SUPREME COURT OF FLORIDA
Tallahassee, Florida

STATE FARM MUTUAL
AUTOMOBILE INSURANCE
COMPANY,

Petitioner,

vs.

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

Respondents.

CASE NO. 83,537

RESPONDENTS' ANSWER BRIEF ON CERTIFIED QUESTION

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PREFACE

This is a petition for review of a question certified by the Fourth District Court of Appeal to be of great public importance in a first party bad faith action. Petitioner, State Farm Mutual Automobile Insurance Company, was the appellant/defendant in the lower courts and respondents, Veronica and Henry A. LaForet, were the appellees/plaintiffs. They are referred to herein as the plaintiffs and the defendant or by their proper names.

The following symbol is used:

R - Record on Appeal

STATEMENT OF THE CASE AND FACTS

The plaintiffs accept the defendant's characterization of the pleadings and the underlying case, but cannot accept its summary of the trial, which defendant has improperly slanted in a light most favorable to itself. The plaintiffs provide the following corrections:

Henry LaForet described the accident as follows: He and his wife were within a mile or two of their destination, waiting at a light, with two or three cars ahead of them (R 325). The car immediately ahead was an ambulance (R 325). Suddenly, he and his wife heard a "wham" and were hit from behind (R 326). The impact was "of substantial force" (R 327). To say that the car that hit them was "rolling at 2 to 3 miles per hour at impact" is

"ridiculous" (R 327). Mrs. LaForet confirmed that there was a "big thud" and their car "just about buckled" (R 120). The impact threw her and her husband against the windshield/dashboard area and then smacked them back against the seat again (R 120). She did not consider that a slight jolt (R 120). The ambulance driver heard the noise and came to investigate (R 326). He called another ambulance driver who put Mrs. LaForet on a board with a neck brace and took her to the hospital (R 326).

Mr. LaForet did not assume that State Farm would present a claim for his wife's injuries along with filing a claim against Travelers to recover their deductible. As State Farm admits on page 10 of its brief, "From time to time Mr. LaForet contacted Grice's office [State Farm's local agent] and asked what was happening on the claim against Travelers (R 333, 353-354)." Before the LaForets contacted a lawyer, and around the time State Farm refused to pay Mrs. LaForet's hospital expenses, a woman in Mr. Grice's office told Mr. LaForet that he had $400,000 in available UM coverage, $200,000 for himself and $200,000 for his wife (R 357-358). When Mrs. LaForet visited her doctor in September of 1986, the LaForets had not discussed who would pay the hospital expenses (R 330). When they returned from the doctor, Mr. LaForet spoke to someone in Bob Grice's office (R 330). He was told he had $10,000 PIP and $10,000 med-pay for a total of $20,000 for medical treatment (R 330). Shortly later, his wife needed a major operation. The hospital told him that State Farm

would not pay and that he needed to guarantee payment or his wife could not have the operation (R 330). He again contacted State Farm through Bob Grice's office, who assured him that they would take care of it, which they did (R 331). State Farm's PIP and med-pay coverage ran out in April of 1988, at which point the LaForets used their personal health insurance which paid 80 to 85% of the costs (R 334).

Mrs. LaForet had problems with her back prior to the accident (R 117, 143-144). She had a nerve block in January of 1986, and felt fine afterwards (R 116-117). Between January of 1986 and the accident, she flew to Chicago and to Canada (R 117). She continued her activities in the church where she was president of the Women's Guild, which involved a lot of driving (R 117). She walked every morning for at least an hour and a half and bicycled in the evening (R 117). She gardened, did all her own housework, and played golf (R 117-118). All of these activities ceased after the accident, as her pain progressively worsened (R 121-122). The pain radiated down her right leg, which had never occurred prior to the accident (R 121-122).

At the initial trial in this case, three people testified regarding Mrs. LaForet's health before and after the accident, a doctor, a church sexton, and a retired Marine Corps General (R 123-124). Each testified that after the accident she was laid-up and house bound, as compared to her very active lifestyle prior

to the accident (R 123-125). Two of the three defense experts at the initial trial admitted on cross-examination that their opinions might be different if they had had the opportunity to meet Mrs. LaForet and know her history prior to the accident (R 268).

On page 10 of its brief, State Farm claims that it was unaware of a possible UM claim until it received Mr. Moss' letter of representation. This statement misrepresents State Farm Claims Adjustor Joanne Hopkins' testimony. While Ms. Hopkins did not know about the UM claim until after the plaintiffs retained counsel, she conceded that good claims practice required that State Farm begin investigating Mrs. LaForet's injuries and the applicable coverages from the time the LaForets notified it of the accident in March of 1986 (R 255-259). Ms. Hopkins further admitted that good claims practice in a case involving a pre-existing back problem included consulting a physician and/or obtaining a statement before making medical payments on behalf of the insured.

