IN THE SUPREME COURT OF FLORIDA

CASE NO.: 77,231

WILLIAM ADAMS AND DOROTHY ADAMS, his wife, AND THOMAS SHELTON AND ELIZABETH SHELTON, his wife,

Plaintiffs/Appellants,

vs.

THE FIDELITY AND CASUALTY COMPANY OF NEW YORK,

Defendant/Appellee.

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

ANSWER BRIEF OF APPELLEE FIDELITY

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INTRODUCTION

Plaintiffs/Appellants will be referred to as the plaintiffs. Defendant/Appellee will be referred to as Fidelity.

As Adams has done, Fidelity will cite to the record as it appeared in the 11th Circuit. That is, citations to the record will be by an "R", then the volume number, the document number, and the page number(s) within the document cited. Fidelity also cites to three other documents not in the record which are attached as appendices -- Appx. A. is of 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); Appx. B. is of the plaintiffs' March 7, 1988 complaint; Appx. C. is the Continental Insurance Policy at issue.

Unless otherwise indicated, all emphasis is original.

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STATEMENT OF THE CASE AND OF THE FACTS

The Adams and the Sheltons were traveling in the Sheltons' car in Broward County, Florida on January 23, 1982. They were hit by another car driven by Sylvia Brannan, who was intoxicated, failed to stop at a red light, and fled the scene. [Fidelity's Appx. B. at para. 5-6].

The Sheltons had a policy of automobile insurance they had purchased from Fidelity in North Carolina which included $200,000 in uninsured motorists (UM) coverage [Appx. B. at para. 8]. Brannan, on the other hand, had no automobile liability insurance. [Appx. B. at para. 7]. Consequently, the plaintiffs sought recovery from their own insurer, Fidelity, under their policy's UM coverage.

1. The First Suit (the Liability Action v. Fidelity & Brannan)

The plaintiffs had the option of either arbitrating the uninsured motorists' claim or bringing the action in circuit court which would allow them to join Brannan, the uninsured motorist, as a party. The plaintiffs chose the option of suing Brannan and Shelton's insurer (Fidelity) in circuit court. [Appx. B. at para. 13].

At trial, Brannan did not appear, and Adams took a default judgment against her on liability. A jury returned a verdict for $70,000 compensatory damages and $750,000 punitive damages, based upon Brannan's egregious conduct in causing the accident. [Appx. B. at para. 13]; Adams v. Brannan, 500 So.2d 236, 237 n.1 (Fla. 3d DCA 1986), rev. denied, 511 So.2d 297 (Fla. 1987). The trial court determined that Fidelity was not liable for the punitive damages

award because those damages were based on Brannan's conduct in causing the accident. Therefore, on June 10, 1985, the trial court awarded a verdict in favor of the plaintiff against Fidelity for the $70,000 in compensatory damages. Id. at 237 n.1.

Plaintiffs appealed. Id. at 236. The Third District reversed and remanded, holding that North Carolina law applied to coverage questions and that North Carolina would permit recovery of punitive damages from an uninsured motorist carrier. Id. at 237. This decision allowed Adams to collect $130,000 under North Carolina law which was uncollectible under Florida law.

On September 3, 1987, the trial court entered an order in accordance with the Third District's opinion which: (1) vacated the first order; (2) ordered that plaintiffs could recover $750,000 in punitive damages from Brannan; (3) ordered that plaintiffs could recover $70,000 in compensatory damages from Fidelity; and (4) ordered that plaintiffs could recover $130,000 in punitive damages (the remaining amount of the $200,000 coverage) from Fidelity.

2. The Second Suit (the Bad-Faith Action v. Fidelity)

Next, the plaintiffs brought a § 624.155, Fla. Stat. bad-faith action against Fidelity, which was removed to federal court. [R1-1,2]. Fidelity moved for summary judgment on two grounds: (1) that the plaintiffs had not suffered any damages, and (2) that Florida does not allow punitive damages (assessed for the conduct of the uninsured motorist) to be recovered against a UM insurer. [R1-9]. The trial court granted summary judgment [R1-41], and the plaintiffs appealed [R1-42].

3. The Question Certified by the Eleventh Circuit

The Eleventh Circuit declined to decide the question and certified it to the Supreme Court of Florida as follows:

> Assuming that Fla. Stat. Section 624.155(1)(b)1. provides for a first-party bad faith claim in an uninsured motorist case, and assuming that damages exceeding the limits of the insurance policy may be collected against an uninsured motorist insurance carrier, can the measure of damages properly include an award of punitive damages against the insurer?

Adams v. Fidelity & Casualty Co., 920 F.2d 897, 900 (11th Cir. 1991) (footnotes omitted).

SUMMARY OF ARGUMENT

The summary judgment for Fidelity (which limited the plaintiffs' recovery to the $200,000 of the policy) was correct for two separate reasons:

I.

The original suit was a liability action against the uninsured motorist Brannan and against Fidelity. This present suit is a first-party bad-faith claim brought by the plaintiffs against Fidelity pursuant to Florida's bad-faith insurance statute, § 624.155, Fla. Stat. The plaintiffs claim they can recover the portion of the judgment which is in excess of the limits of an uninsured motorist insurance policy (in this case, the excess judgment consists solely of punitive damages). The plaintiffs recognize that they cannot recover the excess under Florida law because the entire amount of the excess award is punitive damages awarded against the uninsured motorist based upon her conduct in causing the accident, and Florida does not permit punitive damages to be recovered against an insurer because of the conduct of an uninsured

motorist. However, North Carolina does allow recovery.

