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IN THE SUPREME COURT OF FLORIDA

CASE NO.: 77,219

CONTINENTAL INSURANCE COMPANY, a foreign corporation,

APPELLANT,

vs.

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

APPELLEES.

ON DISCRETIONARY REVIEW OF CERTIFIED QUESTION
FROM THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF APPELLANT CONTINENTAL INSURANCE COMPANY

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ARGUMENT

Jones objects to issues raised by Continental which are not part of the question certified by the Eleventh Circuit. However, this court is not bound by the questions framed by the federal court. This court can decline to answer certified questions or it may reframe them. Kramer v. Piper Aircraft Corp., 520 So.2d 37, 38 n.2 (Fla. 1988); AFM Corp. v. Southern Bell Tel. & Tel. Co., 515 So.2d 180, 180 (Fla. 1987); Cate v. Oldham, 450 So.2d 224, 227 (Fla. 1984).

I. THE COURT USED AN INCORRECT MEASURE OF DAMAGES; JONES CAN RECOVER ONLY THOSE DAMAGES PROXIMATELY CAUSED BY CONTINENTAL'S ACTIONS

A. Because the Statute Is Not Ambiguous, We Should Not Consult Legislative History

Jones states the court must "honor the obvious legislative intent." [Jones' Brief at 11]. The problem with this argument is it is by no means "obvious" that the legislative intent is for an insured to automatically recover the amount of the excess judgment.

Jones states that all of Continental's cases regarding the requirement of proximate cause are not on point because the legislature can allow recovery even if the statutory violation does not proximately cause the damage. [Jones' Brief at 11 n.4]. It is true that the legislature can allow recovery even if the statutory violation does not proximately cause the damage. However, Jones misses the point. The point is that if the legislature intends for the monetary sums to be other than proximately caused damages, the legislature has to clearly say so. The legislature did not clearly say so. Therefore, we are

left with what the legislature did say. The legislature said "damages." The legislature has used the term damages or the phrase actual damages to describe the penalties for violation of statutes where civil causes of actions are permitted by the statute.[1] As shown by the statutes footnoted below, the term "damages" means the same thing it means in tort or breach of contract cases. It means damages proximately caused by the wrongful conduct.

B. Even When Consulted, the Legislative History Adds Nothing

Jones states that "'Judgment in excess of policy limits' is essentially a term of art." [Jones' Brief at 12 n.5]. This is incorrect. The term of art used in the insurance industry is "excess judgment." Using the phrase "the sanction is that a company is subject to a judgment in excess of policy limits" simply means that an insured can recover more than the policy limits. In other words, most of the time, no matter how much an insured is damaged, the insured can only recover the amount of his policy. For example, if an insured has a home which is insured for $100,000, and the home burns to the ground, and the home is worth $250,000, the insured will only receive $100,000. The insured generally cannot recover more than his policy limits.

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[1] See § 376.205, Fla. Stat. (all damages); § 394.459(13), Fla. Stat. (liable for damages as determined by law); § 400.023, Fla. Stat. (action to recover actual and punitive damages); § 542.22, Fla. Stat. (threefold the damages sustained); § 559.77, Fla. Stat. (actual damages); § 634.3284, Fla. Stat. (actual damages); § 58.65(12)(c), Fla. Stat. (actual damages); § 713.76(2), Fla. Stat. (damages); § 772.104, Fla. Stat. (actual damages); § 768.125, Fla. Stat. (liable for injury or damage); § 812.035(7), Fla. Stat. (actual damages); § 817.706, Fla. Stat. (actual damages).

The legislature is simply saying here that, if an insurer does not act in good faith, an insured can recover an amount greater than his policy limits.

Jones relies heavily upon a recent student note on this issue -- Note, The Availability of Excess Damages in First Party Bad Faith Cases: A Distinction Without a Difference, 15 Nova L. Rev. 297 (Wtr. 1991). [Jones' Brief at 13-16, 22, 24]. Respectfully, this law review note has little weight. This is a note, written by a second-year student, still in law school, on a difficult area of law. Its lack of weight should be self-evident. Further, Jones uses the article to bootstrap improper "authority" to his argument. Jones relies upon statements attributed by the article as "paraphras[ed] ... statements" of Eric Tilton, the Editor-in-Chief of the 1982 version of the statute. Mr. Tilton's "expressed ... opinion" is also not a proper authority.