It was undisputed that State Farm did nothing its manual teaches in the one and one-half years after this accident (R 259). When assigned a UM claim, State Farm's policy is to thoroughly investigate, which includes obtaining statements and checking out potential red herrings about pre-existing conditions, with the goal being to resolve the claim as quickly as possible (R 260). No one from State Farm spoke to the LaForets or Mrs. LaForet's doctor about what happened in the accident or her injuries (R 260, 263).

Ms. Hopkins did not believe that Mrs. LaForet was exaggerating her complaints, yet Ms. Hopkins hired a detective to surveil the LaForets, without their permission, instead of talking to them or their doctor (R 261, 263-264).

At no time before the plaintiffs filed suit did State Farm exercise its right to have Mrs. LaForet see a doctor of its choosing, to have a physician look at the plaintiff's records or x-rays, or to investigate whether the plaintiff was telling the truth (R 189). According to State Farm's own claims supervisor, good claims procedure required State Farm to take the plaintiffs' statements before expending money on med-pay and PIP (R 193-194).

In preparation for mediation, JoAnne Hopkins prepared a detailed evaluation of the case to submit to the claims committee (R 264-265). Her report stated that her discussions with the plaintiffs' attorney indicated that he thought Mrs. LaForet's claim was worth $200,000 or more and Mr. LaForet's loss of consortium claim was worth another $100,000 (R 265). She recommended $100,000 settlement authority (R 264). Ms. Hopkins reported that it would be difficult to convince a jury that Mrs. LaForet's injuries were not related to the accident where State Farm had paid the entire limits of the PIP and quite a bit under the med-pay (R 260). In Ms. Hopkins' opinion, if the jury believed Mrs. LaForet's surgeries resulted from the accident, there could be a substantial award, which she defined as over $100,000 (R 266).

Her recommendation of $100,000 was on top of the $10,000 that Travelers had paid and the $20,000 that State Farm had paid (R 278). Ms. Hopkins' evaluation closed with the mention that the plaintiffs had demanded $300,000, $200,000 for Mrs. LaForet and $100,000 for Mr. LaForet (R 209). State Farm knew that Mrs. LaForet's demand of $200,000 for her injuries was within the policy limits (R 209).

State Farm Claims Supervisor, Wallace Cormier, also prepared an evaluation for the claims committee (R 212). His evaluation concluded that liability was clear and recommended $75,000 in settlement authority (R 212-213). According to Mr. Cormier, "if the jury believes the three surgeries are a result of the accident, there could be a substantial award" (R 213). He defined a substantial award as $100,000 or more (R 214). He limited his evaluation to Mrs. LaForet's claim, even though Mr. LaForet's claim for loss of consortium would go to the jury, also (R 214-215).

The claims committee authorized $40,000 in settlement authority which was presented to the plaintiffs at mediation. Mr. LaForet testified that the plaintiffs would have considered taking in the low $100,000's to settle the case before trial (R 337). The LaForets were willing to compromise and accept less than the policy limits, if the offer was reasonable, but they never got an

offer over $40,000 from State Farm (R 337). The last thing the LaForets wanted to do was go to trial (R 338).

State Farm maintained that it reasonably assumed that Mrs. LaForet had aggravated a pre-existing back injury in the accident and gave her the benefit of the doubt by paying her medical bills (R 182, 187, 237). As plaintiffs' expert, Fred Hazouri, explained, however, State Farm had no obligation to pay Mrs. LaForet's medical bills unless they were related to the accident (R 204). It was inconsistent for State Farm to offer $40,000 because it saw no causal connection between Mrs. LaForet's injuries and the accident and yet pay the medicals (R 405). Likewise, Ms. Hopkins' requested settlement authority of $100,000 and Mr. Cormier's requested settlement authority of $75,000 were "puzzling" (R 401, 413-414). On the one hand, State Farm thought it could rely on its expert, Dr. Seig's opinion, yet its claims adjustor requested authority of $100,000 (R 401). If State Farm truly believed Dr. Seig's opinion, then the case was worth almost nothing (R 401). Apparently, Ms. Hopkins recognized the inherent problem of convincing a jury that a doctor who examined the plaintiff once, for fifteen minutes, at the request of the insurance company, was more credible than her treating physician (R 403). Ms. Hopkins also recognized that the company had already paid the PIP and med-pay, for which it had no obligation unless the injuries were related to the accident (R 403-404). Similarly, if Mr. Cormier honestly believed that Mrs. LaForet's injuries were not the result

of the accident, he would have requested much less than $75,000 in settlement authority (R 414).

In Mr. Hazouri's opinion, State Farm violated its own guidelines and manual which required thorough investigation (R 417). State Farm did not operate with due regard for the rights and feelings of its insureds and violated Section 624.155, its own claims manual, and the common law of Florida (R 417). State Farm could have resolved the case without the LaForets having to hire a lawyer (R 389).