Plaintiffs claim North Carolina law is controlling in this second, bad-faith suit because it was controlling in the first, liability suit. Plaintiffs make this claim notwithstanding the fact that they brought their bad-faith claim under Florida law, §624.155, Fla. Stat. However, North Carolina law, which was controlling in the first action, is not controlling in this second action because Florida law applies to questions of performance of the insurance contract and to the remedies available for bad-faith failure to perform that contract. Therefore, whether the plaintiffs can recover the excess portion of the award is a question of Florida law, and Florida law precludes recovery.

II.

To recover against an insurer on the claim that the insurer acted in bad faith, a plaintiff must prove that he suffered damages proximately caused by the insurer's bad-faith conduct. However, the damages the plaintiffs sought to recover (the excess amount of the punitive damages award) were not caused by Fidelity. The "damages" the plaintiffs sought to recover were caused solely by the uninsured motorist.

The reality is that the plaintiffs' sustained no damages and have no right to recover any additional monies from Fidelity. Fidelity has already paid the attorney's fees and court costs associated with trying the underlying action. These are the only damages which can flow from a first-party bad-faith claim. Therefore, the summary judgment for Fidelity was correct because Plaintiffs have sustained no damages.

ARGUMENT

I. WHEN A PLAINTIFF IN FLORIDA BRINGS A BAD-FAITH ACTION UNDER § 624.155, FLA. STAT., A PLAINTIFF CANNOT RECOVER FROM AN INSURER PUNITIVE DAMAGES WHICH WERE ASSESSED BECAUSE OF THE UNINSURED MOTORIST'S CONDUCT

First of all, although the plaintiffs have divided their argument into two issues, this first issue is the only issue which was the basis for Judge Spellman's written order below. And, according to the way the Eleventh Circuit certified the question to this court, its question can be answered without addressing the other issues. And the answer is that, under Florida law, a plaintiff cannot recover punitive damages from an insurer when those punitive damages were assessed based on the uninsured motorist's conduct. Fidelity would like to point out that this case can, and should, be decided on this issue alone. If this court concludes that Judge Spellman was correct on this issue, there is no need for this court to consider the second issue.

Plaintiffs state the issue as follows: "Whether a punitive damage award which exceeds the limits of uninsured motorist coverage can be recovered in a bad faith action under section 624.155, Florida Statutes, when the insurer was obligated to pay punitive damages in the underlying action." The way plaintiffs state the issue does not really address the true issue, therefore, Fidelity has restated it affirmatively as follows: When a plaintiff in Florida brings a bad-faith action under § 624.155, Fla. Stat., a plaintiff cannot recover from an insurer punitive damages which were assessed because of the uninsured motorist's conduct.

A. Florida Law Governs the Plaintiffs' Remedy in This Bad-Faith Action

In the first, liability action, the uninsured motorist Brannan did not appear, and Plaintiffs took a default judgment against her on liability. The case went to trial and the jury returned a verdict totalling $70,000 in compensatory damages and awarded $750,000 punitive damages against Brannan for her egregious conduct in causing the accident. Fidelity had $200,000 of uninsured motorist [UM] coverage available. [Appx. B. at para. 8]. The trial court entered judgment against Fidelity in the amount of the $70,000 compensatory award. The trial court refused to allow recovery of any of the punitive portion of the award from Fidelity on the basis that Florida law does not permit the recovery of punitive damages from an insurance carrier.

Plaintiffs appealed and the Third District reversed. Adams v. Brannan, 500 So.2d 236 (Fla. 3d DCA 1986), rev. denied, 511 So.2d 297 (Fla. 1987). The Third District reasoned that North Carolina law governed questions of construction of the insurance contract because Fidelity issued the policy in North Carolina to a North Carolina resident. Because North Carolina permitted recovery from a liability insurer of punitive damages awarded against its insured to the extent of policy limits, the court concluded North Carolina would permit recovery from an uninsured motorist carrier of punitive damages based on the conduct of the uninsured motorist. This ruling permitted Plaintiffs to collect $130,000 which would have been uncollectible under Florida law, but was collectible under North Carolina law.

B. Grounds Controls -- It Holds That Florida Law Governs the Remedies Available for the Insurer's Bad Performance Under the Contract

However, Plaintiffs are not entitled to recover the excess punitive award from Fidelity in this second, bad-faith action. Although North Carolina law applied to coverage questions, the question of performance of the contract and the remedies available for bad-faith non-performance are still questions of Florida law. Government Employees Ins. Co. v. Grounds, 332 So.2d 13 (Fla. 1976). Grounds is still good law and is controlling upon this case. See McGee v. State, 15 FLW 2922 (Fla. 3d DCA Dec. 4, 1990) (court can't decline to follow Florida supreme court's opinion in absence of specific indication by the supreme court itself that case is no longer viable). Grounds is similar to the present case in the following ways:

1. It involves two separate actions.

2. In the original action, the jury entered a verdict over the automobile policy limits.

3. In the later action, the insured brought a bad-faith action against the insured to recover the amount of the excess judgment.

4. The court ruled that while another state's law (the law of the place where the contract was made) governed the interpretation and obligations of contracts, Florida law governed the subsequent action because questions of the insurer's performance under the contract (or lack thereof) and matters concerning performance are determined by the law of the place of performance under traditional conflict of laws principles.

Grounds, 332 So.2d at 14-15.

In Grounds, a Mississippi resident named Nevils purchased automobile liability insurance in Mississippi, travelled to Florida, and injured Grounds in an automobile accident. Grounds sued Nevils in Florida. The trial resulted in a judgment in

Grounds' favor in excess of Nevils' policy limits. Grounds sued Nevils' insurance carrier to recover the excess amount of the award. The insurer argued that Mississippi law should apply because it issued the insurance contract in Mississippi, to a Mississippi resident, and Mississippi did not permit recovery of excess judgments from insurance carriers guilty of bad faith. If Mississippi law controlled, Grounds would be unable to recover.

