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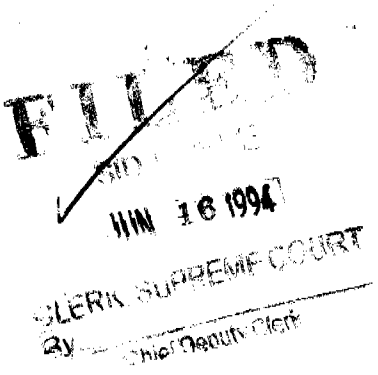
IN THE SUPREME COURT OF FLORIDA

CASE NO. 83, 537



STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner/Defendant,

vs.

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

Respondents/Plaintiffs.

Fourth DCA Case No. 92-2832
L.T. Case No. 90-0323 (CA 09)

INITIAL BRIEF ON THE MERITS OF PETITIONER, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

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STATEMENT OF CASE AND FACTS[1]

The Case

Petitioner, STATE FARM, appellant in the district court and defendant in the trial court, seeks review of the Fourth District decision which passes on a question certified to be of great public importance. This proceeding arises from the entry of a final judgment after a jury verdict was rendered in favor of respondents, Veronica and Henry LaForet, who were the plaintiffs in a so-called "bad faith" action filed pursuant to Section 624.155, Florida Statutes (1986).

A. The Action for Uninsured Motorist ["UM"] Benefits

In May, 1989, plaintiffs LAFORET filed suit against STATE FARM for Uninsured motorist benefits arising from a March, 1986 automobile accident. (R. 242). Five months later, the jury returned a $400,000.00 verdict in favor of plaintiffs LAFORET (R. 227). STATE FARM paid its policy limits of $200,000.00 (R. 638-639)

B. The Action for Bad Faith

Plaintiffs, LAFORET, filed the complaint in this case in 1990 alleging that STATE FARM had acted in "bad faith" in failing to settle Veronica LaForet's claim for uninsured motorist ["UM"]

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[1] In this brief, petitioner will be referred as STATE FARM, and respondent will collectively referred to as LAFORET where appropriate. The parties will also be referred to as they stood in the trial court. The symbol "R" designates the Record on Appeal.

benefits arising out of the 1986 automobile accident. (R. 635-642).[2]

The complaint alleged that STATE FARM had acted in bad faith by failing to give plaintiffs permission to accept a settlement tendered by the tortfeasor, by refusing to arbitrate the UM dispute, by failing to make a reasonable settlement offer despite having full medical information available and by delaying the merits trial to exert economic pressure on plaintiffs. (R. 637-638). The complaint further alleged that "[d]espite Plaintiffs' repeated offers to settle within policy limits," STATE FARM failed to make a good faith offer to settle and failed to negotiate in good faith. (R. 638).

STATE FARM answered the complaint, denying the allegations of "bad faith", (R. 673-675), and the case proceeded to jury trial on July 6-7, 1992. (R. 1-566). At the conclusion of the evidence, the trial court instructed the jury on "bad faith" as follows:

> 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 honesty, 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

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[2] The complaint was originally dismissed on the authority of Schimmel v. Aetna Casualty & Surety Co., 506 So. 2d 1162 (Fla. 3d DCA 1987). (R. 650; 655). Plaintiffs appealed the dismissal. (R. 656-657). After the Supreme Court of Florida decided Blanchard v. State Farm Mutual Automobile Ins. Co., 575 So. 2d 1289 (Fla. 1991), STATE FARM confessed error, and this court reversed. (R. 616, 662-663). LaForet v. State Farm Mutual Automobile Ins. Co., 578 So.2d 910 (Fla. 4th DCA 1991).

> damaged: By the commission of any of the following provisions by the insurer: 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 his interests.
>
> The issue for your determination is whether Defendant acted in bad faith with respect to payment of Plaintiffs' claim.
>
> 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 of 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 has 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. 557-559). The highlighted charges were given over STATE FARM's objection. (R. 281-283; 302-308).

Closing arguments were given. Plaintiff's counsel requested the jury to award damages in the amount of $109,393.88, representing the amount of attorney's fees LAFORET was required to pay, with interest. (R. 368, 527). The jury returned a verdict

finding that STATE FARM had acted in bad faith and awarding damages in the amount of $24,000. (R. 563).

On July 7, 1992, the same day the jury's verdict was returned, Chapter 92-318, Laws of Florida (1993), became law without the signature of the governor. As a part of that chapter, the legislature created section 627.727 (10), Florida Statutes, which provides:

> 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 tortfeasor.

Based on this new provision, plaintiffs filed a motion for additur, asking the court to award them the amount of the "excess judgment" as a matter of law. (R. 866-929). Defendant argued that retroactive application of the statute to the case was unconstitutional as a denial of due process and violated the prohibition against impairment of contracts. (R. 581).

Defendant moved for new trial on the grounds that the verdict was contrary to the manifest weight of the evidence, and that the trial court erred in giving plaintiffs' requested special jury instructions regarding bad faith. (R. 934-935). The motion also asserted that the trial court erred in denying STATE FARM's motion for directed verdict, since the plaintiffs' claim for UM benefits was "fairly debatable" as a matter of law. (R. 449-450; 515; 934-935).

In the order on post-trial motions, the trial court denied STATE FARM's motion for new trial and granted plaintiffs' motion for additur. (R. 965-966). The trial court awarded attorney's fees in the amount of $141,753.00, representing a lodestar of $70,876.50 and a multiplier of 2.0. (R. 961-964). The attorney's fee award included $15,060.00 for work expended during the three appeals which the case generated. (R. 963).[3]

The trial court granted plaintiffs' motion for additur, finding that the application of the UM statute amendment to the case was not unconstitutional. (R. 957-960). Final judgment was entered in the total amount of $416,280.25, which included $265,753 in damages for bad faith, $141,753 in attorney's fees, and $8,774.25 in costs. (R. 968-969).

In the appeal, STATE FARM contended that the trial court erred in denying STATE FARM'S Motion for Directed Verdict because there was no bad faith as a matter of law. As its second point, STATE FARM asserted that the trial court abused its discretion in instructing the jury that an inadequate investigation constituted bad faith without reference to the element of causation. As its third point, STATE FARM raised trial court error in granting plaintiffs' motion for additur based on the post-verdict amendment to Section 627.727, Florida Statutes; STATE FARM argued that retroactive application of the amendment was unconstitutional

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[3] See State Farm Mutual Ins. Co. v. LaForet, 591 So. 2d 1143 (Fla. 4th DCA 1992); State Farm Mutual Automobile Ins. Co. v. LaForet, 586 So. 2d 479 (Fla. 4th DCA 1991); LaForet v. State Farm Mutual Automobile Ins. Co., 578 So. 2d 910 (Fla. 4th DCA 1991).

as applied to this case. As its final point, STATE FARM asserted that the attorney's fee award should be reversed if the court reversed the final judgment; the excessiveness of the fee award was also challenged.