There was evidence that between the filing of the claim by the LaForets and their attorney's getting involved, State Farm paid no attention to the file as it related to Mrs. LaForet's injuries (R 389). That evidenced poor claims handling and violated State Farm's manual, as did State Farm's neglecting to interview its insureds or get statements prior to authorizing the payment of med-pay and PIP (R 387, 389).

When the accident occurred in March of 1986, the tortfeasor was clearly at fault and had inadequate insurance to cover the LaForets' damages (R 394). State Farm recognized early on that this was a case of clear liability with inadequate coverage (R 395). As Mr. Hazouri stated, State Farm's offer of $40,000 under these circumstances was not a good faith offer that would promote meaningful settlement negotiations (R 410).

SUMMARY OF ARGUMENT

This Court should answer the certified question in the affirmative. Section 627.727(10), Florida Statutes (1992), is a remedial statute with retroactive application. By its terms, the statute applies to all causes of action occurring after the effective date of Section 624.155, Florida Statutes (1982). Section 627.727(10) did not change existing law, it merely clarified and reaffirmed it in response to this Court's opinion in McLeod v. Continental Ins. Co., 591 So. 2d 621 (Fla. 1992). Section 624.155 has included the excess judgment among the recoverable damages for first party bad faith since its enactment in 1982.

This Court need not decide whether the trial court correctly denied State Farm's motion for directed verdict under the "fairly debatable" standard because State Farm's motions for directed verdict were inadequate and because the trial court instructed the jury to follow the "fairly debatable standard" in deciding whether State Farm was guilty of bad faith. Regardless of which standard applies, the record amply supports the court's permitting the case to go to the jury and the jury's finding of bad faith.

The "investigation" instruction was an accurate statement of the law and appropriate to this case. It was undisputed that State Farm did nothing to investigate this claim in the one and one-half years after this accident before the plaintiffs hired counsel.

The judgment for attorney's fees and costs should be affirmed unless this Court finds the trial court erred in refusing to direct a verdict for the defendant or in its instructions to the jury.

ARGUMENT

POINT I

SECTION 627.727(10), FLORIDA STATUTES (1992), IS A REMEDIAL STATUTE AND HAS RETROACTIVE APPLICATION.

The trial court correctly granted the plaintiffs' motion for additur based on Section 627.727(10), Florida Statutes (1992), which, by its terms, is "remedial" and applies to all causes of action occurring after the effective date of Section 624.155, Florida Statutes, adopted in 1982. The legislature's applying Section 627.727(10) to all actions occurring after the effective date of Section 624.155 presents no constitutional impediments.

Contrary to State Farm's and its amici's erroneous assumption, Section 627.727(10) did not change the law, but merely clarified and reaffirmed legislation existing since 1982. Section 624.155, enacted in 1982, requires insurers, including uninsured motorist insurers, to deal in good faith. Under the statute, the insurer has 60 days after notification of bad faith to decide whether to continue on that course. If it fails to pay the damages or cure the circumstances, it subjects itself to a later bad faith action

and the sanction of an excess award only if a jury finds the insurer violates the law of good faith.

Section 624.155 was enacted to remedy the common law, which did not recognize a first party bad faith action. From the time of its enactment, Section 624.155 has included the excess judgment among the recoverable damages for first party bad faith. The "sanction" for failing to deal in good faith for first and third party bad faith is "a judgment in excess of policy limits":

> Section 624.155 requires insurers to deal in good faith to settle claims. Current case law requires this standard in liability claims, but not in uninsured motorist coverage; the sanction is that the company is subject to a judgment in excess of policy limits. This section would apply to all policies. (Emphasis added)

Staff Report, 1982 Insurance Code Sunset Revision (H.B. 4F; as amended H.B. 10 G) (June 3, 1982).

The Legislature enacted Section 624.155 in 1982 with the express intent of affording the plaintiff a remedy beyond that which was available under traditional contract law. The "sanction" imposed under Section 624.155, liability for the excess judgment, applies only to insurance companies who, after fair warning, choose to continue their conduct and violate the law and then, only if a subsequent jury finds they are in bad faith. The sanction is the hammer needed to make the bad faith statute work. As this Court

recently held in Imhof v. Nationwide Mutual Ins. Co., 19 Fla. L. Weekly S257 (Fla. May 12, 1994):

> ...Section 624.155 follows longstanding public policy and promotes quick resolution of insurance claims....[S]ection 624.155 also requires an insurer to respond within the sixty-day period to the notice of bad faith....

Retroactive application of Section 627.727(10) does not impose new penalties for past conduct without regard to causation. The UM carrier made itself responsible for damages it did not cause when it sold the policy and agreed to stand in the shoes of the tortfeasor. As previously stated, Section 624.155 has included liability for the excess judgment as a sanction for first party bad faith since 1982. This "sanction", included in Section 624.155 and clarified in 627.727(10), is not a "penalty". Section 624.115(4) is the penalty provision and permits punitive damages in narrowly defined circumstances where the bad faith constitutes a general business practice and the insurer's acts are:

> (a) Willful, wanton and malicious; (b) In reckless disregard for the rights of any insureds; or (c) in reckless disregard for the rights of a beneficiary under a life insurance contract.