The case was considered first by the district appellate court, Government Employment Ins. Co. v. Grounds, 311 So.2d 164 (Fla. 1st DCA 1975), and then by the Supreme Court of Florida, Government Employees Ins. Co. v. Grounds, 332 So.2d 13 (Fla. 1976). In the first Grounds case, the First District reasoned that bad faith was more in the nature of a tort action than a contract action, and that Florida law applied to the tort of bad faith which occurred in Florida. The Florida Supreme Court granted certiorari to expunge the district court's language that a bad-faith action was in the nature of a tort. The supreme court reiterated that bad faith was an action in contract.

The supreme court did not reverse the lower appellate court's decision, however. The supreme court held that Grounds could recover the excess amount of the judgment from the insurance carrier because, while Mississippi law applied to questions of contract obligations, the breach of that contract was a matter of performance and was determined by the laws of the place of performance. The place of performance was Florida. The court held that Grounds could recover the excess amount of the judgment under Florida law.

Judge Spellman properly concluded the Grounds decision controlled his ruling:

> While North Carolina law applies to questions regarding the substantive provisions of the insurance contract and the construction thereof, Brannan, 500 So.2d 236, Florida law applies to questions regarding Defendant's performance under the contract and the remedies available for non-performance, Government Employees Ins. Co. v. Grounds, 332 So.2d 13 (Fla. 1976).

Adams v. Fidelity & Casualty Co., No. 88-0629-Civ-Spellman, slip op. at 9 (S.D. Fla. Feb. 12, 1990) [R1-40-9].

As Judge Spellman noted in his ruling, the Third District held in Adams v. Brannan, 500 So.2d 236, 237 n.1 (Fla. 3d DCA 1986), rev. denied, 511 So.2d 297 (Fla. 1987), that North Carolina law applied to questions of contract obligation. But Judge Spellman correctly recognized that did not mean North Carolina law applied to question of performance. He pointed out that Florida law determines whether Fidelity acted in bad faith **AND THE REMEDIES AVAILABLE IF IT DID.** Adams v. Fidelity & Casualty Co., No. 88-0629-Civ-Spellman, slip op. at 9 (S.D. Fla. Feb. 12, 1990) [R1-40-9].

Judge Spellman further pointed out: **"PLAINTIFFS CONCEDE THAT FLORIDA LAW CONTROLS THIS MATTER**, for they instituted this action pursuant to Section 624.155, rather than on the insurance contract itself." Id. (e.a.). Notwithstanding the inescapable logic of Judge Spellman's point, the plaintiffs continue to claim that they do not concede that Florida law governs their claim. Plaintiffs still claim that what they are entitled to recover under this §624.155 action is governed by North Carolina law. This is

nonsense. Because the plaintiffs chose to pursue a bad-faith action against the insurer for his lack of performance, in Florida, under Florida law, the plaintiffs are restricted to the remedies available under Florida law. Grounds, 332 So.2d 13. Judge Spellman recognized this. He also recognized that there is nothing in Adams v. Brannan which dictates a contrary result.

The foregoing argument was made to the Eleventh Circuit in the present case. This argument is perhaps the flip side of the additional point made by the Eleventh Circuit when it certified the question in Adams v. Fidelity, 920 F.2d 897, 900 n.6 (11th Cir. 1991):

> [A]nother question that comes to mind in reviewing this particular case that the Supreme Court of Florida might want to consider is whether Fla.Stat. Section 624.155 is even available to plaintiffs suing for a bad faith failure to settle under an automobile insurance policy issued in North Carolina to North Carolina residents.

This is another way of describing the point Fidelity has been trying to make all along. In other words, if you assume the plaintiffs have this cause of action under the Florida statute, the plaintiffs' cause of action must necessarily be within the limits of Florida law.

C. Adams v. Brannan Does Not Mandate the Result That the Plaintiffs Claim It Does

The plaintiffs argue that Adams v. Brannan dictates that North Carolina law apply in this second suit. It does not. In Adams v. Brannan, the Third District made the following conclusions:

1. North Carolina law applies to questions of insurance coverage;[1]

2. This would not be the case if Florida had a policy or interest which would be contravened by applying North Carolina law;

3. Florida does not have a policy or interest which would be contravened by applying North Carolina law; therefore,

4. In determining if there is insurance coverage, North Carolina law applies;

5. While Florida does not allow insurance coverage for punitive damages, North Carolina law does; therefore,

6. Under North Carolina law, there is insurance coverage for punitive damages; therefore,

7. The plaintiffs can recover a portion of their punitive damages.

The Florida appellate court relied upon the North Carolina Supreme Court case of Mazza v. Medical Mut. Ins. Co., 319 S.E.2d 217 (N.C. 1984), in reaching these conclusions. These conclusions entitled the plaintiffs to recover in the first suit, under North Carolina law, a portion of the punitive damages (up to the policy limits of $200,000). However, there is nothing in Adams v. Brannan which indicates, in a second, bad-faith action, brought under the Florida bad-faith statute, that the plaintiffs are entitled to recover punitive damages beyond the policy limit.

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[1] The Third District's determination that North Carolina law applies to questions of contract construction is supported by the Florida Supreme Court's recent reaffirmance of the lex loci contractus doctrine in Sturiano v. Brooks, 523 So.2d 1126 (Fla. 1988).