C. The 1990 "Clarification" of the Statute Changes Nothing

As expected, Jones relies upon the 1990 clarification. However, the 1990 clarification does not support Jones' position. This is because, before the amendment, no one knew whether the statute applied to all forms of bad faith or just first party. No one knew whether bad faith actions could be brought only pursuant to the statute or whether the common law third-party action was still viable. This can be seen be examining the cases which came out shortly before the 1990 amendment.

For example, in Clauss v. Fortune Ins. Co., 523 So.2d 1177 (Fla. 5th DCA 1988), the trial court determined that § 624.155 had preempted the common law remedy. However, on appeal, the

Fifth District was able to decide the case without determining whether § 624.155 preempted the common law bad faith cause of action. Shortly thereafter, the Third District said § 624.155 creates a cause of action for the insured when the insurer treats the third party badly, but it does not create a cause of action for the third party himself. Cardenas v. Miami-Dade Yellow Cab, 538 So.2d 491 (Fla. 3d DCA 1989).

The legislature's response to this confusion was the added subsection (7), which began:

> 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 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.

§ 624.155(7), Fla. Stat.

Therefore, if you look at the 1990 amendment in the context of the then-current caselaw, you can see that the primary thing the amendment accomplished was to clear up the confusion over the statutory/common law cause of action question. The amendment also says a violation may result in an award in excess of policy limits. All this amendment is saying on the issue of damages is that policy limits don't limit the amount of damages. Thus, in a first-party action, an insured can recover over his policy limits, and, in the third-party context, damages may include an excess award or judgment, so the statute applies to all bad-faith actions. But there is no indication that the legislature gave any thought to the recovery of an excess judgment in a first-party case.

D. As the Trial Court Applied the Statute, It Is a Penal Statute and, Thus, Unconstitutional

Jones does not really address Continental's argument that the statue is penal. All Jones does is cite Empire State Ins. Co. v. Chafetz, 302 F.2d 828 (5th Cir. 1962) [Jones' Brief at 25 n.11]. All Chafetz says is that a statute requiring an insurer to pay attorney's fees is not unconstitutional. Contrary to what Jones asserts, Chafetz does not discuss penal statutes at all. Continental has no problem with Chafetz. However, Continental's point is that penal statutes are construed strictly in favor of the party against whom the penalty is imposed. Nell v. State, 277 So.2d 1 (Fla. 1973); Allure Shoe Corp. v. Lymberis, 173 So.2d 702 (Fla. 1965); Lollie v. General American Tank Storage Terminals, 160 Fla. 208, 34 So.2d 306 (Fla. 1948); Main v. Benjamin Foster Co., 192 So. 602 (Fla. 1939); Rosen v. Marlin, 486 So.2d 623 (Fla. 3d DCA 1986).

That the statute is penal is buttressed by Jones' own argument. Jones emphasizes the legislative history which calls the remedy of § 624.155 a "sanction." [Jones' Brief at 12]. As such, that "sanction," i.e., a penal statute, must be construed strictly in favor of Continental, the party against whom the penalty is imposed.

In Rosen the Third District reversed a judgment for treble damages, allowable under the civil theft statute. The Third District refused to extend the civil remedy statute to a claim where a contractual relationship existed between the parties. The court stated the statute was "clearly a departure from common law which proscribes a penalty which did not exist at common law and

should be strictly construed and limited in its application." Rosen, 486 So.2d at 625 (footnote omitted). Likewise, § 624.155 proscribes a penalty which did not exist at common law. Therefore, the statute should be strictly construed -- interpreting § 624.155 strictly results in a conclusion that a plaintiff cannot automatically recover the amount of the excess judgment.

E. Of the Federal Trial Courts' Rulings, Adams Is Better Reasoned Than Jones

(Federal Law Supports Continental's Position)

Jones relies heavily upon Judge Aronovitz' decision. However, Judge Aronovitz' decision now essentially carries no weight. The Supreme Court recently held that when a trial court interprets state law and the case is appealed, the appellate court will have to interpret the state law de novo. Salve Regina College v. Russell, 111 S.Ct. 1217 (Mar. 20, 1991).

Further, Jones relies upon Cocuzzi v. Allstate Ins. Co., No.: 89-613-Civ-Orl-19 (M.D. Fla. June 5, 1990), and upon denial of Plaintiff's Motion for Relief from Judgment (June 26, 1990), to say that the excess award is automatically recoverable. [Jones' Brief at 20 n.8]. Cocuzzi does not say that. In Cocuzzi, Judge Fawsett stated that § 624.155, Fla. Stat. allows an insured to recover damages that are proximately caused by the wrongful conduct. The amount of the excess judgment does not necessarily represent the measure of damages proximately caused by the insurer.