See, Home Ins. Co. v. Owens, 573 So. 2d 343 (Fla. 4th DCA 1990), rev. denied, 592 So. 2d 680 (Fla. 1991).

The insurer is subject to the "sanction" of the excess award if it continues on the statutorily prohibited course of conduct with this insured after 60 days notice and, even then, only after

a jury finds bad faith. The insurer makes itself liable for the excess judgment only if it violates the law. The insurer is subject to a "penalty", punitive damages, if it continues on the statutorily prohibited course of conduct as a general business practice with this insured and others. Fla. Stat. § 624.155(4). Punitive damages are a separate standard with unique requirements.

In 1990, the legislature amended Section 624.155, Florida Statutes, to clarify the legislative intent that an uninsured motorist carrier that acts in bad faith towards its insured can be held liable for the excess award. The 1990 amendment to Section 624.155(7) provided in pertinent part:

> The damages recoverable pursuant to this section shall include those damages which are a reasonably foreseeable result of a specified violation of this section by the insurer and may include an award or judgment in an amount that exceeds the policy limits. (Emphasis added)

The title to Chapter 90-119, containing the 1990 amendment, specifically stated that its purpose was to clarify legislative intent.

Opinions following the enactment of Section 624.155 were consistent with the legislative intent that the recoverable damages in a first party bad faith case include the excess judgment. Hollar v. International Bankers Ins. Co., 572 So. 2d 937, 939 (Fla. 3d DCA 1990), rev. dismissed, 582 So. 2d 624 (Fla. 1991), recognized that Section 624.155 expanded the bad faith cause of action to first-

party claims and that the damages recoverable under first and third party bad faith claims are the same:

> ... The insurer is subject to liability in excess of policy limits if it acts in bad faith or through fraud. Baxter v. Royal Indemn. Co., 285 So. 2d 652, 656 (Fla. 1st DCA 1973); cert. discharged, 317 So.2d 725 (Fla. 1975).
>
> 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, [cits. om.] ... . (Emphasis added)

See also, Jones v. Continental Ins. Co., 716 F. Supp. 1456 (S.D. Fla. 1989), vacated 956 F.2d 1052 (11th Cir. 1992) (Eleventh Circuit vacated trial court's decision after this Court decided McLeod v. Continental Ins. Co., 591 So. 2d 621 (Fla. 1992), which held that first-party bad faith damages do not include the excess judgment); Opperman v. Nationwide Mut. Fire Ins. Co., 515 So. 2d 263 (Fla. 5th DCA 1987), rev. denied, 523 So. 2d 578 (Fla. 1988), and cases cited therein.

In McLeod v. Continental Ins. Co., supra, this Court misinterpreted the legislature's intent in enacting Section 624.155 and held that a UM carrier could not be liable for the excess UM award even when the UM carrier acted in bad faith. This Court reasoned that allowing recovery of the excess judgment in first party bad faith cases would violate the principle that one is not liable for damages he or she did not cause. This "causation analysis" is faulty. The UM carrier makes itself responsible for

damages it did not cause by selling the policy and agreeing to stand in the shoes of the tortfeasor. The UM carrier makes itself liable for the excess judgment only if it violates the law.

In response to McLeod, the Legislature enacted Section 627.727(10) in 1992 to again clarify and reaffirm that the damages recoverable in a first party bad faith action include the excess judgment. The introductory language to Section 627.727(10) unambiguously states that the statute merely reaffirms existing legislative intent and is remedial:

> The purpose of sub-section (10) of Section 627.727, Florida Statutes, 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 take effect upon this act becoming a law [July 7, 1992] and, as it serves only to reaffirm the original legislative intent, section 627.727(10), Florida Statutes, shall apply to all causes of action accruing after the effective date of Section 624.155, Florida Statutes. (Emphasis added)

The Fourth District recently held in Brookins v. Goodson, 19 Fla. L. Weekly D1535 (Fla. 4th DCA July 20, 1994), that Section 627.727(10) is remedial and, therefore, applies retroactively:

> Subsequent to McLeod, the legislature amended section 627.727 to permit a first party insured in a bad faith claim under section 624.155 to recover as damages "the amount in excess of the policy limits" and to specify that "the total amount of the claimant's damages are recoverable whether caused by an insurer or by a third-party tortfeasor." § 627.727(10), Fla. Stat. (Supp. 1992). [Fn. 2] Subsection (10) supersedes McLeod only to the extent of recognizing explicit statutory authority for awarding excess judgment damages