All the Third District says in Adams v. Brannan is that in the liability action, which is governed by North Carolina law, the plaintiffs can recover a portion of their punitive damages.

D. Suarez and Arnette Control -- Plaintiffs Cannot Recover Punitive Damages from an Insurer Under Florida Law

Suarez and Arnette considered the precise issue presented to Judge Spellman below. These cases are still good law, have not been overruled, are right on point, and are, therefore, controlling. In Suarez, the Third District held that Florida does not permit the recovery of punitive damages from an uninsured motorist carrier when the damages are awarded because of the conduct of the uninsured motorist. Suarez v. Aguiar, 351 So.2d 1086 (Fla. 3d DCA 1977), cert. dismissed, 359 So.2d 1210 (1978). Further, the court reasoned that "punitive damages are distinguished from compensatory damages in that punitive damages do not have as their primary purpose the making of the plaintiff whole after bodily injury, sickness or death." Suarez, 351 So.2d at 1088. The Third District concluded that "uninsured motorist coverage in the State of Florida does not include liability for punitive damages." Id. The Third District reaffirmed that decision in Arnette v. Continental Ins. Co., 490 So.2d 158 (Fla. 3d DCA 1986), also relying upon 31 Fla. Jur.2d Insurance § 769.

The plaintiffs point out the Third District's footnote 3 in Adams v. Brannan, which states:

> This reasoning may well indicate that this court was in error in applying the liability rule to the uninsured motorist situation as a matter of Florida law in Suarez, 351 So.2d at 1088 and Arnette v. Continental Ins. Co., 490 So.2d 158 (Fla. 3d

DCA 1986). However, that issue is not now before us.

Adams v. Brannan, 500 So.2d at 239 n.3. [Plaintiffs' Brief at 9]. The obvious response to the plaintiffs must be: That comment is strictly dicta, because, as the court stated, **"THAT ISSUE IS NOT NOW BEFORE US."** Id. (e.a.). In Suarez and Arnette, on the other hand, the Third District did have that issue directly before them.

E. UM Coverage Is a Limited Form of Coverage

And the reason why the court was right in Suarez and Arnette is because the court in Adams v. Brannan did not consider the very nature of UM insurance. As this court pointed out repeatedly in Allstate Ins. Co. v. Boynton, 486 So.2d 552, 557 (Fla. 1986) (e.a.), **"UM COVERAGE IS A LIMITED FORM OF THIRD PARTY COVERAGE"** "The UM coverage, in purpose and effect, provides a limited form of insurance coverage...." Id. Florida's UM statute was enacted so that "a motorist may obtain a limited form of insurance coverage for the uninsured motorist." Id.

This is what the court did not consider in Adams v. Brannan -- the limited nature of UM coverage. Smith v. Valley Forge Ins. Co., 566 So.2d 612, 612 (Fla. 4th DCA 1990). And the limited intent of UM coverage is "to provide uniform and specific insurance benefits to members of the public **TO COVER DAMAGES FOR BODILY INJURIES** caused by the negligence of uninsured/underinsured motorists." Automobile Ins. Co. v. Beem, 469 So.2d 138, 139-40 (Fla. 3d DCA 1985) (e.a.), citing Mullis v. State Farm Mut. Auto. Ins. Co., 252 So.2d 229 (Fla. 1971); see Ellsworth v. Insurance Co. of N. Am., 508 So.2d 395, 400 (Fla. 1st DCA 1987).

Further, the UM statute, by its very language, shows what the Legislature intended, and provided for, was "the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness, or disease, including death, resulting therefrom." § 627.727(1), Fla. Stat. Bodily injury, sickness, or disease. That is the limited coverage. There is no mention of punitive damages, and clearly punitive damages do not fall within the limited coverage contemplated expressly by the statute or contemplated by this court in caselaw. This is why the Third District was right initially in Suarez -- because the purpose of punitive damages is not to make the plaintiff whole after bodily injury, sickness or death. Suarez, 351 So.2d at 1088. Plaintiffs, therefore, are wrong to seek to recover damages not contemplated by Florida's UM statute. § 627.727, Fla. Stat.

Additionally, the policy itself is in accordance with the statute and the caselaw construing it. The policy limits UM recovery to "bodily injury and property damage":

> We will pay damages which a **covered person** is legally entitled to recover from the owner or operator of an **uninsured motor vehicle** because of:
>
> 1. Bodily injury sustained by a **covered person** and caused by an accident; and
>
> 2. **Property damage** caused by an accident.

[Fidelity's Appx. C. at 5]. The punitive damages plaintiffs seek are not covered by the policy any more than they are contemplated

by the statute or caselaw.[2]

Finally, if footnote 3 in Adams v. Brannan really casts any doubt over the continued validity of Suarez and Arnette (which it shouldn't), this court should consider Northwestern Nat'l Casualty Co. v. McNulty, 307 F.2d 432 (5th Cir. 1962), where the policy also covered bodily injury and property damage. The Fifth Circuit performed a careful, thorough analysis and concluded that Florida would not allow punitive damages for the conduct of another to be assessed against an insurer. As the court said, there is no point in punishing the insurer because it has done no wrong. And "the burden would ultimately come to rest not on the insurance companies but on the public, since the added liability to the insurance companies would be passed along to the premium payers. Society would then be punishing itself for the wrong committed by the insured." Id. at 440-41. This court should not place the penalty (assessed for the uninsured motorist's conduct) upon the innocent shoulders of society.