The Fourth District's decision, for the most part, affirmed the final judgment entered pursuant to the jury's verdict and the additur ordered by the trial court. The Fourth District rejected STATE FARM's contention that a directed verdict should be granted finding there was an issue of fact as to whether STATE FARM acted in bad faith.

The court also rejected STATE FARM's argument that the trial court erred by granting LAFORETS' post-trial motion for additur based on amended Section 627.727(10). The court found "the express intent of the legislature to be that this statute have retroactive application." On this issue, however, the Fourth District certified the following question as one of great public importance:

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

The Fourth District did reverse the award of appellate attorney's fees for work performed in three prior appeals. The district court held that the LAFORETS were only entitled to appellate attorney's fees in one of the three earlier appeals because they had only requested appellate fees in that one case. The Fourth District summarily rejected STATE FARM's remaining points.

In this proceeding, STATE FARM requests this Court to accept jurisdiction and decide the certified question in the negative. STATE FARM further requests this Court to review the entire decision including the issues of: 1) STATE FARM's entitlement to a directed verdict on the ground that there was no bad faith as a matter of law; 2) the propriety of a bad faith instruction; and 3) the propriety of the attorney's fee award.[4]

The Facts -- The Bad Faith Trial

The testimony at trial established the following: Veronica LaForet was a passenger in a car driven by her husband when they were struck from the rear by a vehicle driven by Tracy Culverhouse while they were stopped for a red light. (R. 120). LAFORETs' car sustained approximately $400 in property damage. (R. 163).

After receiving notice of the accident from Mr. LaForet, STATE FARM obtained the Florida Traffic Accident Report which reflected that both vehicles had been stopped, but that Culverhouse's vehicle had defective brakes and had therefore begun to roll forward, striking the back of the LAFORET vehicle. (R. 223; Defendant's Exhibit 1). The report further noted that the LAFORET vehicle had not been pushed forward as a result of the impact. Culverhouse would later testify in deposition that he was going 2-3 miles per hour when he struck LAFORETs' vehicle. (R. 350). There was no

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[4] In a case involving a certified question, the Supreme Court clearly has the right to review the entire decision of the district court and "not just the question certified." See, e.g., Hillsborough Association for Retired Citizens, Inc. v. City of Temple Terrace, 332 So.2d 610, 612 (Fla 1976); Confederation of Canadian Life Ins. Co. v. Arminar, 144 So.2d 805, 807 (Fla 1962),

property damage to Culverhouse's vehicle. (R. 426). At trial, Henry LaForet testified that the impact was "a substantial force;" Veronica LaForet testified that the car "just about buckled." (R. 120, 327).

Mr. LaForet wanted his car fixed. (R. 329). He was told by his STATE FARM agent, Bob Grice, that STATE FARM would fix the car if he paid his $100 deductible, or he could wait for Travelers, which insured the other car, to do so. (R. 327, 329). Mr. LaForet decided to pay the deductible rather than wait, and the STATE FARM agent said they would file a claim against Travelers and try to recover his deductible for him. (R. 329). Mr. LaForet assumed that STATE FARM was going to present Travelers with a claim for Mrs. LaForet's personal injuries as well, although no one at STATE FARM actually told him that. (R. 329, 353).

After the accident, Mrs. LaForet was taken to the emergency room, where she was treated and released. (R. 120-121). On April 11, 1986, she signed an application for PIP benefits which stated that she had severe neck pain: there was no mention of back pain. (R. 149). She did not seek further medical attention until September of 1986, six months after the accident, when she went to see Dr. Jacobson, with whom she had received pre-accident treatment for low back pain. (R. 122, 147). Dr. Jacobson's records did not reflect that she gave him a history of being in an automobile accident until four months later in January of 1987. (R. 348).

Mrs. LaForet, who was 58 years old at the time of the accident, had a long history of back trouble. (R. 116, 125). Dr.

Jacobson had treated Mrs. LaForet for back pain since 1981, and had performed a partial dissectomy in the low back area in 1982. (R. 116, 142, 325). His report from 1981 noted that she had a "long history of episodic low back pain which dates back to 1954." (R. 345). Before the accident, Mrs. LaForet had undergone two spinal nerve blocks, including one performed two months prior to the accident. (R. 117, 143-144).

After January of 1987, Mrs. LaForet began to receive extensive medical treatment for her low back pain, and was hospitalized a total of three times: twice for microscopic dissectomy, and once for a laminectomy in July of 1988. (R. 126). Dr. Jacobson found that Mrs. LaForet had reached maximum medical improvement in the summer of 1988. (R. 130).

LAFORET had $20,000 in coverage available to pay Veronica's medical bills: $10,000 in personal injury protection coverage ["PIP"], and $10,000 in medical payments coverage ["med-pay"]. (R. 176). The medical bills were paid by STATE FARM under the PIP coverage until its $10,000 limits were exhausted. Lynnita Johnson was the adjuster at STATE FARM who handled the PIP and med-pay payments. (R. 170).

On one occasion when Mrs. LaForet was being admitted to the hospital, she was told by the hospital that her PIP benefits had been exhausted. (R. 126, 330). Henry LaForet contacted agent Grice, who determined that the policy also provided med-pay coverage, and STATE FARM accepted responsibility for the claim. (R.

331). There was no gap in payment of Mrs. LaForet's medical expenses. (R. 352).

The med-pay coverage was exhausted in due course on April 15, 1988, as Mrs. LaForet continued to receive treatment for her back. (R. 187, 195). At that point, LAFORET's health insurance coverage took over; ultimately, Mrs. LaForet received approximately $40,000 worth of treatment. (R. 133, 334, 215). No claim for UM benefits had been presented to STATE FARM to that point. (R. 352-353). Mrs. LaForet testified that she did not fail to seek treatment because of a lack of funds. (R. 150, 164).

From time to time, Mr. LaForet contacted Grice's office and asked what was happening with the claim against Travelers. (R. 333, 353-354). At some point in 1987, Grice, apparently recognizing Mr. LaForet's misunderstanding, advised him that he would have to hire an attorney to sue the other driver in order to recover any money from Travelers for his wife's personal injuries. (R. 333, 354-355).

Thereafter, in September of 1987, LAFORET retained counsel, who put STATE FARM on notice of the representation. (R. 195). STATE FARM was not aware that a UM claim was possibly going to be presented until receipt of the letter of representation. (R. 255). At that point, the UM portion of the claim was assigned to JoAnne Hopkins for handling on behalf of STATE FARM. (R. 259).