> as part of the insured's damages in a first party bad faith claim.
>
> [Fn. 2] Section 627.727 was amended in July 1992 to add subsection (10), which clarifies recoverable damages in actions brought under section 624.155. Subsection (10) reaffirms existing legislative intent, and as such, is remedial and applies retroactively. Chapter 92-318, § 80 Laws of Florida. (Emphasis added)

Where, as here, the legislature expressly indicates retroactive intent, courts generally give the statute retroactive effect unless the provision would "violate the constitution or result in manifest injustice." Seaboard System R.R., Inc., v. Clemente for and on Behalf of Metropolitan Dade County, 467 So. 2d 348, 357 (Fla. 3d DCA 1985). Neither prohibition bars retroactive application of Section 627.727(10), which is a clarifying remedial measure affecting a previously existing right of action. As the United States Supreme Court recently noted in Landgraf v. USI Film Products, et al., 114 S. Ct. 1483, 1498, 128 L. Ed. 2d 229 (1994):

> Retroactivity provisions often serve entirely benign and legitimate purposes, whether to respond to emergencies, to correct mistakes, to prevent circumvention of a new statute in the interval immediately preceding its passage, or simply to give comprehensive effect to a new law Congress considers salutary. However, a requirement that Congress first make its intention clear helps ensure that Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness. * * * (Emphasis added)

State Farm concedes that the legislature enacted Section 627.727(10) in response to McLeod. The amendment did not change the original legislation governing damages recoverable against a UM carrier for violation of Section 624.155, but merely clarified the remedies available for first party bad faith since 1982. Like the statute in Adams v. Wright, 403 So. 2d 391 (Fla. 1981), concerning remittitur and additur in actions arising out of motor vehicles, Section 627.727(10) was designed to give effect to existing legislative intent and, is, therefore, remedial.

It is well settled that the legislature may enact a statutory amendment to clarify its original intent in response to a judicial interpretation which is contrary to the legislature's original intent. See Palma Del Mar Condominium Ass'n No. 5 of St. Petersburg, Inc. v. Commercial Laundries of West Florida, Inc., 586 So. 2d 315 (Fla. 1991). As this Court stated in Lowry v. Parole and Probation Com'n, 473 So. 2d 1248 (Fla. 1985), on page 1250 of its opinion:

> When, as occurred here, an amendment to a statute is enacted soon after controversies as to the interpretation of the original act arise, a court may consider that amendment as a legislative interpretation of the original law and not as a substantive change thereof.

That is precisely what occurred here and what the legislature indicated in its preamble to Section 627.727(10). See also Ziccardi v. Strother, 570 So. 2d 1319 (Fla. 2d DCA 1990).

Village of El Portal v. City of Miami Shores, 362 So. 2d 275 (Fla. 1978), where this Court analyzed whether the Uniform Contribution Among Tort-feasor's Act applied even though the action giving rise to the tort liability predated passage of the Act, is analogous. The applicable provision, Section 768.31(7), provided:

> (7) PENDING CAUSES OF ACTION.--
> This act shall apply to all causes of action pending on June 12, 1975, wherein the rights of contribution among joint tort-feasors is involved and to cases thereafter filed.

The events giving rise to the tort action occurred in December of 1973. The litigation was begun in August of 1974. The Act became law in June of 1975 and was in effect prior to the final judgment. The Village claimed that the Act was unconstitutional because it affected substantive rights by abrogating the common law rule of no contribution and by creating a new cause of action in relation to events which preceded passage of the statute. This Court rejected this contention and held that the Act was a remedial measure which affected only the remedies available in a cause of action which already existed; therefore, retroactive application of the Act did not violate the Constitution.

Ivey v. Chicago Ins. Co., 410 So. 2d 494 (Fla. 1982), held that an amendment to the UM statute applied retroactively, even in the absence of the Legislature's expressly so stating, where the legislature intended the amendment to clarify, rather than change, the law.

Similarly, Davis v. City and County of San Francisco, 976 F.2d 1536 (9th Cir. 1992), held that the 1991 Civil Rights Act applied retroactively to cases pending at the time of its enactment, even though the Act did not contain explicit retroactive language similar to Section 627.727(10). Like here, the language of the Act revealed Congress' clear intention that the Act apply to cases pending at the time of its passage. Also, like here, the Act contained introductory language in which Congress expressed its intent to reverse a number of Supreme Court decisions that too narrowly construed various employment discrimination statutes. As the 9th Circuit stated on page 1552 of the opinion:

> Given Congress' sense that the Supreme Court had construed the Nation's civil rights laws so as to afford insufficient redress to those who have suffered job discrimination, it appears likely that Congress intended the courts to apply its new legislation, rather than the Court decisions which predated the Act, for the benefit of the victims of discrimination still before them. ...