F. Making an Insurer Pay for the UM's Bad Conduct Does Not Deter the Bad Conduct; The Insurer Did Not Do the Bad Acts

This court's latest pronouncement on allowing insurance for bad conduct is in Ranger Ins. Co. v. Bal Harbour Club, Inc., 549 So.2d 1005 (Fla. 1989). Ranger Ins. recognized that sometimes the purpose of imposing liability is to deter the wrongful conduct. That was the situation in Ranger Ins., where the purpose

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[2] In contrast to our policy limitations of bodily injury and property damage, in Mazza, 319 S.E. 2d at 222, the North Carolina court found coverage because, in the insurance policy, the insurer promised to pay for "all sums which the insured shall become legally obligated to pay as damages."

was to deter intentional acts of discrimination. That is also the situation in our case where punitive damages were assessed against the uninsured motorist. This court recognized in Ranger Ins. that, where the purpose is to deter, the purpose is defeated by allowing the insurer to pay. Just as in Ranger Ins., the purpose of deterring the (admittedly deplorable) conduct of the uninsured motorist is defeated by forcing Fidelity to pay.

As for the rest of Florida law allowing insurance for punitive damages, specifically, the case plaintiffs rely upon--U.S. Concrete Pipe v. Bould, 437 So.2d 1061 (Fla. 1983), as well as Queen v. Clearwater Elec., Inc., 555 So.2d 1262 (Fla. 2d DCA 1989); cf. Country Manors v. Master Antenna Sys., 534 So.2d 1187 (Fla. 4th DCA 1988), these cases do not support allowing insurance in our situation. In these cases, the courts have allowed insurance for punitive damages for an employer who is vicariously liable (because he is not insuring against his own bad acts). However, in our situation, the insurer is not even vicariously at fault. Therefore, there is just no reason to make the insurer pay punitive damages for the uninsured motorist's conduct.

II. THE AMOUNT OF THE EXCESS JUDGMENT IS NOT AUTOMATICALLY THE AMOUNT RECOVERABLE IN A FIRST-PARTY BAD-FAITH CLAIM UNDER § 624.155 -- PLAINTIFFS CAN RECOVER ONLY THOSE DAMAGES PROXIMATELY CAUSED BY THE INSURER'S ACTIONS

As the plaintiffs point out, this second issue has been certified to this court in Jones v. Continental Ins. Co., 920 F.2d 847, 851 (11th Cir. 1991), as follows: "What is the appropriate measure of damages in a first-party action for bad faith failure to settle an uninsured motorist insurance claim (under Fla. Stat.

§ 624.155(1)(b)(1.)?" This issue is also before this court in McLeod v. Continental Ins. Co., 15 FLW D2785 (Fla. 2d DCA Nov. 14, 1990).

However, it should be emphasized that this issue was not the basis of the trial court's order in this particular case. The trial court based its order not on this issue but on the other issue (the fact, that, in Florida, a plaintiff cannot recover punitive damages under a UM policy). And the Eleventh Circuit's certified question can be answered in the negative without getting into this issue. Fidelity has always maintained, and still maintains, that this case can be decided without consideration of the McLeod/Jones issue. Even though the trial court did not rule on that basis, the plaintiffs keep raising the McLeod/Jones issue because there is obviously room for argument on this issue. Because the plaintiffs have raised this non-issue, Fidelity will discuss the amount of damages a party can receive in a first-party bad-faith action:

A. Florida's Codification of Its Bad-Faith Law Does Not Mandate the Result the Plaintiffs Seek

Florida has traditionally had a cause of action against an insurer when an insurer acts in bad faith in settling a claim by an injured third party against its insured. This cause of action is a so-called "third-party action." In a third-party claim, the insured is claiming that the insurer failed to settle with a third party. This failure to settle **EXPOSES THE INSURED TO A JUDGMENT IN EXCESS OF THE POLICY LIMITS.** So, in a third-party claim, the measure of damages is the difference between the

amount of coverage and the amount of damages awarded.

When Florida passed a statute codifying this bad-faith cause of action, some plaintiffs claimed, and several courts have held, that there was now a right to a first-party claim of bad faith as well. These same plaintiffs have also argued that the measure of damages was the same, i.e., the amount the judgment exceeded the policy limits. However, in a first-party action, the insured is claiming that the insurer failed to handle the insured's own claim in good faith. In this type of situation, however, the failure to settle **DOES NOT EXPOSE THE INSURED TO A JUDGMENT IN EXCESS OF THE POLICY LIMITS.** It exposes the insured only to the extra costs of proceeding against the insurer, e.g., going to trial (attorney's fees and costs) and of prejudgment interest.

The plaintiffs argue the legislative history supports their argument. It does not. First of all, the plaintiffs place great emphasis on the legislative history contained in the Staff Report to the 1982 Insurance Codes Sunset Revision. [Plaintiffs' Brief at 13]. All the report says is that an insurer could be subject to judgment in excess of policy limits. This simply means that an insurer who violates § 624.155, Fla. Stat. (1983), may ultimately be required to pay to its insured damages over and above the policy limits. That is not to say the appropriate standard of damages in this case would be the amount of the excess jury award.

The plaintiffs next rely heavily upon the 1990 amendment of § 624.155, Fla. Stat., which states that it was "clarifying" the legislative intent. Ch. 90-119, Preamble, Laws of Fla. This is claimed by the plaintiffs to be an intent for a plaintiff to

recover the exact amount of the excess award as the proper measure of recovery in both first and third party bad faith actions. This is incorrect. Yes, the amendment of the statute shows that damages in excess of the policy limits can be recovered. That is not disputed. However, there is nothing in the amendment which shows that the legislature's intent is for the plaintiff to automatically receive the excess as his damages. The plaintiff is still required to prove a connection between the amount of his damages and the amount he can receive.