The tort law requirement of "proximate cause" remains -- an insured can only recover the damages proximately caused by the

insurer. Judge Fawsett noted that in a third-party action an excess judgment is the measure of damages caused by the insurer because the wrongful refusal to make a reasonable settlement proximately caused the injury to the insured (the exposure to personal liability on an award which exceeds the policy limits). In contrast, in a first-party action, the insured is not exposed to personal liability on an award that exceeds his policy limits. See Fidelity & Casualty Co. v. Cope, 462 So.2d 459, 461 (Fla. 1985) (insurance bad faith case; "An essential ingredient to any cause of action is damages."); Florida Physicians Ins. Reciprocal v. Avila, 473 So.2d 756, 758 (Fla. 4th DCA 1985) (same).

Upon denial of Plaintiff's Motion for Relief from Judgment, Judge Fawsett stated:

> This Court has ruled that the excess judgment involved in this case is not, as a matter of law, the measure of damages on the claim of the Plaintiff asserted against the Defendant here, but that the Plaintiff is free to prove those damages proximately caused by the Defendant.... Proof of damages proximately caused by Defendant would include proof of those damages which are a reasonably foreseeable result of a violation of Florida Statutes §624.155.

This statement says nothing new -- merely that plaintiffs can recover for damages they incur which are proximately caused by the insurer's bad faith. As the jury found in our case, Jones incurred no damages as a result of Continental's conduct.

F. McLeod Is Correct; Hollar Is Inapplicable Because Hollar Is a Third-Party Action

(Florida Law Supports Continental's Position)

Jones argues Florida law is "that the injured plaintiff, as a third-party beneficiary of the insurance contact, [sic] has a

right to maintain his own action against the insurer for recovery of the excess judgment and that, even if such an action is brought by the insured, the damages recovered -- the excess judgment -- belong to and are the property of the injured party." [Jones' Brief at 22]. Unfortunately, the two cases Jones cites for that proposition, O'Hern v. Donald, 278 So.2d 257 (Fla. 1973); Thompson v. Commercial Union Ins. Co., 250 So.2d 259 (Fla. 1971), were decided before the Florida legislature enacted the nonjoinder statute in 1982. § 627.7262, Fla. Stat.

Now, under Florida law, the injured plaintiff has no legal interest in the policy and has no right to bring an action "either as a third-party beneficiary or otherwise" until there is a judgment against the insured. § 627.7262, Fla. Stat. See VanBibber v. Hartford Acc. & Indemn. Ins. Co., 439 So.2d 880 (Fla. 1983), recognizing that the legislature's enactment of § 627.7262 was intended to modify the third-party beneficiary concept adopted in Shingleton v. Bussey, 223 So.2d 713 (Fla. 1969). Shingleton, no longer good law, was one of the primary cases relied upon by the court in the case Jones relies upon-- Thompson, 250 So.2d at 263.

Jones quotes at length from Judge Aronovitz's opinion, stating that Judge Aronovitz "looked to current Florida case law," in making his decision. [Jones' Brief at 7]. Jones persists in stating that one of the primary decisions relied upon by Judge Aronovitz -- Fidelity & Casualty Ins. Co. v. Taylor, 525 So.2d 908 (Fla. 3d DCA 1987) -- is still completely good law. Jones says "Continental is in error" because "the only ruling in Taylor that was ever appealed

was one that dealt solely with discovery." [Jones' Brief at 19]. Continental has never contended that the issues in Taylor and Kujawa were absolutely identical to the issues in this case. All Continental has ever said, and continues to say, is this: in Taylor the Third District misinterpreted the same bad-faith insurance statute at issue in our case, § 624.155, Fla. Stat. And the Third District concluded that the statute did away with all the differences between first-and third-party bad-faith actions. Taylor, 525 So.2d at 909.

This court then disapproved the Third District's decision in Kujawa v. Manhattan Nat'l Life Ins. Co., 541 So.2d 1168, 1169 (Fla. 1989), because there were differences between the two and because the relationship between the insurer and the insured in a bad faith cause of action is adversarial, not fiduciary. This court may have considered the issue in the context of a discovery matter, but it does not change the fact that this court recognized what Continental repeatedly pointed out to Judge Aronovitz -- the very nature of a first-party action is quite different from a third-party action and the courts in Florida have long recognized this difference. Jones is burying his head in the sand if he does not see the connection.