LAFORET sued the owner and driver of the truck in the fall of 1988. (R. 130, 335). On October 25, 1988, Travelers, which insured the owner, tendered its policy limits of $10,000. (R. 130, 151). On November 3, 1988, plaintiffs' counsel contacted STATE FARM to

seek authorization to accept Travelers' policy limits. (R. 189). Hopkins responded on November 11, 1988, stating that STATE FARM needed to know if the driver had any other insurance before it could authorize the settlement. (R. 190, 191). In response, LAFORETs' counsel, Mr. Lanier, advised STATE FARM that in response to a statutory demand for disclosure of insurance information, no information regarding additional coverage for Culverhouse was given; Mr. Lanier also stated that he would "wait for [Travelers] to clarify the situation." (R. 190).

In April of 1989, Lanier advised STATE FARM that the driver in fact did not have any other coverage available, and although verbal permission to settle was given before that time, STATE FARM formally authorized the settlement, on April 28, 1989, agreeing to waive its subrogation rights. (R. 197, 198).

During the time Hopkins was awaiting a response from plaintiffs' counsel regarding the existence of other insurance coverage, she requested surveillance due to the disparity between the degree of impact and the amount of treatment. (R. 191-193, 263, 270). The surveillance films showed nothing. (R. 205).

LAFORETs' attorney demanded arbitration of the UM claim. (R. 132, 198, 261). Since the insurance policy provided the option of resolving claims by jury trial, however, STATE FARM advised LAFORET of its election not to arbitrate. (R. 198). Wallace Cormier, STATE FARM's claims supervisor, testified that STATE FARM normally does not elect to arbitrate; based on its experience with both

arbitrations and jury trials, STATE FARM would rather let a jury decide disputed issues. (R. 198-199).

On March 31, 1989, LAFORET made a written demand to settle the UM claim for $300,000. (R. 271). This was the only demand ever made in the case. (R. 271). The available UM coverage, however, was only $200,000: $100,000 per person for each vehicle insured under the policy. (R. 172). In response to LAFORETs' demand, Hopkins stated that she needed more than what was in the medical reports to justify the demand. (R. 182, 242, 273). Rather than respond to the letter, plaintiffs filed suit against STATE FARM for UM benefits in May of 1989. (R. 242).

STATE FARM answered the complaint in June, and shortly thereafter, its counsel, Richard Singer, filed a motion to remove the cause from the trial docket stating that he could not be ready for the trial date which had been noticed for June 27, 1989. (R. 512). He testified that he needed to subpoena plaintiff's medical records from Dr. Jacobson to make sure that he had complete records, in light of her past history. (R. 512). Cormier did not know about the motion until after it was filed, and testified that STATE FARM did not advise its lawyers to seek a postponement of the trial. (R. 201, 228).

STATE FARM requested that Mrs. LaForet submit to a physical examination by Dr. Seig, an orthopedic surgeon. (R. 502). Dr. Seig gave STATE FARM a 14- page report in which he expressed the opinion that plaintiff suffered from a degenerative arthritic condition, and that the automobile accident played no role in Mrs. LaForet's

subsequent treatment. (R. 503). STATE FARM also had the case reviewed by a neurologist, who reached the same conclusion. (R. 222, 503). Finally, STATE FARM asked a radiologist to compare MRI studies performed prior to the accident with studies performed after the accident. (R. 187, 503). All three physicians advised STATE FARM that plaintiff's low back problems pre-existed the accident. (R. 223, 241, 503).

In preparation for mediation of the case, the claim was evaluated by STATE FARM's claims committee -- a group of STATE FARM supervisors with over 100 years combined experience, which is used to provide a consensus evaluation on settlement authority. (R. 233).

JoAnne Hopkins prepared a detailed evaluation for submission to the committee which requested $100,000 in authority to settle the case. (R. 207). Her report discussed the minimal impact, outlined the medical bills, discussed plaintiff's multiple surgeries, and the opinion of Dr. Seig that the surgeries were necessitated by progressive degenerative changes in the facet joints, and not by the accident. The report stated:

> I believe we are going to be faced with a problem here. Although it appears, from reviewing the medical bills and reports, that none of Mrs. LaForet's back problems actually were related to this auto accident, and Dr. Seig indicates that she probably would have had these problems if she'd never been in an auto accident, the fact remains that we paid $19,835.20 under the PIP and Med-Pay portions of her policy. ...From what I understand, juries have a hard time comprehending why an insurance company would pay a person's medical bills and then turn around at a later date and say the treatment was not related to the auto accident... Had we previously denied payment of the

> medical bills and possibly have forced the LaForets to file a PIP lawsuit in order to get them paid, I believe we would be in a better position to convince the jury that this treatment was not related to the auto accident.

(R. 207-210). Hopkins believed that $100,000 was the "top dollar" settlement value of the case. (R. 275).

Cormier, Hopkins' supervisor, provided his own evaluation which requested $75,000 in authority. (R. 213). He testified that his evaluation took into account the minimal impact, plaintiff's long history of back problems, and Dr. Seig's opinion; however, his report further noted that there could be a "substantial award" if the jury believed that plaintiff's three surgeries were related to the accident. (R. 212-214, 226).

The claims committee decided to extend $40,000 in settlement authority, and that offer was presented to plaintiffs at the mediation. (R. 216, 230, 267). LAFORET did not make a counter demand, and the mediation quickly reached an impasse. (R. 230). Although Mr. LaForet testified that they told the mediator that they would take "in the low hundreds," the evidence conclusively established that STATE FARM was never given any indication that plaintiffs would take less than $300,000 to settle the claim. (R. 359, 505). Cormier testified that he could have returned to the claims committee to ask for additional authority if plaintiffs had been willing to negotiate, but with no new information and a demand which remained outside the policy limits, there was no basis for making a request for additional authority. (R. 232). Because there was no hint that plaintiffs would accept less than their unshakable

demand of $300,000, Cormier felt that STATE FARM had no alternative but to try the case. (R. 204, 230, 235).

The UM case was tried five months after it was filed, in October 1989, and resulted in a verdict in favor of plaintiffs in the amount of $400,000. (R. 227). [5] LAFORET continued to believe the policy provided $400,000 in UM coverage until the issue was resolved against them in post-trial proceedings at the conclusion of the merits case.[6] (R. 358, 462). Their attorney never advised them otherwise. (R. 358).

In response to criticism of STATE FARM's investigation prior to making payment of medical bills, Cormier testified that although the LaForets were not contacted for a statement after the accident, there was no need because for the first six months, the only bills submitted were from the emergency room and the ambulance. (R. 180). Moreover, the minimal impact and report of only neck injuries did not suggest that a UM claim would be presented. (R. 180, 185, 226-227).