In fact, it has been true all along that a plaintiff can recover an amount that exceeds the policy limits. That is exactly what a plaintiff does recover in a bad faith action whenever he recovers attorney's fees for the bad faith action, interest, costs, etc. These extra-contractual damages may include a number of different elements, but it can hardly be said the language used in the legislative history means the damages available would automatically include the amount a jury award exceeds policy limits. Therefore:

Yes, a plaintiff can recover an amount that exceeds the policy limits, but

No, a plaintiff cannot automatically receive the amount that the jury award exceeds policy limits.

The plaintiff must first prove his damages. This was true before the 1990 amendment to the statute, and it is no less true after the amendment. A plaintiff must show that the conduct caused the amount of damages sought; therefore, the amount of the plaintiff's damages would depend on the circumstances. The statute does not say, as the plaintiffs say it says (ipsi dixit) that recovery will be the exact amount of the excess award. It

cannot be so, because, if that is what the statute means, it is an unconstitional penalty statute. See Travelers Indem. Co. v. Chisholm, 384 So.2d 1360 (Fla. 2d DCA 1980) (§ 627.428, Fla. Stat., allowing attorney fees to an insured for disputes with insured is a penalty).

The statute itself does not indicate the nature of the damages recoverable, but penal statutes are construed strictly in favor of the person 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); See Rosen v. Marlin, 486 So.2d 623 (Fla. 3d DCA 1986) (statutory treble damages for civil theft does not extend to claim where contractual relationship existed between the parties where statute did not so state). Similarly, the Legislature's failure to say this (that the damages awardable under § 624.155 for a refusal to settle is the amount of the excess award) mandates a conclusion that such damages are not available.

B. Plaintiffs Can Recover Only Those Damages Proximately Caused by the Insurer's Actions; Fidelity Did Not Cause [and Plaintiffs Did Not Sustain] Any Damages

§ 624.155, Fla. Stat., begins: "Any person may bring a civil action against an insurer **WHEN SUCH PERSON IS DAMAGED**" by certain acts of the insurer. (e.a.). This requirement of the statute, that the bad-faith plaintiff be "damaged" by an act of the insurer is significant for two reasons. First, Fidelity's actions did not cause the award of punitive damages. Second, the plaintiffs

did not sustain any damages.

Part of the confusion over first- and third-party bad-faith actions is that, in these actions, sometimes the terms "damages" and "excess amount of the judgment" are used interchangeably. This is because, in third-party actions, the two terms are interchangeable. They are not, however, interchangeable in a first-party action. In a third-party action, the amount of the excess judgment becomes the measure of damages because the insured has the excess judgment hanging over his head. He is therefore damaged by that amount. On the other hand, in a first-party action, the insured has no excess judgment hanging over his head which he will be called upon to satisfy. The excess judgment is not his measure of damages.

1. Fidelity Did Not Cause the "Damages" Plaintiffs Seek To Recover

Unlike third-party actions, where the conduct of the insurer causes an insured to have an excess judgment hanging over his head, in all first-party uninsured motorist cases, there is no automatic relationship between the amount of damages suffered by the plaintiff and the amount of the excess judgment. The insurer's bad-faith actions do not cause its insured's injury, it is the uninsured motorist who causes the physical injury. And, in this case, it was the uninsured motorist's egregious conduct which resulted in the award of punitive damages. Awarding the plaintiffs the amount of the excess punitive damages award under these circumstances simply does not make sense.

The fallacy of the plaintiffs' argument can be shown by the following example:

A homeowner has a homeowner's policy which provides $10,000 in coverage. The home is burned and sustains $100,000 of damages. The insurer refuses to settle the claim in good faith, so the plaintiff sues the insurer for bad faith.

In such a situation, what are the plaintiff's damages? His damages include, of course, $10,000 of the damage to the home, which is covered by his homeowner's policy. Damages caused by the bad faith of the insurer could be the homeowner's cost of putting his family up at the Holiday Inn while waiting to receive the money to repair his home -- plus meals, plus laundry, plus other expenses he incurs while he is deprived of the use of his home. He would also be entitled to interest on money that should have been paid earlier, and his costs and fees incurred by his having to bring a bad-faith action.

These would be the amount of damages recoverable. However, what the homeowner cannot recover is an automatic award of the entire $100,000 value of his home. The damages actually incurred by the homeowner as a result of the fire would be $90,000 more than the policy limits even if the insurer had tendered its limits immediately. If the excess of the loss above policy limits was automatically the measure of "damages," then plaintiffs would be receiving a windfall.

The Florida Supreme Court discussed the measure of damages in a first-party bad-faith claim in the case of Fidelity & Casualty Co. of N.Y. v. Cope, 462 So.2d 459 (Fla. 1985). This court held that damages in a first-party bad-faith claim would be the costs of going to trial and the interest on money that should have been

paid earlier. The supreme court stated that its landmark decision in Thompson v. Commercial Union Ins. Co., 250 So.2d 259 (Fla. 1971) (allowing injured party to sue the tortfeasor's insurer directly without assignment from tort feasor), did not reflect that the insurance carrier owed an independent duty to the injured party:

> We did not extend the duty of good faith by an insurer to its insured to a duty of an insurer to a third party. The basis for an action remained the damages of an insured from the bad faith action of the insurer which caused its insured to suffer a judgment for damages above his policy limits. Thompson merely allowed the third party to bring such an action in his own name without an assignment.

Cope, 462 So.2d at 461.

