FDLA submits that, as demonstrated above, the excess arbitration award is not recoverable as compensation for an actual injury caused by the insurer's conduct. Accordingly, FDLA submits that the excess award was, in essence, imposed as punishment for the insurer's conduct. However, the excess amount cannot constitutionally be imposed against the insurer as punitive damages.

Punitive damages go beyond the actual damages suffered by an injured party and are imposed as a punishment of the defendant and as a deterrent to others. Mercury Motors Express, Inc. v. Smith, 393 So.2d 545, 547 (Fla. 1981). Punitive damages are not intended as a means by which a plaintiff can recover extra damages. Chrysler Corp. v. Wolmer, 499 So.2d 823, 825 (Fla. 1986). The standard for imposing punitive damages is that the character of negligence necessary to sustain an award of punitive damages is the same as that required to sustain a conviction for

manslaughter. Id. at 824. See also White Construction Co. v. Dupont, 455 So.2d 1026 (Fla. 1984).

The Civil Remedy Statute already expressly provides for the recovery of punitive damages. It requires the insured to meet the standard in White Construction Co. and also show that the insurer's conduct occurred with such frequency as to constitute a general business practice. Accordingly, it would be superfluous to allow punitive damages, in the form of the excess amount, to be awarded for a violation of the statute.

Furthermore, if the excess amount is considered a punitive damage, it was awarded in this case without reference to the standard enunciated in White Construction Co. No punitive damage claim was submitted for determination. Accordingly, neither the District Court nor the jury was asked to determine whether the insurer's conduct was of a character sufficient to sustain a conviction for manslaughter. Accordingly, the insurer is being treated differently from other defendants against whom punitive damages are awarded. Consequently, the insurer has been denied the equal protection of law. Art. I, Section 2, Fla. Const.

There is no state interest which would be served by treating UM insurers any differently than other defendants. Vildibill v. Johnson, 492 So.2d 1047 (Fla. 1986) (statute cannot create a classification that is arbitrary and totally unrelated to any state interest). The focus of the Court's analysis in determining if punitive damages can be recovered is on the conduct. If the conduct rises to the level of manslaughter,

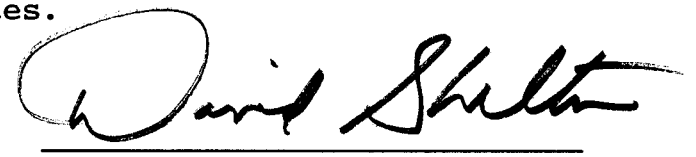
punitive damages are recoverable. Since the focus is on the conduct, there is no reason to create a class based on the type of defendant. Accordingly, it would be unconstitutional to impose punitive damages in the form of the excess amount unless the standard in White Construction Co. is met.

Additionally, a due process concern is raised if punitive damages, in the form of the excess amount, can be awarded without the inquiry required by White Construction Co. The UM carrier's property would be taken without the procedural and evidentiary requirements which the Florida Supreme Court has declared are necessary to any award of punitive damages.

Finally, policy considerations do not warrant the recovery of the excess amount. FDLA submits that allowing the recovery of attorneys fees, litigation costs and interest would be a substantial deterrent to unlawful insurer conduct while assuring that the insureds are compensated for injuries proximately caused by unlawful insurer conduct. Attorneys fees are themselves a substantial deterrent to unnecessary litigation of UM claims especially since the insureds cannot typically recover attorneys fees after successfully presenting a UM claim against an insurer. See Section 627.727(8), Florida Statutes (1987).

CONCLUSION

Based on the foregoing arguments and authorities, the FDLA, as amicus curiae, respectfully requests that this Honorable Court respond to the certified question and hold that the excess judgment is not recoverable in a first party action under Section 624.155, Florida Statutes.



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