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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

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REPLY BRIEF OF APPELLANTS/MOVANTS

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ARGUMENT

I
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

In its argument on this point, F & C never squarely faces the issue before the Court, i.e. what authority, reason or rationale there could be for eliminating a punitive damage award that was both covered and recoverable in the underlying case from the potential recovery in a bad faith action. No case is cited by F & C holding that this can or should be done, and no reason or rationale is put forth to justify such a result.

Rather, F & C spends its time arguing satellite propositions whose relevancy ranges from tangential to nonexistent. First, in pages eight through twelve of its brief, F & C suggests that the Plaintiffs cannot recover their excess punitive damage award, which was based upon North Carolina law, because Florida law controls the remedy in Florida bad faith actions according to Government Employees Ins. Co. v. Grounds, 311 So.2d 164 (Fla. 1st DCA 1975), aff'd, 332 So.2d 13 (1976). Neither Grounds nor F & C's "Florida remedy" argument, however, address the issue involved in this case.

In Grounds, both the First District and this Court held that the question of whether a cause of action for bad faith exists would be determined by Florida law when the underlying case was a Florida case. No issue.[1] But Grounds did not address the question of what law controlled the

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[1]Grounds thus answers the question the Eleventh Circuit raises in footnote 6 of its certification opinion. While questions of coverage are controlled by the law of the State in which the policy was issued, the insurer's lack of performance thereunder in a Florida lawsuit subjects it to a Florida action for bad faith. F & C's attempt to turn the Eleventh

damages in the underlying case, and thus the potential components of any excess award. And Grounds certainly did not hold that components of the underlying award could be eliminated later under the guise of Florida bad faith law. This, of course, is exactly what happened in the federal district court, and neither Grounds nor any known case supports such a holding.

F & C simply tries to read too much into Grounds' holding that Florida law determines what remedy exists for bad faith which occurs in Florida. What that means is that Florida law controls the question of whether an action for bad faith exists at all (i.e. the issue in Grounds), whether an excess judgment is a recoverable element of damages in a bad faith action (i.e. the issue raised in the second point of these briefs), and even whether punitive damages are recoverable based upon the bad faith conduct of the insurer. (§624.155(4), Florida Statute).[2]

What it does not mean, however, is that Florida bad faith law controls the damages recoverable in an underlying action governed by the law of another state - the damages which necessarily make up any excess judgment.

Second, F & C argues that the Third District's earlier decision in this case, Adams v. Brannan, 500 So.2d 236 (Fla. 3d DCA 1986), rev. denied, 511

Circuit's question into an argument in its favor on page 12 of its brief is nonsensical.

[2]F & C tries to make some point on page 7 of its brief by underscoring the fact that the punitive damages at issue in this case, unlike those provided by Section 624.155(4), Florida Statutes, were awarded based upon the tortfeasor's, not the insurer's conduct. The significance of this is a mystery. Damages in the case underlying a bad faith case are always awarded based upon the tortfeasor's, not the insurer's conduct. And if those damages are covered by the policy, they may be recovered from the insurer. Likewise, if the covered damages awarded exceed the policy limits, they may become the subject of a bad faith action. All of this was true of the punitive damages awarded in this case.

So.2d 297 (Fla. 1987), does not mandate the result the Plaintiffs urge before this Court. (F & C's brief, pp. 12-14). If F & C means that Adams v. Brannan does not address the issue before the Court, that is certainly true. The Third District held only that, in the underlying case, North Carolina law controlled the question of (and provided for) uninsured motorist coverage for punitive damages. If F & C means to suggest, however, that Adams v. Brannan is irrelevant to the Court's present inquiry, that is untrue. The fact that punitive damages was a covered and recoverable element of damages in the underlying case makes the award a legitimate part of the excess judgment which resulted. There is no bad faith law anywhere holding that the elements making up an excess judgment can be revisited, much less eviscerated, when the bad faith action is filed.

Finally, F & C spends pages fourteen through eighteen of its brief arguing that punitive damage awards are not covered by uninsured motorist insurance under Florida law, and that this is a wise rule given the limited nature of uninsured motorist coverage and the questionable value of punitive damages as a deterrent in this context. While the Plaintiffs disagree with much of F & C's position, the point here is that all of this has nothing to do with the issue before the Court.