In Cope, Brosnan (the driver of the first car) ran a stop sign and killed Cope (a passenger in the second car). In Cope, Brosnan originally suffered a judgment in excess of his policy. Before this action was filed, however, the judgment was satisfied. Upon its being satisfied, Brosnan no longer had a cause of action; if he did not, then Cope did not. Cope's action was not separate and distinct from, but was derivative of Brosnan's.

The supreme court recognized that "[a]n essential ingredient to any cause of action is damages," id., and went on to state that, even if it did recognize a duty from an insurer to an injured third party "to settle the insured's claim within the policy limits, the damages of that third party would be entirely different from the damages of an insured. **AT BEST SUCH DAMAGES WOULD BE THE EXTRA COSTS OF GOING TO TRIAL AND LOSS OF THE MONEY THAT EARLIER SHOULD HAVE BEEN PAID."** Id. at 461 n.5 (e.a.).

The supreme court's reasoning applies to a first-party uninsured motorist claim. Nothing in the statute changes the black-letter rule of law that a plaintiff must show his damages were proximately caused by the breach. See Lyle v. National Savings Life Ins. Co., 558 So.2d 1047, 1048 (Fla. 1st DCA 1990).

2. Plaintiffs Did Not Sustain Any Damages; They Seek To Recover a Windfall

The traditional reason for permitting a bad-faith action is that the insurance carrier could have settled a claim, did not do so, and, thus, exposed its insured to an excess judgment which remains hanging above his head. In the present case, there is no excess judgment hanging above the plaintiffs, they will never have to satisfy a judgment. All plaintiffs have lost is their expectation of reaping a huge windfall. This would be true even if the excess award was for compensatory damages instead of punitive damages. It is doubly true here because the punitive damages award does not represent compensation for any loss suffered by Plaintiffs. See Suarez, 351 So.2d at 1088. Consequently, what the plaintiffs are asserting is just simply bad policy.

There cannot be a cause of action unless there are damages. plaintiffs have been paid the $200,000 policy limit and they suffered no damages over and above that amount. The plaintiffs do not dispute that they have no actual items of damages; they merely seek to recover the excess judgment. (Nor do the plaintiffs dispute that Fidelity did not owe a duty to the uninsured motorist,

Brannan.)[3]

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

As stated earlier, this issue is already before this court in McLeod v. Continental Ins. Co., 15 FLW D2785 (Fla. 2d DCA Nov. 14, 1990), Fla. S. Ct. No.: 77,089, and in Jones. Fidelity agrees with the Second District for the reasons cogently stated in McLeod. The Second District recognized that there are "fundamental differences" between a first- and third-party action because, in a third-party action, the tortfeasor has been exposed to liability for the excess judgment. In a first-party action, he has not.

On the other hand, in Jones the Eleventh Circuit, in its opinion certifying the a similar question to this court, relies in part upon Hollar v. International Bankers, 15 FLW D2888 (Fla. 3d DCA Nov. 27, 1990), for the following proposition:

> (in first-party action, tender of policy limits will not ordinarily satisfy insured's full claim of damages for a bad-faith claim; "if, upon remand, bad-faith actions by the insurers are proven, the [plaintiffs'] damages would equal the amount of the excess judgment for which they are now responsible."

Jones, 920 F.2d at 850. There is a big problem with this statement -- **HOLLAR IS NOT A FIRST-PARTY ACTION, IT IS A THIRD-PARTY ACTION.** Hollar sued his insurers because, he claimed, they failed to settle with the injured third party. Because Hollar is a third-party action, it has no impact upon our case. It is governed by the well-settled rule that in a third-party action

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[3] It should also be noted that the Sheltons are still named parties in this suit. Even though they suffered no compensable injuries, the Sheltons seek a windfall as well -- presumably they would receive a share of the punitive damages also.

the measure of damages is the amount of the excess judgment.

To the extent that the plaintiffs might argue the Third District also decided the measure of damages in a first-party action would be identical to the measure of damages in a third-party action by its following statement in Hollar: "Section 624.155 changes neither the case law obligation of good faith nor the measure of the damages due an insured once bad faith is proven. Rather than changing the decisional law, section 624.155 simply expands the cause of action to first-party claims." Hollar, 15 FLW at D2888, this off-the-cuff statement is merely that. The issue of proximately caused damages in a first-party action was just not considered. And if the Third District does end up concluding that the measure of damages in both first-and third-party actions is the amount of the excess judgment, it would be just another example of the Third District's recent tendency to consistently err by leaning over too far on the side of the insureds against insurance companies.

The prime example of this bias is AIU Ins. Co. v. Block Marina Inv. Co., 512 So.2d 1118 (Fla. 3d DCA 1987), which was quashed by this court in AIU Ins. Co. v. Block Marina Inv. Co., 544 So.2d 998 (Fla. 1989). AIU Ins. Co. is a prime example because in it the Third District, on the ground of furthering legislative intent, interpreted an insurance statute, § 627.426, Fla. Stat., to the point of "rewriting [the] insurance policy." AIU Ins. Co., 544 So.2d at 1000. This court recognized that the Third District's strained "construction presents grave constitutional questions, the impairment of contracts, and the taking of property

without due process of law." Id. These same problems exist in Jones and may exist in Hollar -- if Hollar is construed to mean the measure of damages is the same in both first- and third-party actions.

Another example of the Third District's bias is in Berger v. Firemans Fund Ins. Co., 515 So.2d 997 (Fla. 3d DCA 1987). In Berger, the court again refused to follow the provisions of the insurance contract (which provided the parties could arbitrate and also provided the parties could demand a jury trial if the award was over $10,000). The Third District held the policy contravened the arbitration statute and also public policy. This court disapproved the Third District's decision in Roe v. Amica Mut. Ins., 533 So.2d 279 (Fla. 1988), stating that the provision did not violate public policy and that "[w]e fail to discern any logical reason which would or should prohibit such an agreement." Roe, 533 So.2d at 281.