Lussier v. Dugger, 904 F.2d 661 (11th Cir. 1990), is also analogous. The plaintiff argued that changes to the Rehabilitation Act applied retroactively. The Act became law in March of 1988, with the express purpose of restoring "the prior consistent and long-standing executive branch interpretation and broad, institution-wide application" of four civil rights statutes, including the Rehabilitation Act. The preamble to the 1988 legislation stated that it was enacted to restore the broad scope of coverage and clarify the application of several acts and amendments stated therein. The Eleventh Circuit construed the

statutory amendment as remedial, and held as follows on page 665 of the opinion:

> [T]he Civil Rights Restoration Act of 1987 itself does not change prior legislation, but rather merely corrects judicial interpretations which the Congress believed "unduly narrowed or cast doubt upon the broad application" of the civil rights laws. ...

L. Ross, Inc. v. R. W. Roberts Const. Co., Inc., 481 So. 2d 484 (Fla. 1986), on which State Farm relies, is distinguishable. Unlike the amendment here, the amendment there contained no express statement of retroactive application. Nor did L. Ross, Inc. involve a situation where the legislature amended a statute to reiterate and reaffirm existing legislative intent and/or to correct prior judicial misinterpretations of a statute.

State Farm's reliance on State, Dept. of Transp. v. Knowles, 402 So. 2d 1155 (Fla. 1981), is also misplaced. Here, the legislature stated that Section 627.727(10) clarified the law as originally enacted and provided for total retroactivity of the amendment. The statute in Knowles provided for partial retroactivity. Further, the statute in Knowles was not a clarification or restatement of existing law, but "a declaration ... by the Legislature that the state will henceforth substitute its liability to injured persons for the liability of public employees who are merely negligent." (Emphasis added) Id., at 1157.

Additionally, unlike the plaintiff in Knowles, who was unaware of the legislation until after the verdict, State Farm knew in the middle of this trial that the legislature had enacted Section 627.727(10), subject to the Governor's approval (R 317-319). Defense counsel stated as follows:

> I have no objection to proffering it out in the excess, going ahead with the trial with the instructions that we had. And if there need be any modification post-verdict based on this new law, then the court can do it at that time. We would agree to that. (Emphasis added) (R 319)

Retroactive application of Section 627.727(10) does not unconstitutionally impair contracts. Again, Section 627.727(10) did not change the substantive law as it has existed since 1982. State Farm's argument on pages 30-31 of its brief, that "The enactment of section 627.727(10) unquestionably diminishes the value of the insurance contract to the insurer because it subjects it to significantly increased exposure -- open-ended policy limits -- with no corresponding benefit", ignores Section 627.0651(12), Florida Statutes (1990), which prohibits State Farm from increasing its rates commensurate with bad faith damages:

> (12) Any portion of a judgment entered as a result of a statutory or common-law bad faith action and any portion of a judgment entered which awards punitive damages against an insurer shall not be included in the insurer's rate base, and shall not be used to justify a rate or rate change. ... The portion of the taxable costs and attorney's fees which is identified as being related to the bad faith and punitive damages in these judgments and settlements shall not be included in the insurer's rate base and shall not be utilized

> to justify a rate or rate change. (Emphasis added)

By statute, State Farm is precluded from increasing its rates as a corollary to the amendment. There is no impairment of contract.

The legislature reacted to McLeod in enacting Section 627.727(10) in the sense that it was forced to clarify and reaffirm existing legislation. Rather than abrogating a plaintiff's right to full tort recovery as would have occurred in Knowles, Section 627.727(10) provides plaintiffs their full recovery. Section 624.155 has included the excess judgment in the recoverable damages for first party bad faith since its enactment in 1982, primarily to discourage precisely what State Farm did here. Section 627.727(10) is remedial, applies retroactively, and required the trial court to grant the plaintiffs' motion for additur to include the excess judgment.

POINT II

THE TRIAL COURT CORRECTLY DENIED STATE FARM'S MOTION FOR DIRECTED VERDICT.

This Court need not reach this issue for two reasons. First, counsel for State Farm failed to make an adequate motion for directed verdict at the close of the plaintiffs' case and at the close of the evidence, thereby waiving State Farm's right to contest the sufficiency of the evidence. Secondly, the court instructed the jury to follow the "fairly debatable" standard in

deciding whether State Farm was guilty of bad faith (R 558-559). Thus, regardless of which standard applies, the record supports the jury's finding of bad faith.

At the close of the plaintiffs' case, State Farm moved for a directed verdict "on all theories and elements of damages that the plaintiffs are claiming." (R 449-450). That was State Farm's counsel's entire motion and argument regarding liability for bad faith. The court denied the motion (R 450). At the close of all of the evidence, State Farm's counsel stated, "I wanted to renew my motion that I previously made" (R 515). There was no further argument; the court did not rule on the renewed motion (R 515).