In contrast to Jones' reliance upon a student note and upon Judge Aronovitz' opinion, Continental relies upon, among other cases, the Second District's opinion in McLeod v. Continental Ins., 573 So.2d 864 (Fla. 2d DCA 1990). Continental respectfully submits that, in contrast to Jones' authorities, the Second District had a firm grasp of Florida insurance law, and ruled

accordingly. The Second District is the only Florida court which has had our precise issue in front of it, and the appellate court ruled correctly.

Jones then relies upon Hollar v. International Bankers, 572 So.2d 937 (Fla. 3d DCA 1990), and Sarko v. Fireman's Ins. Co., 573 So.2d 1076 (Fla. 4th DCA 1991). Continental pointed out in its initial brief that Hollar is a third-party action. Sarko, which has come out since Continental's brief, is a first-party action, but, again, does not deal with the issue in our case. Sarko simply held that § 624.155 did not preempt a plaintiff's common law bad-faith action against an insurer. That's all. Therefore, the same statements Continental made about the Hollar dictum also apply to the Sarko dictum: Continental will reiterate that most of the issues raised in our case (constitutionality, proximately caused damages, etc.,) were not considered by either of those courts. The courts simply had no need to consider those issues.

Further, none of the language in Sarko even gives us a hint as to what the Fourth District would do if presented with our situation. The Fourth District does not discuss, in any way, the measure of damages. And as for the Third District, if it eventually does conclude the measure of damages in a first-party actions is the amount of the excess judgment, it will be yet another example of the court's recent trend of consistently erring by leaning over too far on the side of the insureds against insurance companies. See, e.g., State Farm Mut. Auto. Ins. Co. v. Barth, 16 FLW D880 (Fla. 5th DCA Apr. 4, 1991) (Cowart, J., dissenting)

("It has been said, not entirely in jest, that the first and controlling rule (Rule Number One) in cases involving insurance coverage is 'the insurance company loses.'")

G. The Amount of the Excess Arbitration Award Is an Improper Yardstick for Measuring Damages Against a UM Insurer

Jones continues to argue that unless the excess arbitration award is the measure of damages the statute is meaningless. This argument's disingenuousness is shown by the fact that, even before the appeal(s) of this case, Jones' attorney was seeking approximately $415,225 in attorney's fees. [R4-101-110].[2] Further, as Jones is well aware, the interest on this judgment continues to run at 12% per annum, which, again, as Jones is well aware, is an excellent return for Jones' money [R4-99]. Undoubtedly, both figures will be astronomical by the time the appeal(s) are concluded, and Continental does not by any means consider them to be a "pittance." [Jones' Brief at 23].

Jones further misconstrues what Continental says in its initial brief at 31 n.7. Therefore, Continental will explain again and try to be clearer. That is, that Amicus Curiae, Prudential, makes a valid point about this court's recent decision in Moore v. Allstate Ins., 570 So.2d 291 (Fla. 1990). In Moore, this court held that, when an insurer denies coverage and liability under UM provision so the insured is forced to sue, but the insurer thereafter concedes coverage so only liability and damages remain

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[2] Jones does not come up with a total; however, counsel's calculations show a bill for the firm of Daniels & Hicks of $45,690; and a bill for Attorneys Dickman, Gomez, et al., of 602 hours at $200 an hour for a total of $120,400. Adding $45,690 and $120,400 equals $166,090, which Jones seeks to multiply by 2.5, which equals a grand total of $415,225.

at issue, the attorney's fee is limited only to that time during which coverage was at issue. § 627.727(8). Continental's point is that this court has indicated an intent to limit attorney's fees to the time that coverage was at issue. On the other hand, under Jones' interpretation of § 624.155, the first-party insured would continue to recover fees for the entire underlying action, even though it may only have focused only on the reasonable amount of a UM award and coverage may have never been contested. Therefore, Continental's point is that the problem with Jones' interpretation is that it conflicts with the reasoning of this court's recent decision in Moore.

Jones also misconstrues third-party cases when he states: "In [third-party] cases, the courts allow recovery of the excess judgment even though the insured does not actually suffer those damages because there is no possibility he will ever be able to pay off the judgment ...." [Jones' Brief at 22]. The reason courts allow recovery in that instance is because, even if an insured has no money and cannot pay the judgment, the insured is "injured" -- the excess judgment has the potential to "impair his credit, force him into bankruptcy, diminish his reputation, subject his outright property to lien, and immediately subject any future earnings to possible garnishment." Frankenmuth Mut. Ins. Co. v. Keeley, 461 N.W.2d 666 (Mich. 1990); see Shuster v. South Broward Hosp., 570 So.2d 1362 (Fla. 4th DCA 1990). "This dilemma is lacking in the first-party claim." Clearwater v. State Farm Mut. Auto Ins. Co., 792 P.2d 719, 722 (Ariz. 1990) (en banc).