In Ranger Ins. Co. v. Bal Harbour Club, Inc., 509 So.2d 945 (Fla. 3d DCA 1987), the Third District, sitting en banc, again ruled against the insurer, this time by finding no violation of public policy. The Third District's decision was quashed by this court in Ranger Ins. Co. v. Bal Harbour Club, Inc., 549 So.2d 1005 (Fla. 1989). This court held the Third District's decision did violate public policy (holding that an insured cannot be indemnified by an insurer for loss resulting from an intentional act of religious discrimination).

Another excellent example is a case plaintiffs rely upon in their brief -- The Third District's decision in Fidelity &

Casualty Ins. Co. v. Taylor, 525 So.2d 908 (Fla. 3d DCA 1987) [Plaintiffs' Brief at 14]. Unfortunately, **TAYLOR WAS DISAPPROVED BY THIS COURT.** In Taylor, the Third District misinterpreted the same bad-faith insurance statute at issue in our case, § 624.155, Fla. Stat. And, as it may have done in Hollar, the court concluded that the statute did away with the differences between first- and third-party bad faith actions. Taylor, 525 So.2d at 909. This court disapproved the Third District's decision in Kujawa v. Manhattan Nat'l Life Ins., 541 So.2d 1168 (Fla. 1989), once again trying to correct a fundamental misimpression of the Third District. This court stated that there were differences between the two and that the relationship between the insurer and the insured in a bad faith cause of action is adversarial, not fiduciary.

And, finally, in Griss v. Aetna Casualty, 554 So.2d 556 (Fla. 3d DCA 1989), the Third District once again found coverage for an insured, notwithstanding a clear exclusion in the policy. This court quashed the Third District's decision, Aetna Casualty v. Griss, 568 So.2d 903 (Fla. 1990), because the insured's act of self-defense was excluded from coverage under the policy exclusion for injury expected or intended by the insured.[4]

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[4] Another Third District case which should be disapproved by this court in the near future is Rodriguez v. American United Ins. Co., 570 So.2d 365 (Fla. 3d DCA 1990). In Rodriguez, the Third District cites Quirk v. Anthony, 563 So.2d 710 (Fla. 2d DCA 1990), as support for its holding that, for the purpose of getting a knowing rejection of UM, an "independent" agent (a) is the agent of the insurer he is licensed to represent, and (b) is not the insured's broker. This decision in Quirk represents a radical change in the law of insurance agents and brokers, and this court has accepted review of Quirk, No. 76,432 (Oral argument set for June 5, 1991).

D. Other Than Jones, Federal Courts Have Ruled a Plaintiff Can Recover Only Damages "Caused" by the Insurer

The plaintiffs continue to rely heavily upon Jones v. Continental Ins. Co., 716 F.Supp. 1456 (S.D. Fla. 1989). This is understandable because, at the time Jones came out, it was the only federal case on this issue, and it was in the plaintiffs' favor. Judge Aronovitz decided in Jones that, just as in a third-party action, the measure of damages is the amount of the excess judgment. Judge Aronovitz made the same mistake the Third District may have made in Hollar -- he simply did not analyze the fundamental difference between first- and third-party actions.

Jones, of course is no longer the only federal case on this issue. Next, of course, came Judge Spellman's decision in this case. Judge Spellman recognized the distinction between first- and third-party causes of action. Now another federal trial court has considered the issue. In 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) [Fidelity's Appx. A.], Judge Fawsett came to the same conclusion that Judge Spellman had.

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. Cocuzzi, [Appx. A. at 8-9].[5]

Aside from these three Florida federal trial courts, there has also been a federal appellate decision by the Fourth Circuit Court of Appeals which recognized that, in a UM situation, it is the **UNINSURED MOTORIST** who is responsible for the injuries. Weese v. Nationwide Ins. Co., 879 F.2d 115 (4th Cir. 1989). As the court stated, "Nothing that [the insurer] did, or omitted to do, contributed to the damage [the insured] suffered as a result of the accident." Weese, 879 F.2d at 121. Consequently, the Fourth Circuit refused to hold the insurer liable for the uninsured motorist's acts.

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[5] 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 Fidelity has previously stated, plaintiffs have incurred no damages. Unlike a third-party action, plaintiffs have no excess judgment hanging over their heads, they just don't get the windfall they want.

The plaintiffs argue Fidelity's proximate cause argument is misguided. [Plaintiffs' Brief at 14-16]. Even if this is true, which it certainly is not, the plaintiffs ignore the fact that they are seeking punitive damages from the insurer for conduct by the **UNINSURED MOTORIST**. The insurer did nothing to warrant the severe sanction of punitive damages.

CONCLUSION

I. The trial court properly granted summary judgment for Fidelity because the only damages left unpaid are punitive damages based on the conduct of the uninsured motorist and these are not recoverable under Florida law.

II. The amount of the excess judgment is not automatically the amount recoverable in a first-party bad-faith claim under §624.155. The plaintiffs must still show that the insurer's conduct proximately caused their damages. There was no damage to the plaintiffs. Additionally, nothing the insurer did caused the award of punitive damages. It was the conduct of the uninsured motorist which caused the award of punitive damages.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 25th day of February 1991, to: James B. Tilghman, Jr., Esq., Stewart Tilghman Fox & Bianchi, Suite 1900, 44 West Flagler Street, Miami, FL 33130-1808.

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