Florida Rule of Civil Procedure 1.480(a) requires that "A motion for a directed verdict shall state the specific grounds therefor." State Farm's motion was inadequate as a matter of law as it failed to state the specific grounds. Thus, the trial court properly denied it. Further, there was evidence from which the jury could and did find that State Farm acted unreasonably. Where there is a conflict in the evidence, all reasonable inferences must be drawn favorably to the non-movant and the court cannot direct a verdict. Powell v. Prudential Property & Cas. Ins. Co., 584 So. 2d 12 (Fla. 3d DCA 1991), rev. denied, 598 So. 2d 77 (Fla. 1992).

Further, as the Fourth District recognized in its opinion below, the trial court applied the "fairly debatable" standard, as

evidenced by the jury instructions, and the jury found State Farm liable:

> ... The question of whether the evidence is fairly debatable is for the jury. Here, there was conflicting evidence on the issue, preventing the direction of a verdict in the appellant's favor. ...

State Farm Mut. Auto Ins. Co. v. LaForet, 632 So. 2d 608, 609 (Fla. 4th DCA 1993). For this reason, the Fourth District declined to decide whether the "fairly debatable" standard should apply in Florida. Like the Fourth District, this Court should decline to address the "fairly debatable" issue since, regardless of which standard applies, the record supports the jury's finding of bad faith.

Further, the fairly debatable standard is not the standard for first party bad faith since the standard is delineated in Section 624.155(1)(b)1.:

> (1) Any person may bring a civil action against an insurer when such person is damaged:
>
> * * *
>
> (b) By the commission of any of the following acts by the insurer:
>
> (1) Not attempting in good faith to settle claims when, under all the circumstances, it could and should have done so had it acted fairly and honestly toward its insured and with due regard for its interest; ....

In Imhof v. Nationwide Mutual Ins. Co., 19 Fla. L. Weekly S257 (Fla. May 12, 1994), this Court remarked in dicta, citing Reliance Ins. Co. v. Barile Excavating & Pipeline Co. Inc., 685 F. Supp. 839, 849 (M.D. Fla. 1988), that insurers can be liable for bad faith when the disputed claim is determined not to be "fairly debatable", meaning "when there is no reasonable basis to deny policy benefits". Imhof and the out-of-state cases it cites (cases from states which recognize a common law first party bad faith action), overlook that Florida has a statutory first party bad faith standard, Section 624.155(1)(b)1. Third party bad faith was cognizable under common law. Conversely, first party bad faith is a creature of statute. Because Florida has a statutory definition of bad faith, resort to the fairly "debatable standard" is unnecessary and inappropriate.

The Fifth District in Robinson v. State Farm Fire & Cas. Co., 583 So. 2d 1063, 1067-1068 (Fla. 5th DCA 1991), rejected the "fairly debatable" standard as the applicable standard in third party bad faith cases. The fact that Robinson involved third party bad faith is irrelevant because Section 624.155(1)(b)1. imposes the same duty upon the insurer to the insured in first party and third party actions. Hollar v. International Bankers Ins. Co., supra, 939.

In any event, the record contains ample evidence supporting the jury's finding of bad faith. State Farm's claims manual and

policies on UM coverage defeat its argument. State Farm's manual provided that each element on its work chart-"communications and human relations, investigation, analysis and evaluation, ... as well the file record-apply to the handling of coverage U and U-1 (uninsured and underinsured) claims" (R 177). The manual further provided that the nature of UM coverage requires particular sensitivity to the needs of the injured person (R 177). "Number one, an insured is injured. ... Number two, State Farm represents the insured, not the uninsured motorist." (R 177-178). The injured insured is a member of the State Farm family who has paid the premiums, may not understand the coverage and may have unrealistic expectations (R 177-178). In spite of its own claims manual, State Farm made no effort to advise the LaForets before September of 1988 of their actual coverage, what they could expect, and what they should do to obtain the coverage they had paid for (R 179). Under State Farm's own contract, it had an affirmative obligation, like the insurer in a third party excess case, to avoid prejudice to its insured.

Even the early procedural stages of the initial trial contained evidence of bad faith. Faced with clear liability on the part of the tortfeasor and damages well in excess of the $10,000 tortfeasor's limits, State Farm elected to ignore its own claims manual, to not investigate, and, in essence, to do nothing until its insureds were forced to hire a lawyer in September of 1987, after an accident which occurred in March of 1986. State Farm

claimed that Mrs. LaForet's injuries were unrelated to the accident, yet State Farm paid her medical expenses up to the limits of the PIP and med-pay coverages which it was not obligated to do unless the injuries were causally related. State Farm's own people evaluated the claims at between $75,000 to $100,000 and recognized that if the jury believed the plaintiffs, State Farm faced a "substantial verdict" in excess of $100,000. The plaintiffs attended mediation, wanted to settle, and would have accepted in the low $100,000 range. State Farm never offered more than $40,000.