Cormier testified that the medical bills were paid to give plaintiff the benefit of any doubt regarding the cause of her

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[5] Based on the holding in McLeod v. Continental Ins. Co., 591 So. 2d 621 (Fla. 1992), the jury in the bad faith action was not advised of the amount of the jury's verdict.

[6] Henry LaForet testified that at some point, he asked someone in Bob Grice's office how much UM coverage was available, and was told $200,000 for him, and $200,000 for his wife. (R. 332). Of course, this statement would have been entirely accurate had Mr. LaForet pursued a claim for his own personal injuries (his application for PIP benefits reflected injuries to his neck, for which he was seen at the emergency room), instead of a consortium claim.

condition, indulging the reasonable assumption that the accident aggravated her pre-existing condition to some extent. (R. 182, 187). Although Cormier acknowledged that it would have been good claims practice to have taken plaintiff's statement before STATE FARM paid out $20,000 for medical bills, he testified that "it would not have changed the picture any." (R. 194).

Cormier testified that STATE FARM's evaluation of the case would have been the same if a physical examination of plaintiff and a statement from her had been obtained before the lawsuit was filed, instead of after. (R. 236). STATE FARM would still have paid the medical bills in light of the different standards for payment of PIP and UM benefits. (R. 237). While he would have liked for Hopkins to have called Mrs. LaForet to talk to her about the claim, in the end result, it would not have changed anything. (R. 240, 251).

Plaintiffs' expert, Fred Hazouri, testified that STATE FARM's failure to take a statement from the insured before paying her medical bills was evidence of "bad claims handling," and evidence of bad faith if STATE FARM was not going to pay on the claim. (R. 387, 388). Hazouri testified that STATE FARM did not act in good faith to get the case resolved within the policy limits. (R. 392).

Hazouri acknowledged that the policy only provided $200,000 in UM coverage. (R. 395, 433). He admitted that there was nothing legally wrong with requesting surveillance. (R. 397). He testified that STATE FARM's decision to insist on a jury trial instead of

arbitration was not bad faith, because it has that right in the contract. (R. 440).

He recognized that the issue of plaintiff's pre-existing back injuries created an issue as to whom among the experts the jury would believe. (R. 400). Hazouri testified: "If you really believe that Dr. Seig's testimony is going to be believed by a jury with some substantial weight, then it's a case that is worth almost nothing." (R. 401). If Dr. Seig's testimony was believed, he testified, the case would be worth $10,000 to $15,000 at the most. (R. 402). He testified that Hopkins' and Cormiers' requests for settlement authority of $100,000 and $75,000 respectively were inconsistent with reliance upon Dr. Seig's testimony. (R. 402, 413).

Hazouri testified that STATE FARM should have refused to pay plaintiff's medical bills if it believed that the accident did not cause her injuries. (R. 404-405, 423). He testified that paying the bills under the PIP and med-pay coverages instead of forcing the insured to file a lawsuit for payment, and then contesting the relationship between the treatment and the accident under the UM coverage was evidence of bad faith. (R. 408). Hazouri opined that the $40,000 offer made by STATE FARM was not a good faith offer. (R. 410).

On cross-examination, Hazouri admitted that the six month gap in treatment, followed by further delay in telling the physician about the accident, was a weakness in plaintiffs' case that raised issues for the defense. (R. 423). He also acknowledged that the

minimal impact was another weakness and a defense issue, admitting: "There was not a severe enough impact to cause the kinds of injuries that she sustained." (R. 424). He testified that insurers may legitimately take into account information contained in police reports, together with evidence of minor property damage, minimal impact and slow speed in evaluating claims. (R. 424).

Hazouri also acknowledged that the nerve block performed two months prior to the accident, Dr. Jacobson's opinion that 50% of plaintiff's problems pre-existed the accident, and the lack of any reference to low back problems on the PIP application were defense arguments that STATE FARM could take into consideration in evaluating the case; however, he maintained that these arguments were not "reasonable." (R. 429, 432). He conceded that common sense would cause one to question whether the extensive treatment was related to the accident. (R. 430).

STATE FARM called attorney Charles Stack to testify as an expert on its behalf. (R. 451). He testified that STATE FARM did not act in bad faith, and that its evaluation of the case was within a reasonable range. (R. 459). Stack testified that plaintiffs' demand was unreasonable from the outset because it was in excess of the policy limits, and was "outside of anyone's ability to deal with." (R. 460).

Stack testified that paying PIP benefits and challenging the relationship of the medical treatment to the accident when presented with a UM claim were completely consistent because of the different considerations involved in the two coverages. (R. 467,

469). He believed that STATE FARM properly considered the minimal impact, Dr. Seig's opinion, the photograph of the car, the prior surgeries, the delay in seeking treatment, and plaintiff's delay in telling Dr. Jacobson about the accident in evaluating the case. (R. 471-473). In Stack's opinion, the main factor which impeded serious settlement negotiation was plaintiffs' insistence on their demand of $300,000. (R. 474).

Based on this evidence, the jury found STATE FARM acted in bad faith and awarded damages of $24,000. (R.563).

SUMMARY OF ARGUMENT

The certified question should be answered in the negative. The trial court erred in giving newly-enacted section 627.727 (10), Florida Statutes, retroactive application, and in granting plaintiffs' motion for additur. The statute unconstitutionally impairs the contract between the parties. Moreover, it affects vested substantive rights. As a result, the statute violates due process.

On the second point, the evidence was insufficient to support the jury's finding of bad faith as a matter of law. The standard to be applied in a first-party case is whether the evidence showed the absence of a reasonable basis for denying or delaying payment, and whether the insurer had knowledge or reckless disregard of the lack of a reasonable basis for denying the claim. In light of plaintiff's pre-existing arthritic condition, there was an objectively reasonable basis for STATE FARM's evaluation of the claim. It cannot be held liable for bad faith damages for the mere

assertion of its right to seek a judicial resolution of an unquestionably legitimate dispute. Plaintiffs' primary argument -- that STATE FARM should have refused to pay PIP and med-pay benefits -- cannot support a bad faith claim as a matter of law.

The trial court abused its discretion in instructing the jury that a breach of the duty of good faith "has occurred" where there are flaws in the investigation. Absent any reference to the concept of causation, the instruction was an erroneous statement of the law, which misled the jury.

Finally, the Judgment for attorney's fees and costs should be reversed if this court reverses this final judgment.