The question is not whether the Plaintiffs could have recovered punitive damages against F & C in an uninsured motorist action where questions of coverage were governed by Florida law, which was the issue in Suarez v. Aguiar, 351 So.2d 1086 (Fla. 3d DCA 1977), cert. dismissed, 359 So.2d 1210 (1978), and Arnette v. Continental Ins. Co., 490 So.2d 158 (Fla. 3d DCA 1986). The question is whether, having recovered them in a case where that issue was controlled by North Carolina law, F & C's Florida duty to

negotiate all of the Plaintiffs' covered claims in good faith is going to be enforced or be eliminated in a tangle of inapplicable legal arguments.

For the above reasons, as well as those set forth in the Plaintiffs' initial brief, the Eleventh Circuit's certified question should be answered in the affirmative.

II
A JUDGMENT WHICH EXCEEDS THE LIMITS OF UNINSURED MOTORIST COVERAGE CAN BE RECOVERED IN A BAD FAITH ACTION UNDER SECTION 624.155, FLORIDA STATUTES

What the Court must determine here or in other cases before it is whether the Florida Legislature intended that excess judgments be a recoverable element of damages in first party bad faith actions under Section 624.155, Florida Statutes. Given a decision making process that begins and ends with trying to discern legislative purpose, see, e.g., Lowry v. Parole and Probation Com'n, 473 So.2d 1248 (Fla. 1985), F & C's approach to this issue is remarkable.

First, it tries to explain away references in both the legislative history of Section 624.155 and in the statute itself to judgments in excess of policy limits[3] by arguing that this merely means that bad faith awards for

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[3]Section 624.155(7), Florida Statutes, provides that:

> The damages recoverable pursuant to this Section ... may include an award or judgment in an amount that exceeds the policy limits.

The June 3, 1982 Staff Report, 1982 Insurance Code Sunset Revision (HB4F; as amended HB10G) provides:

> [T]he sanction [for not dealing in good faith] is that a company is subject to a judgment in excess of policy limits.

interest, attorney's fees and any consequential damages resulting from an insurer's refusal to settle are permissible even if their total exceeds the limits of the insurance policy. This argument is nonsense and violates several rules of statutory construction. The Florida Legislature did not say that damages under Section 624.155 "may include consequential damages which exceed the policy limits", it said that damages "may include an award or judgment in an amount that exceeds the policy limits." §624.155(7), Florida Statutes. Needless to say, F & C cannot ask the Court to rewrite the statute. See, e.g., Chaffee v. Miami Transfer Co., 288 So.2d 209, 215 (Fla. 1974).

The argument also presumes that the Florida Legislature was unaware of the law when it enacted and amended Section 624.155, so that its reference to excess judgments and awards was mere coincidence and not a reference to those well known legal concepts.[4] Of course, the required presumption is just the opposite. See, e.g., Ford v. Wainwright, 451 So.2d 471, 475 (Fla. 1984), Opperman v. Nationwide Mutual Fire Ins. Co., 515 So.2d 263, 266 (Fla. 5th DCA 1987), rev. denied, 523 So.2d 578 (1988).

The argument would also require the Court to conclude that the

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[4]The reference to "awards" as well as judgments in Section 624.155(7) is particularly telling. Section 624.155 envisions a legal action for bad faith, and any damages awarded in such an action would come in the form of a judgment. On the other hand, uninsured motorist disputes are frequently resolved by arbitration which results in an "award". In fact, many arbitration awards that exceed policy limits become the subject of first party bad faith actions. See, e.g., Fidelity and Casualty Co. of New York v. Taylor, 525 So.2d 908 (Fla. 3d DCA 1987), rev. denied, 528 So.2d 1181 (1988); Opperman v. Nationwide Mutual Fire Ins. Co., 515 So.2d 263 (Fla. 5th DCA 1987), rev. denied, 523 So.2d 578 (1988). The statutory reference to awards in excess of policy limits is an obvious reference to this situation, not to the kinds of consequential damages to which F & C would confine a Section 624.155 recovery.