State Farm refused to entertain meaningful negotiations and ultimately forced this case to a trial which could and should have been avoided. Courts have found bad faith under analogous circumstances. See Robinson v. State Farm Fire & Cas. Co., supra; Powell v. Prudential Property & Cas. Ins. Co., supra; Opperman v. Nationwide Mut. Fire Ins. Co., supra. All of these facts, taken as a whole, support the court's permitting the case to go to the jury and the jury's finding of bad faith.

POINT III

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY REGARDING STATE FARM'S DUTY TO INVESTIGATE.

State Farm has taken the investigation instruction out of context. When viewed in context, the instruction was a proper statement of existing law:

> An insurance company owes its insured an implied duty of good faith and fair dealing in the processing of a claim made under its insurance policy.
>
> You are instructed that good faith implies honest, fair dealing and full disclosure. Florida Statute 624.155 (a)(1) provides: Any person may bring a civil action against an insurer when such person is damaged: By the commission of any of the following provisions by the insured: Not attempting in good faith to settle claims when under all circumstances it could and should have done so, had it acted fairly and honestly towards its insured and with due regard for his interests.
>
> The issue for your determination is whether Defendant acted in bad faith with respect to payment of Plaintiffs' claims.
>
> An insurance company acts in bad faith in failing to pay a claim of its insured under its policy when, under all the circumstances, it should have done so, had it acted fairly and honestly towards its insured and with due regard for their interests.
>
> You are instructed that Defendant cannot be found to have acted in bad faith if the validity [sic] the Plaintiff's claim was fairly debatable.
>
> A claim is 'fairly debatable' when there is a reasonable basis for denial of policy benefits.
>
> The insurance company is under a duty to promptly investigate the facts underlying a

> claim, and when the insurance company fails to properly investigate, a breach of a promise of good faith and fair dealing occurred between the insurance company and its insureds.
>
> The lack of a formal offer to settle by Plaintiffs does not preclude a finding of bad faith. Bad faith may be inferred from a delay in settlement negotiations. (R 558-559).

In Boston Old Colony Ins. Co. v. Gutierrez, 386 So. 2d 783, 785 (Fla. 1980), this Court held that an insurer, in handling the defensive claims against its insured, has a duty to use the same degree of care and diligence as a person of ordinary care and prudence should exercise in the management of his own business, which duty includes investigating the facts:

> This good faith duty obligates the insurer to advise the insured of settlement opportunities, to advise as to the probable outcome of the litigation, to warn of the possibility of an excess judgment, and to advise the insured of any steps he might take to avoid same. [cit. om.] The insurer must investigate the facts, give fair consideration to a settlement offer that is not unreasonable under the facts, and settle, if possible, where a reasonably prudent person, faced with the prospect of paying the total recovery, would do so. [cits. om.] Because the duty of good faith involves diligence and care in the investigation and evaluation of the claim against the insured, negligence is relevant to the question of good faith. *** (Emphasis added)

See also, Powell v. Prudential Property & Cas. Ins. Co., supra, 14 (an insurer has an affirmative duty to investigate the possibilities of settlement); Hollar v. International Bankers Ins. Co., supra, 939:

> The insurer must investigate the facts, give fair consideration to a settlement offer

> that is not unreasonable under the facts, and settle, if possible, where a reasonably prudent person faced with the prospect of paying total recovery would do so. [cit. om.] (Emphasis added)

The instructions as given were an accurate statement of the law as articulated in Boston Old Colony Ins. Co. v. Gutierrez, supra; Hollar v. International Bankers Ins. Co., supra; and Powell v. Prudential Property & Cas. Ins. Co., supra. The point is not whether additional investigation would have changed State Farm's evaluation, but that State Farm made no investigation, as its Claims Adjustor and Claims Supervisor admitted. Good claims practice required that State Farm begin investigating the plaintiffs' claims and the applicable coverages when it was notified of the accident in March of 1986 (R 255-259). Good claims practice also included consulting Mrs. LaForet's treating physician and/or obtaining statements from her and her husband before making medical payments on their behalf. Instead, State Farm did nothing to investigate this claim for one and one-half years after this accident, before the plaintiffs hired counsel. The instructions as given were accurate and warranted by the facts of this case.

POINT IV

THE JUDGMENT FOR ATTORNEY'S FEES AND COSTS SHOULD BE AFFIRMED.

The plaintiffs agree that if this Court reverses the final judgment based upon the defendant's arguments in Points II and/or III, the attorney's fees and costs must be reversed. If, however, the plaintiffs prevail or the defendant prevails only on Point I, the defendant would only be entitled to a reduction of damages and not a reduction for attorney's fees and costs. The attorney's fees and costs were incurred and properly taxed against the defendant for its bad faith, regardless of the retrospective nature of the amendment.

CONCLUSION

This Court should answer the certified question affirmatively and hold that Section 627.727(10), Florida Statutes (1992) is a remedial statute with retroactive application. The decision of the Fourth District Court of Appeal should be approved.

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CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished, by mail, this 5th day of August, 1994, to:

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