ARGUMENT

POINT I

AMENDED SECTION 627.727(10), FLORIDA STATUTES (Supp. 1992) IS NOT A REMEDIAL STATUTE WHICH HAS RETROACTIVE APPLICATION

The certified question should be answered in the negative. The trial court erred in applying section 627.727(10), Florida Statutes which became law on the same day the jury returned its verdict in this case, and in awarding additur in the amount the underlying judgment exceeded the policy limits. Retroactive application of the statute to this case was unconstitutional because it impaired the contract between the parties, and it violated due process.

The amendment at issue requires that damages in a section 624.155 action arising out of a UM claim include, inter alia, "the total amount of the claimant's damages, including the amount in

excess of the policy limits... whether caused by an insurer or by a third-party tortfeasor." Ch. 92-318; § 79, Laws of Fla. (1992). Quite obviously, the statute was the legislature's attempt to overrule the Supreme Court's decision in McLeod v. Continental Ins. Co., 591 So. 2d 621 (Fla. 1992) as discussed below. As a part of the same legislation, the legislature created section 80, which provides:

> The purpose of subsection (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 and , as it serves only to reaffirm the original legislative intent, section 627.727, Florida Statutes, shall apply to all causes of action accruing after the effective date of section 624.155, Florida Statutes.

Ch. 92-318, 580, Laws of Fla. (1992). Not happy with just overruling McLeod, the legislature apparently sought to do so with a vengeance. This effective date provision, which purports to make the newly-created section 627.727 (10) applicable to all actions brought under section 624.155 since its effective date **ten years** earlier in 1982, gives rise to serious questions regarding the act's constitutionality which must be resolved in favor of giving the statute prospective application only.

The LaForet Fourth District decision found "the express intent of the legislature to be that Section 627.727 (10) have retroactive application." However, when the amendment is viewed in light of the history of the bad faith statute, section 624.155, a different conclusion must be reached.

The first-party bad faith cause of action, previously not allowed in Florida under common law, was created by statute in 1982 in Section 624.155, Florida Statutes (Supp. 1982) Ch. 82-243, § 9, Laws of Florida. Baxter v. Royal Indemnity Co., 285 So. 2d 652, 656 (Fla. 1st DCA 1973), cert. discharged, 317 So. 2d 725 (Fla. 1975).

Recently, in McLeod v. Continental Ins. Co., 591 So. 2d 621 (Fla. 1992) the Supreme Court held that plaintiffs in first-party bad faith actions had no right to recover the amount of the judgment in excess of the policy limits because the claimant's damages were not caused by the insurer's conduct, but by the uninsured tortfeasor. In the McLeod decision, this Court determined the legislative intent of the statute after a studied analysis of the issue. This Court specifically agreed with the second district's conclusion that there was nothing in the legislative history of the statute which would require an insurer to pay the amount of the excess judgment-- "a loss it did not cause." McLeod v. Continental Ins. Co., 573 So. 2d 864, 868 (Fla. 2d DCA 1990). Given the Supreme Court's decision in McLeod, it is clear that there is nothing in the legislative history to support the legislature's fictitious statement, that newly-created section 627.727 (10) was intended merely as an expression of its original intent in 1982 (ten years earlier) when a different statute section 624.155 was enacted.

An analogous situation was presented in State Dept. of Transportation v. Knowles, 402 So. 2d 1155 (Fla. 1981). In that

case, this Court rejected the argument that the subject statute was simply a "clarifying amendment," even though it was passed shortly after the Supreme Court had given the statute a contrary interpretation. The Court stated:

> The appellants offer nothing to document their assertion that the 1980 statute can recharacterize the law as originally enacted. Although the legislature may well have reacted to our [earlier] decision, that fact alone does not revitalize an earlier, omitted legislative purpose. [Id. at 1157. Emphasis added]

Due Process Violation:

In McLeod, the Supreme Court apparently recognized that the right to recover damages not caused by the insurer's conduct is a substantive right. The dissenting opinion in McLeod noted that the recovery of the excess judgment is a penalty. The alteration of substantive rights, i.e., imposing liability without regard to causation, and the retroactive application of a penalty, gives rise to a violation of due process.

In Anderson v. Anderson, 468 So. 2d 528, 530 (Fla. 3d DCA) rev. denied, 476 So. 2d 672 (Fla. 1985), the court stated the general rule that

> even a clear legislative expression of retroactivity will be ignored by the courts if the statute impairs vested rights, creates new obligations, or **imposes new penalties.**

This rule is fully applicable here. The retroactive application of section 627.727 (10) to this case imposes new penalties for conduct which occurred years ago. The statute goes so far as to make such a penalty mandatory. In this case, the jury determined that the

damages caused by the insurer's bad faith conduct were $24,000. Retroactive application of section 624.727 (10), however, resulted in "mandatory" post-trial imposition of a penalty over ten times that amount -- $265,753. The penalty, which is tantamount to mandatory punitive damages, is substantial, and quite obviously bears no relation to the amount of damages caused by the insurer.

The case which is most closely analogous to the instant case, and which fully supports rejection of the legislature's expressed intent that the statute have retroactive application, is the Supreme Court's decision in L. Ross, Inc. v. R. W. Roberts Construction Co. Inc., 481 So. 2d 484 (Fla. 1986). That case involved an amendment which lifted a limitation on recovery of statutory attorney's fees in cases against a surety on a construction bond. As a result of the amendment, insurers were required to pay full attorney's fees, instead of fees not to exceed 12% of the judgment. The Supreme Court resolved conflict between two district court decisions in favor of the decision which denied retroactive application of the amendment to a pending case.

This Court stated:

> The right to attorney fees is a substantive one, as is the burden on the party responsible for paying the fee. A statutory amendment affecting the substantive right and concomitant burden is likewise substantive. As stated by [district court]:
>
> "The argument [that the amendment is procedural, affecting 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 of the substantive law giving the substantive right which is the basis for the damages."

Id. at 485, quoting L. Ross Inc. v. R.W. Roberts Construction Co. Inc., 466 So. 2d 1096, 1097-98 (Fla. 5th DCA 1985) approved 481 So. 2d 484 (Fla. 1986).

The well-reasoned district court decision in L.Ross, Inc. v. R.W. Roberts Construction Co., supra, found that statutes which add a new right to attorney's fees create a substantive right in favor of insureds, and a substantive burden on insurers "because it gives to a party who did not have that right the legal right to recover substance (money!) from a party who did not theretofore have the legal obligation to render or to pay that money." Id. at 1098.