statutory reference to judgments and awards that exceed policy limits is meaningless surplusage - something the Court cannot do. See, e.g., Johnson v. Feder, 485 So.2d 409, 411 (Fla. 1986). If the Florida Legislature intended that the damages recoverable in a first party bad faith action under Section 624.155 be limited to fees, interest and other types of consequential damages occasioned by a plaintiff not having recovered his money earlier, there would be no need to sanction the recovery of judgments in excess of policy limits. The coverage provisions in an insurance policy do not extend to these types of damages in the first place. They are extra contractual damages to which policy limits have no relevance or meaning. Policy limits only come into play when dealing with covered damages, ie., the kind of damages that produce the excess judgment in the underlying case. Thus, the reference to damages that exceed policy limits is a clear reference to excess judgments in the underlying case, not, as F & C would have it, to extra contractual consequential damages.[5]

Second, in addition to trying to twist or obliterate the language of Section 624.155, F & C ignores the fact that the interpretation it promotes would render Section 624.155 meaningless in the context of uninsured motorist coverage. The fees and costs it wants to award bad faith victims are already

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[5]F & C's reliance upon Fidelity and Casualty Co. of New York v. Cope, 462 So.2d 459 (Fla. 1985), for the proposition that a first party bad faith plaintiff's damages are limited to these types of consequential damages under Section 624.155 is seriously misplaced. The Court was not interpreting Section 624.155 or dealing with a first party bad faith claim in Cope. Rather, it was determining whether an injured party loses his bad faith claim against the defendant's insurer when the defendant satisfies the judgment. In holding that the claim is lost, the Court actually confirmed that the excess judgment, rather than the additional consequential damages it could hypothetically imagine and F & C champions, is the gravamen of a bad faith action.

available from other sources (see Plaintiffs' initial brief, p.12), and without responsibility for the excess judgments bad faith produces there is no incentive for insurers to comply with the Legislature's mandate that they deal in good faith with first party claims.

After trying to sidestep the critical issue of legislative intent, F & C argues that principles of causation preclude recovery of excess judgments in first party bad faith actions. The basis for this argument is twofold: that the damages making up the excess judgment are caused by the tortfeasor, not the insurer; and that, unlike in a third party bad faith situation, the insured is not "exposed" to a judgment in excess of policy limits. Neither of these propositions, however, get F & C where it wants to go.

The fact that the damages producing the excess judgment were ultimately caused by the tortfeasor is meaningless. The same is true in both third and first party bad faith actions.

Similarly, the fact that the first party bad faith plaintiff suffers from the inability to collect a judgment rather than from "exposure" to one is a distinction without a difference. In both cases, the excess judgment is proximately caused by the insurer's bad faith - the excess judgment would not exist "but for" the insurer's refusal to act in good faith by settling within policy limits when it had the opportunity to do so. In both cases the insured is damaged by the excess judgment - one by not being able to collect it and the other by being exposed to or threatened by it. And in

both cases the amount of the excess judgment forms a measure of the damage.[6]

Finally, F & C spends pages twenty-seven through thirty-two of its brief reviewing the decisions which have addressed the question of whether excess judgments are recoverable as damages under Section 624.155. While most of this is appropriate,[7] the question is now in this Court's hands, and its decision must be guided by the intent of the Florida Legislature, not the judgments of inferior or collateral courts. In this regard, the language of the statute, its legislative history, and its clarifying amendment, when viewed against the backdrop of previously existing law and what the Legislature was trying to accomplish, lead to one unmistakable and logical conclusion. Whether an insured is the defendant or the claimant, the Florida Legislature has determined that, where an insurer refuses to settle a claim within policy limits when in good faith it should, the insurer will be liable for the full value of the claim.

For these reasons, as well as those set forth in Plaintiffs' initial brief, the assumptions made in the Eleventh Circuit's certified question should be validated.

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[6]The notion that the amount of the excess verdict represents a third party bad faith plaintiff's actual damages was exploded in Plaintiffs' initial brief, and F & C has not taken issue with the analysis. In fact, in referring to a third party bad faith plaintiff's damages, F & C now uses phrases like "exposure" to a judgment or having a judgment "hanging over" one's head. This, of course, is not the same as having paid it.

[7]What is inappropriate is F & C's tirade concerning the Third District's decisions on various non-related insurance issues. This was apparently prompted by an urge to discredit a statement made in Hollar v. International Bankers Ins. Co., 572 So.2d 937 (Fla. 3d DCA 1990), upon which the Plaintiffs have not relied.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail this 22nd day of March, 1991 to: Love Phipps, Esq., Corlett, Killian, Hardeman, McIntosh & Levi, P.A., 116 West Flagler Street, Miami, Florida 33130.

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