IN THE SUPREME COURT OF FLORIDA

CASE NO.: 83,537

District Court of Appeal,
Fourth District No. 92-2832

STATE FARM MUTUAL
AUTOMOBILE INSURANCE
COMPANY,

Petitioner,

vs.

VERONICA ANN LaFORET
and HENRY A. LaFORET,
her husband,

Respondents.

AMICUS CURIAE BRIEF OF GOVERNMENT EMPLOYEES INSURANCE COMPANY

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INTRODUCTION

The Petitioner, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, will be referred to as "STATE FARM" or "Petitioner". The Respondents, VERONICA ANN LaFORET and HENRY A. LaFORET, will be referred to as "LAFORET" or "Respondents". Throughout this Brief, the terms uninsured/underinsured motorist coverage shall be abbreviated as "UM".

All emphasis is supplied by counsel unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

GOVERNMENT EMPLOYEES INSURANCE COMPANY adopts the Statement of the Case and Facts as stated by the Petitioner, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, in its Initial Brief on the Merits.

ISSUE ON APPEAL

WHETHER AMENDED §627.727(10), FLORIDA STATUTES (SUPP. 1992), IS A REMEDIAL STATUTE AND HAS RETROACTIVE APPLICATION?

SUMMARY OF ARGUMENT

The Florida Legislature amended the Uninsured Motorist Act in July of 1992 by adding subsection (10). That amendment enlarged the totality of damages recoverable from a uninsured motorist carrier in first-party bad-faith actions. The Legislature "termed" the statutory amendment "remedial" in nature rather than substantive and therefore having retroactive application.

Prior to the amendment, uninsured motorist carriers were responsible for damages, which were specified as including, but not limited to: interest, court costs, and reasonable attorney's fees. The passage of this provision was obviously in response to this Court's decision in McLeod v. Continental, 591 So.2d 621 (Fla. 1992). In McLeod, the Florida Supreme Court limited the damages in first party bad-faith actions, which are recoverable, to those which were the natural, proximate, probable or direct consequence of an insurer's bad faith actions. In so holding, this Court specifically rejected the premise that first-party bad-faith damages are fixed at the amount of the excess judgment.

In its decision, the Supreme Court noted that the Legislature's 1990 amendment to the UM statute clarified its intent to limit damages to those "which were the reasonable foreseeable result of a specific statutory violation". The Legislature's enactment of subsection (10), however,

retroactively increases the measure of damages from those which had been previously recoverable as specified by the statute.

Generally, while retroactive legislation is not necessarily invalid, it is constitutionally defective if "vested rights are adversely affected or destroyed, or where a new obligation or duty is created or imposed, or an additional disability is established..." by its enactment See, McCord v. Smith, 43 So.2d 704 (Fla. 1950).

In the case herein, the Legislature's amendment creates a patent new obligation and/or disability upon the UM carriers of this state. The retrospective application of the subsection cannot be applied in consonance with the pronouncement of the due process clause of Florida's Constitution.

In the past, this Court has stricken similar-type legislation whenever it application has constituted an infringement upon a substantive right. See, L. Ross, Inc. v. R. W. Roberts Construction Co., 481 So.2d 484 (Fla. 1986). In analogous case, this Court disallowed the retroactive application of a statute imposing attorney's fees, because it infringed upon a substantive right. In other instances, this Court has refused to apply a statute's retroactivity when its imposition equates to the abrogation of a value. See, State Dept. of Transportation v. Knowles, 402 So.2d 1135 (Fla.

1981). Moreover, in Knowles, the Court found that the statute's amendment was not merely a procedural adjustment of a remedy, but operated as an unconstitutional infringement on a substantive right.

Therefore, it stands to reason that if the Legislature is precluded from reducing a jury award, it should not be permitted to increase an insurer's obligation retroactively by imposing new duties and/or additional damages. The retrospective application of subsection (10) would open the floodgates of litigation to an untold number of cases where excess judgments were rendered against insurance carriers. It is not only unconstitutional, but also inequitable to impose this new formula which will dramatically increase a carrier's obligation under cases already decided.

Clearly, it has been held that the empowerment of the Legislature should not be used to bow to political pressures so that it is tempted to use retroactive legislation to seek retribution against unpopular groups and individuals. Although the Legislature has termed the subsection "remedial", its impact would greatly affect a UM carrier's substantive obligations as previously fixed by law. Accordingly, the retrospective application of §624.155, Florida Statutes, is unconstitutional and the decision of the Fourth District Court of Appeal should be answered in the negative.