The court reasoned that the right to recover, and the obligation to pay, attorney's fees were incidental to the accrual of the underlying cause of action, and for that reason, accrued and vested at the same time the underlying cause of action accrued. The court stated:

> Substantive rights and obligations created by statutes do not vest and accrue as to particular parties until the accrual of a particular cause of action giving rise to the substantive rights and obligations in a particular instance.
>
> * * *
>
> It is a facet of constitutional due process that, after they vest, substantive rights cannot be adversely affected by the enactment of legislation. Likewise, but conversely, it is fundamentally unfair and unjust for the legislature to impose, ex

> post facto, a new or increased obligation, burden or penalty as to a set of facts after those facts have occurred. For the same reason, regardless of the intent of the legislature, the legislature cannot constitutionally increase an existing obligation, burden or penalty as to a set of facts after those facts have occurred.

Id. at 1098. The court reasoned that the crucial date for the due process analysis was the date on which the underlying cause of action accrued. After the "date on which the essential facts occurred and were sealed beyond change, ... the legislature cannot, ex post facto, constitutionally enhance the obligation or penalty that results from those facts." Id. at 1099.

In the instant case, section 624.155, Florida Statutes, like the statute allowing recovery of attorney's fees, gives a substantive right to recover damages for bad faith in a first party suit. The amendment to the UM statute, section 627.727 (10), Florida Statutes, like the amendment abolishing the 12% limitation on fees, affects a substantive right, and not just the remedy. The amendment has the effect of changing the nature of the substantive right created by the civil remedy statute. To paraphrase the district court in L.Ross, Inc. v. R.W. Roberts Construction Co., supra at 1098:

> A statute, such as [section 627.727 (10)], which extends the application of an existing statute [such as section 624.155] which itself created substantive rights and obligations to an additional class of prospective parties creates as to the newly affected class of parties, substantive rights in the additional class of potential plaintiffs [first party claimants], and substantive obligations upon the additional class of potential defendants [insurers].

Under the amendment, a first-party claimant has a right to recover damages not caused by the insurer. There is no doubt that this is substantive change in the law, as it changes the fundamental premise that a party to a contract is not liable for damages he did not cause. See McLeod v. Continental Ins. Co., 591 So. 2d 621 (Fla. 1992). Section 627.727 (10), Florida Statutes, simply cannot be seen as procedural in any sense. The legislature's characterization of the amendment as remedial instead of substantive does not change the nature of the rights affected and should be disregarded. Calling it remedial, and thus presumably constitutional, does not make it so. The legislature's characterization cannot cure the constitutional defect.

By incredible coincidence, the statute at issue became law on the same day the jury returned its verdict in this case. In State Dept. of Transportation v. Knowles, supra, the Supreme Court held that the legislature could not retroactively create sovereign immunity where plaintiff had already obtained a verdict against a previously non-immune defendant. In that case, the court reasoned that the verdict created a vested right which could not be altered without violating due process. The court found that, despite the fact that the legislature obviously intended the statute to override a recent Supreme Court decision on the issue, it did not accomplish that purpose. The prior opinion was the law at the time the verdict was rendered. The Court rejected the argument that the statute was merely a clarification of earlier legislative intent,

and applied a balancing test, which it easily resolved in favor of allowing the prior verdict to stand.

The Court went on to sum up, in the words of Mr. Justice Holmes:

> Stripped of conciliatory phrases the question is whether a state legislature can take away from a private party a right to recover money that is due when the act is passed.

Id. at 1158-1159. The Court held that it could not.

The instant case is the mirror image of Knowles, and its reasoning is directly applicable. The verdict awarding damages in the amount of $24,000 created a vested right -- that was the extent of STATE FARM's liability for the asserted "bad faith" conduct. As in Knowles, the amendment at issue in this case was obviously enacted in response to a Supreme Court decision. According to Knowles, however, the prior opinion was the law on which substantive rights were established, and those rights could not be taken away by the legislature.

Finally, applying the balancing test applied in Knowles likewise results in the inescapable conclusion that the statute violates due process. The three considerations involved are "the strength of the public interest served by the statute, the extent to which the right affected is abrogated, and the nature of the right affected." Id. at 1158. The public interest served by the statute is encouraging good faith claims handling. The interest, however, is served by prospective application of the statute. Retrospective application only serves to punish past acts. Any public interest in such ex post facto punishment is clearly

outweighed by the severity of the infringement of the insurer's substantive right to be free from liability for damages it did not cause. As in Knowles, the statute here does not merely effect a procedural adjustment to plaintiffs' remedies -- it imposes a penalty in the nature of mandatory punitive damages. Balancing the competing considerations leads to the inescapable conclusion that the extent to which STATE FARM'S vested, substantive rights are adversely affected by section 627.727 (10) outweighs any public interest in the legislation.

Retroactive statutes are constitutionally defective:

> ... in those cases wherein vested rights are adversely affected or destroyed or when a **new obligation** or duty is imposed, **or an additional disability** is established, in connection with **transactions or considerations previously had or expiated.**

Village of El Portal v. City of Miami Shores, 362 So. 2d 275, 277 (Fla. 1978), quoting McCord v. Smith, 43 So. 2d 704 (Fla. 1949) (emphasis added). The statute at issue here creates a new obligation, i.e., the requirement to pay the amount of the claimant's total damages, without regard to causation. This obligation constitutes an additional disability, with respect to events that have already taken place and have given rise to a cause of action that has already accrued, and has been reduced to verdict.

Under these facts, the retrospective application of section 627.727 (10) plainly works an unconstitutional denial of due process. See also State v. Lavazzoli, 434 So. 2d 321 (Fla. 1983); Cone Brothers Contracting v. Gordon, 453 So. 2d 420 (Fla. 1st DCA

1984); Parrish v. Mullis, 458 So. 2d 401 (Fla. 1st DCA 1984); Stillwell v. Thigpen, 426 So. 2d 1267 (Fla. 1st DCA 1983).

Impairment of Contracts:

The Florida Constitution provides:

> **Prohibited laws:** No bill of attainer, ex post facto law or law impairing the obligation of contracts shall be passed.

Art. I, § 10, Fla. Const. The statute which was amended in this instance was the uninsured motorist statute, which is incorporated into all policies issued in Florida, and therefore forms a basis of the insurance contract. The policy in this case was issued to LAFORET before the effective date of section 627.727 (10), Florida Statutes; therefore, the amendment impairs the contract between the parties. Dewberry v. Auto-Owners Ins. Co., 363 So. 2d 1077 (Fla. 1978).

In Dewberry v. Auto-Owners Ins. Co., the landmark insurance case in this area, the Supreme Court held that retroactive application of the anti-stacking statute unconstitutionally impaired contracts for UM coverage which were issued before the effective date of the policy. In language pertinent here, this Court stated:

> It is axiomatic that subsequent legislation which diminishes the value of a contract is repugnant to our Constitution. ...
>
> Any conduct on the part of the legislature that detracts in any way from the value of the contract is inhibited by the Constitution.