II. BECAUSE THE JURY FOUND NO DAMAGES, JONES HAS NO CAUSE OF ACTION, REGARDLESS OF ALL THE OTHER CASELAW

Jones argues that, because this case was certified to this court by the federal court, this court cannot consider the fact that the jury found there were no damages. Continental recognizes that this court's review is somewhat limited by the nature of the certification process. However, the point Continental is making in this regard is this: The statute says that a party may recover his damages. The jury found that Jones was not damaged. Therefore, regardless of any argument a hypothetical plaintiff may have about the excess award being the measure of his damages, Jones cannot recover where, as here, the jury found there were no damages.

III. THE INSURER CANNOT BE GUILTY OF BAD FAITH SIMPLY BECAUSE IT ARBITRATES ITS INSURED'S CLAIM FOR UNINSURED MOTORIST COVERAGE

Jones states that there is no conflict between § 624.155 and the arbitration code, § 682.02. [Jones' Brief at 33]. It is true there is no conflict between the two <u>if</u> § 624.155 is construed properly. And if § 624.155 is construed as Jones says to make the insurer act in good faith, there is still no problem. However, the problem is that, as Jones construes § 624.155, it conflicts with the arbitration code. Why? Because an insurer has a contractual right to arbitration, and the mere fact that the insurer decides to exercise its right to arbitrate the matter cannot constitute bad faith. If, as in our case, the insurer's decision to arbitrate can be legally construed as constituting bad faith, then there clearly is a conflict between the two statutes.

According to a new decision out of the Fourth District, where the parties to an insurance contract have contracted to give a right to the insurer, the insurer does not breach the contract by exercising that right. Shuster v. South Broward Hosp., 570 So.2d 1362 (Fla. 4th DCA 1990). This is true regardless of the reason the insurer exercised that contractual option. It is irrelevant whether the insurer is "motivated by good faith, bad faith, self-interest, malice, spite, or indifference." Id. at 1367. Therefore, contrary to Jones' assertion, if Continental's decision to exercise its contractual right to arbitration can be legally construed as constituting bad faith, then there definitely is a conflict between the two statutes.

Further, Jones argues that in our specific situation, an arbitration award, the amount of excess is a "pittance" and "not sufficient to justify enactment of this type of statute nor to assure compliance with it." [Jones' Brief at 23]. What Jones overlooks is that this statute was not directed specifically at arbitration awards. In fact, this statute was not even directed specifically at uninsured motorist coverage. This statute covers many, many types of insurance coverage. Damages will vary accordingly.

It is true that, in the context of an arbitration award, a plaintiff cannot recover the windfall of the excess award, but, as stated previously, attorney's fees and interest are hardly peanuts. And, in any case, it is wrong for Jones to say that because in his specific situation he will not recover a windfall that

therefore the statute must be convolutedly read so as to give him that windfall.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Appellant, CONTINENTAL INSURANCE COMPANY, was mailed this 3d day of May 1991 to: **PATRICE A. TALISMAN, ESQ.,** DANIELS & TALISMAN, P.A., Counsel for Appellees, Suite 2401, New World Tower, 100 North Biscayne Boulevard, Miami, FL 33132-2513; **ROBERT J. DICKMAN, ESQ.,** Attorney for Appellees, Dickman Building, 4500 LeJeune Road, Coral Gables, FL 33146; **ROLAND GOMEZ, ESQ.,** Co-Counsel for Appellees, Suite 400, 8100 Oak Lane, Miami Lakes, FL 33016; **RAYMOND T. ELLIGETT, JR., ESQ.,** Amicus Curiae for Prudential Property & Casualty Ins. Co., NCNB Plaza, Suite 2600, 400 N. Ashley Dr., Tampa, FL 33602; **GEORGE A. VAKA, ESQ.,** FOWLER, WHITE, GILLEN, BOGGS, VILLAREAL & BANKER, P.A., Amicus Curiae for Florida Association for Insurance Review, Post Office Box 1438, Tampa, FL; **JOEL D. EATON, ESQ.,** Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin, P.A., Amicus Curiae for Academy of Florida Trial Lawyers, 25 W. Flagler St., Suite 800, Miami, FL 33130.

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