ARGUMENT

In July of 1992, the Legislature amended the Uninsured Motorist Act (§627.727, Florida Statutes) by adding subsection (10). That subsection provides as follows:

> "(10) The damages recoverable from an uninsured motorist carrier in an action brought under s.624.155 shall include the total amount of the claimant's damages, including the amount in excess of the policy limits, any interest on unpaid benefits, reasonable attorney's fees and costs, and any damages caused by a violation of a law of this state. The total amount of the claimant's damages are recoverable whether caused by an insurer or by a third-party tort-feasor".

The Legislature explained in Ch. 92-318, 1992 Fla. Laws 3151:

> "The purpose of subsection (10) of Section 627.727,...relating to damages, is to reaffirm existing legislative intent, and as such is remedial rather than substantive. This section and Section 627.727(10), Florida Statutes, shall apply to all causes of action accruing after the effective date of Section 624.155, Florida Statutes".

It should be noted that the effective date of §624.155, Florida Statutes, was October 1, 1982.

Accordingly, by its addition of subsection (10) to §627.727, the Legislature apparently attempted to create a new constellation of damages recoverable from an uninsured

motorist carrier, not previously recognized. Now the responsibility of an uninsured motorist carrier would be measured by the totality of the damages sustained by an uninsured motorist claimant by the actions of an uninsured or underinsured motorist. Prior to this change, the damages for which an uninsured motorist carrier would be responsible in a first-party bad-faith action were specified as including, but not necessarily limited to: interest; court costs; and reasonable attorney's fees incurred by the claimant. The passage of this provision was obviously a reaction to this Court's decision in the case of McLeod v. Continental Insurance Company, 591 So.2d 621 (Fla. 1992).

In McLeod, this Court reviewed §624.155, Florida Statutes, and its history, in great detail and held that the damages recoverable from an uninsured motorist carrier, in a first-party suit for bad-faith under that section, are limited to those amounts which represent the natural, proximate, probable, or direct consequence of an insurer's bad faith actions. This Court specifically rejected the contention, there, that first-party bad faith damages would be fixed at the amount of the excess judgment (representing the totality of the bodily injury damages an insured would be entitled to reduce to judgment against an uninsured or under-uninsured motorist).

In reaching its holding in McLeod, this Court noted that in 1990 §624.155 had been amended to clarify the Legislature's intent as to the damages recoverable in actions brought pursuant to that section. That amendment provided that those damages "which are a reasonably foreseeable result of a specified violation of this section by the insurer" may be recovered. Ch. 90-119, §30 Laws of Florida (1990).

In commenting on this clarifying amendment, this Court stated:

> "While it is reasonably foreseeable that the insurer's bad faith refusal to settle will result in an excess judgment, the statute says the insured is entitled to damages which are a reasonably foreseeable result of the violation. As pointed out earlier, the insured in a first-party action, is not injured as a result of the excess judgment and, thus, the excess judgment does not meet the definition of damages".
>
> McLeod, at 626.
> (Emphasis in original).

The question therefore arises whether the Legislature is empowered to retroactively increase the measure of damages against an uninsured motorist carrier from those which would have been previously recoverable in a §624.155 action.

While retroactive provisions of legislative acts are not necessarily invalid, Village of El Portal v. City of Miami Shores, 362 So.2d 275, 277 (Fla. 1978), retrospective

statutes are constitutionally defective where "vested rights are adversely affected or destroyed, or when a new obligation or duty is created or imposed, or an additional disability is established, in connection with transactions or considerations previously had or expiated". McCord v. Smith, 43 So.2d 704, 708-709 (Fla. 1950).

Accordingly, the focus becomes whether the legislative pronouncement that first-party bad-faith damages encompass the "excess judgment" represents a situation where a new obligation or duty is created or an additional disability is established retroactively. As will be shown, the increased obligation and disability is patent. As such, the legislative pronouncement cannot be applied retrospectively in consonance with the due process clause of Florida's Constitution.

This Court, in the case of L. Ross, Inc. v. R.W. Roberts Construction Co., 481 So.2d 484 (Fla. 1986), agreed with a "well-reasoned opinion" of the lower court in finding that a legislative enactment granting a right to an attorney's fees in excess of what had previously been statutorily allowed in judgments against sureties, constituted an infringement on a substantive right. As such, it could not be applied retrospectively. This court there quoted the lower court:

> "This argument [that the amendment is procedural, effecting only the measure of damages for vindication of an

> existing substantive right] fails to recognize that substantive rights do not exist in an absolute binary world but are relative and are often a matter of degree and that damages always follow the right and that any change in a substantive right normally changes the amount of damages resulting from a breach of that substantive right. Therefore, it cannot be reasoned that a statutory change that affects and changes the measure of damages is merely 'remedial' and thus, procedural, and, therefore, is not a change in the substantive law giving the substantive right which is the basis for the damages".
>
> L. Ross, Inc., at 485.