Id. at 1080 [citations omitted]. 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.

In Pomponio v. Claridge of Pompano Condominium, Inc., 378 So. 2d 774 (Fla. 1979), the Supreme Court adopted a balancing test to determine whether an impairment of a contract is unconstitutional, noting that a lesser degree of impairment is tolerable under the Florida Constitution than under the Federal Constitution. Application of this test -- which requires balancing the degree of the impairment against the state interest in retroactive application of the statute -- readily demonstrates that retroactive application of section 627.727 (10) creates an unconstitutional impairment of contracts.

The impairment of the contract between the parties brought about by retroactive application of the statute is severe, and is not outweighed by the state interest. As indicated above, the state interest at issue is encouraging good faith claims handling. Retroactive application of section 627.727 (10), however, would only further punish past acts. The interest of the state is adequately served by prospective application, and it is not necessary to apply the penalty retroactively to satisfy the state's interest.

Because the uninsured motorists statute is an integral part of the contract between the parties, the amendment to that statute which seeks to impose a significantly enhanced penalty for breach of contract creates an unconstitutional impairment of the contract

of insurance. See Fleeman v. Case, 342 So. 2d 815 (Fla. 1976)(statute invalidating escalation clauses in pre-statute lease contracts noted to be unconstitutional impairment of contract); Standard Distributing Co. v. Fla. Dept. of Business Regulation, 473 So. 2d 216 (Fla. 1st DCA 1985) (repeal of statutes which had become a part of the parties' contract could not apply retroactively without unconstitutionally impairing the contract).

The trial court's interpretation of section 627.727 (10) as merely a "clarifying amendment" does not cure the serious constitutional problems created by retroactive application of the statute to alter vested substantive and contract rights. Although it is clear that the legislature sought to alter the interpretation of section 624.155 given by the Supreme Court in McLeod, it did not amend that statute. Rather, the legislature created section 627.727 (10) as a new provision of the uninsured motorist statute, which is made a part of all contracts for UM coverage in this state. The fact that a new substantive provision was enacted which imposes a liability of a totally different nature than that which previously existed belies any argument that the statute was merely a "clarifying amendment."

The trial court erred in giving section 627.727 (10) retroactive application, and in awarding plaintiffs' motion for additur. If this Court determines that STATE FARM is not entitled to a new trial or a directed verdict on the substantive grounds argued, in Point II or Point III of this brief, the final judgment

should nonetheless be reversed, and the cause remanded for instructions to enter judgment in the amount of the jury's verdict.

Petitioner also adopts the amicus briefs of the Florida Defense Lawyers Association, Nationwide Ins. Companies, The National Association of Independent Insurers and G.E.I.C.O. on this point.

POINT II

WHETHER STATE FARM IS ENTITLED TO A MOTION FOR DIRECTED VERDICT WHERE THE COMPETENT EVIDENCE ESTABLISHED THERE WAS A LEGITIMATE CONTROVERSY REGARDING THE AMOUNT OF UNINSURED MOTORIST BENEFITS DUE AS A RESULT OF THE ACCIDENT; PLAINTIFF'S PRE-EXISTING BACK PROBLEMS GAVE RISE TO AN ISSUE THAT WAS "FAIRLY DEBATABLE" AS A MATTER OF LAW.

STATE FARM was entitled to entry of a directed verdict in its favor; there was no "bad faith" as a matter of law. There was a "reasonable basis" for the amount of uninsured motorist benefits State Farm offered to plaintiff. Imhof v. Nationwide Mut. Ins. Co., 19 Fla. L. Weekly S257 (Fla. May 12, 1994). The facts presented a legitimate controversy which STATE FARM was entitled to have resolved by a jury without the imposition of "bad faith" damages. See also McLeod v. Continental Ins. Co., 573 So. 2d 864, 866 n.4 (Fla. 2d DCA 1990), aff'd, 591 So. 2d 621 (Fla. 1992). In the alternative, the jury's verdict which found that STATE FARM was guilty of bad faith was contrary to the manifest weight of the evidence, and the trial court abused its discretion in denying STATE FARM's motion for new trial. In the absence of competent evidence to support the jury's finding of bad faith, the final judgment must be reversed.

The "fairly debatable" standard was first articulated by the Supreme Court of Wisconsin in Anderson v. Continental Ins. Co., 85 Wis.2d 675, 271 N.W.2d 368 (1978). In recognizing a cause of action for first-party bad faith, the court stated:

> To show a claim for bad faith, a plaintiff must show the absence of a reasonable basis for denying benefits of the policy and the defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim. It is apparent then, that the tort of bad faith is an intentional one. "Bad faith" by definition cannot be unintentional.
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> * * *
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> The tort of bad faith can be alleged only if the facts pleaded would, on the basis of an objective standard, show the absence of a reasonable basis for denying the claim, i.e., would a reasonable insurer under the circumstances have denied or delayed payment of the claim under the facts and circumstances. [citations omitted].
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> * * *
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> Under these tests of the tort of bad faith, an insurance company, however, may challenge claims which are fairly debatable and will be found liable only where it has intentionally denied (or failed to process or pay) a claim without a reasonable basis.

Id. at 376-377. The court reasoned that putting the test on an objective basis would avoid the undesirable result of scaring insurers into paying questionable claims under the threat of a bad faith lawsuit and excessive damages. Id. The court was "satisfied" that extortionate lawsuits would not follow "when an insurance company in the exercise of ordinary care makes an investigation of the facts and law and concludes on a reasonable basis that the claim is at least debatable." Id.

This court recently recognized the "fairly debatable" standard in Imhof v. Nationwide Mut. Ins. Co., supra. In Imhof, this Court stated:

> An insurer has been found to have acted in bad faith when the disputed claim is determined no to be "fairly debateable." Reliance Ins. Co. v. Barile Excavating and Pipeline Co., 685 F. Supp. 839, 840 (M.D. Fla. 1988). Under Reliance, a claim is not "fairly debatable" only when there is no reasonable basis to deny policy benefits.