Similarly, in an analogous case, this Court held that the statute allowing for the imposition of attorney's fees in medical malpractice actions could not apply retroactively to causes of action which vested prior to the statute's effective date. This Court noted there that,

> "Due process considerations preclude retroactive application of a law that creates a substantive right. Whitten v. Progressive Casualty Insurance Co., 410 So.2d 501 (Fla. 1982)".
>
> Florida Patient's Compensation Fund v. Schere, 558 So.2d 411, 412 (Fla. 1990).

Also instructive in situations involving the Legislature's right to retroactively affect damages in civil actions, is this Court's opinion in State Department of Transportation v. Knowles, 402 So.2d 1155 (Fla. 1981). There

this Court dealt with the retroactivity of §768.28, which provided public employees absolute immunity from suit. That statute changed the prior law as enunciated by this Court in the case of District School Board of Lake County v. Talmadge, 381 So.2d 698 (Fla. 1980). In the Talmadge decision, this Court held that public employees were partially indemnified, but not immunized, from suit for injuries that they inflicted in the course of their employment.

In Knowles, the Plaintiff had obtained a jury verdict for $70,000.00 against the Department of Transportation and one of its employees for a motor vehicle mishap. A retroactive application of the legislative enactment there would, accordingly, reduce Daniel Knowles' jury award for his damages from $70,000.00 (recoverable against the Department of Transportation and its employee) to $50,000.00 (the existing limits of liability of the Department of Transportation at the time the case was decided). This Court noted that a "retroactive abrogation of value has generally been deemed impermissible". Knowles, at 1158. It further found that because the statute affected Knowles' right to his full tort recovery it was not merely a procedural adjustment of his remedy but operated, impermissibly, as a unconstitutional infringement on his substantive rights.

Certainly, if the Legislature cannot reduce a jury award by enacting retroactive legislation, it should not,

concomitantly, be permitted to increase an insurance company's obligation, retroactively, to a claimant by imposing upon it additional damages representing an "excess judgment".

The retrospective application of subsection (10) to §627.727 would work much mischief should it be allowed to stand. It is suggested that there are many jury awards in this state which have been rendered within the past five years (the limitation period for bringing first-party bad-faith actions in this state) which exceed by large amounts the uninsured motorist limits available to a claimant. Many of these judgments have only been partially satisfied by the carrier by paying the extent of its coverage limits. By allowing for the retrospective application of subsection (10), this Court would open up untold numbers of cases for further litigation against the uninsured motorist carriers of this state. It would seem inequitable and unconstitutional, to revisit upon those carriers a new formula for determining damages so as to greatly increase their obligations under cases long decided.

The United States Supreme Court has recently noted:

> "The Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means

of retribution against unpopular groups or individuals".

Landgraf v. USI Film Products, No. 92-757 (U.S. Sup.Ct, April 26, 1994).

The argument appears manifest that our state Legislature is likewise responsive to political pressures. Certainly those pressures were brought to bear in the enactment of subsection (10). That legislation, though termed "remedial", actually has great impact on existing substantive obligations previously fixed in the law. A retrospective application of subsection (10) of §627.727 is, therefore, unconstitutional. Accordingly, the certified question of the Fourth District Court of Appeal (whether subsection (10) has retroactive application) should be answered in the negative.

CONCLUSION

The certified question of the Fourth District Court of Appeal as to whether subsection (10) of Florida Statute §627.727 should have retroactive application should be answered by this Court in a negative fashion and the decision of the Fourth District Court of Appeal, on that issue, should be disapproved.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was mailed this 15th day of June, 1994, to: BETSY E. GALLAGHER, ESQUIRE Attorney for Petitioner, 25 West Flagler Street, Penthouse, Miami, Florida 33130. Telephone: (305) 374-1212; JANE KREUSLER-WALSH, ESQUIRE, Attorney for Respondents, 501 South Flagler Drive, Suite 503, Flagler Center, West Palm Beach, Florida 33401. Telephone: (407) 659-5455; GEORGE H. MOSS, ESQUIRE, 817 Beachland Boulevard, Vero Beach, Florida 32964-3406. Telephone: (407) 231-1900; LOUIS K. ROSENBLOUM, ESQUIRE, Attorney for Amicus Curiae, Academy of Florida Trial Lawyers, P.O. Box 12308, Pensacola, Florida 32581. Telephone: (904) 435-7000; GEORGE A. VAKA, ESQUIRE, Attorney for Amicus Curiae, Florida Defense Lawyers Association, Nationwide Insurance Companies and National Association of Independent Insurers, P.O. Box 1438, Tampa, Florida 33601. Telephone: (813) 228-7411; THOMAS KANE, ESQUIRE, 2816 East Robinson, Orlando, Florida 32803. Telephone: (407) 898-9130.

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