Likewise, in the district court decision in McLeod v. Continental Ins. Co., 573 So. 2d 864 (Fla. 2d DCA 1990), aff'd 591 So. 2d 621 (Fla. 1992), the Second District implicitly recognized a standard which approximates the "fairly debatable" standard.[7] There, the court held that the jury instructions given improperly deprived the insurer of its defense and reversed on that issue, stating: "Like people, insurance companies can be incorrect without acting in bad faith." Id. at 866. In support of this proposition, the court quoted a passage which appears at 15A Couch on Insurance 2d § 58:1 (1983):

> [T]he insurer should not be held liable for extra-contractual damages where there is a legitimate

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[7] The smattering of other reported Florida cases involving section 624.155 have not discussed in any detail the standard by which the insurer's conduct is to be judged in a first-party action. See e.g., State Farm Mut. Auto. Ins. Co. v. Otieza, 595 So. 2d 1094 (Fla. 3d DCA), rev. denied, 602 So. 2d 942 (Fla. 1992)(trial court directed verdict for insurer on "bad faith" claim, which was not appealed); Home Ins. Co. v. Owens, 573 So. 2d 343 (Fla. 4th DCA 1990), rev. denied 592 So. 2d 680 (Fla. 1991) ("evidence a-plenty of bad faith" not outlined; evidence sufficient to support punitive damage award). In Cruz v. American United Ins. Co., 580 So. 2d 311, 312 (Fla. 3d DCA 1991), the court noted only that "the legal standard governing an insurer's settlement conduct is one of reasonableness."

> controversy as to whether benefits are due or the amount of such benefits... [T]he insurer must be entitled to a full judicial resolution of controverted issues of fact and law without the imposition of penalties for the mere assertion of such a right.

Id. at 866 n.4.

Applying the "fairly debatable" standard results in judgment in the insurer's favor as a matter of law where the evidence establishes an objectively reasonable basis for the insurer to deny the claim. See e.g., Thomas v. Allstate Ins. Co., 974 F.2d 706 (6th Cir. 1992)(applying Ohio law; bad faith claim rejected as a matter of law where denial of claim for fire loss was "reasonably justified"); Mills v. Regent Ins. Co., 152 Wis.2d 566, 449 N.W.2d 294 (Ct. App. 1989), rev. denied, 451 N.W.2d 297 (Wis. 1990)(bad faith not established by insurer's conduct in denying payment on fire loss where evidence failed to establish that no objectively reasonable basis existed for the insurer to deny the claim). See also Reliance Ins. Co. v. Barile Excavating & Pipeline Co., 685 F.Supp. 839 (M.D. Fla. 1988)(applying "fairly debatable" standard; summary judgment entered in favor of insurer).

In factual settings similar to the instant case, bad faith claims arising out of an insurer's conduct in not settling UM claims have been rejected as a matter of law where the facts presented an issue which was "fairly debatable." See e.g., LeFevre v. Westberry, 590 So. 2d 154 (Ala. 1991)(amount of benefits owed under UM claim "fairly debatable" as a matter of law where plaintiff's injuries first appeared nominal but gradually worsened); Dolan v. Aid Ins. Co., 431 N.W. 2d 790 (Iowa

1988)(insurer entitled to summary judgment because plaintiff's previous back injury raised a "fairly debatable" issue regarding whether any residual disability remained at the time of the accident).

"Where a claim is 'fairly debatable,' the insurer is entitled to debate it, whether the debate concerns a matter of fact or law." Dolan v. Aid Ins. Co., supra at 794. In this case, STATE FARM was entitled to debate the question of whether the minimal impact of the accident caused the damages claimed by Mrs. LaForet, or whether her post-accident surgeries were necessitated by the natural progression of her pre-existing condition. This issue plainly presented a genuine and legitimate controversy. STATE FARM was entitled to debate that issue without being subjected to "bad faith" penalties for the mere assertion of its right to do so. McLeod v. Continental Ins. Co., 573 So. 2d at 866 n.4.

The only conclusion supported by the evidence was that STATE FARM's position -- that the post-accident surgeries were necessitated by plaintiff's pre-existing condition, and not the accident -- was reasonable, based on a studied evaluation of plaintiff's medical reports, the evidence regarding the degree of impact, and the opinions of the three experts who reviewed the case. The fact that the jury in the underlying case reached a different conclusion does not mean that STATE FARM acted in bad faith. As the court in Sharpe v. Physicians Protective Trust Fund, 578 So. 2d 806, 808 (Fla. 1st DCA), rev. denied, 589 So. 2d 292

(Fla. 1991), stated: "Bad judgment does not, in our opinion, equate with bad faith."

Faced with conflicting evidence regarding causation, STATE FARM made a legitimate judgment call, which should not be subject to second-guessing in the absence of evidence that it was unreasonable under the facts, dishonest, or based on a reckless disregard for the facts.[8] There was no such evidence here. Plaintiffs' own expert admitted that the evidence created legitimate defense issues regarding the extent to which plaintiff's injuries were caused by the accident; therefore, STATE FARM's conduct in this case was not unreasonable as a matter of law. (R. 423-424).

In a third-party excess case, unlike the present case, a factual question regarding the insurer's bad faith is generally presented because, despite the legitimacy of the insurer's defensive position, it is under an affirmative obligation to avoid prejudice to the insured. An insurer is obligated to settle a claim against its insured, if possible, where a reasonably prudent person, faced with the prospect of paying the total recovery would do so. Boston Old Colony Ins. Co. v. Gutierrez, 386 So. 2d 783, 785 (Fla. 1980). In such a circumstance, the legitimacy of the insurer's position is one factor which must be weighed against the risk of exposing the insured to an excess judgment, presenting a jury question. See Robinson v. State Farm Fire & Casualty Co., 583

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[8] "[T]he court should not second guess a legitimate judgment call, even if questionable". Id.

So. 2d 1063 (Fla. 5th DCA 1991)(rejecting "fairly debatable" standard as applied to third-party cases).[9]

Of course, in the present first-party context, there is no such risk which would counterbalance the insurer's right to seek a judicial resolution of a legitimate controversy. The insured and insurer are in an adversarial relationship, not one in which the insured has relinquished control of the litigation to the insurer. More significantly, a verdict in excess of the policy limits will not cause harm to the insured by exposing her to personal liability. See McLeod v. Continental Ins. Co., 591 So. 2d 621 (Fla. 1992). See also Hollar v. International Bankers Ins. Co., 572 So. 2d 937 (Fla. 3d DCA 1990), rev. dismissed, 582 So. 2d 624 (Fla. 1991). Thus, if the evidence establishes the existence of an objectively legitimate controversy, or one that is "fairly debatable," the issue of the insurer's "bad faith" is properly decided as a matter of law. Imhof v. Nationwide Ins. Co., supra. State Farm Fire and Casualty Ins. Co. v. Balmer, 891 F.2d 874 (11th Cir.), cert. denied, 111 S. Ct. 263, 112 L.Ed.2d 220 (1990)(applying Alabama law); LeFevre v. Westberry, supra; Dolan v. Aid Ins. Co., supra.

No jury question was presented in this case because the evidence wholly failed to establish the absence of an objectively

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[9] Even under traditional third-party bad faith principles, however, resolution of the issue of bad faith as a matter of law is proper where the carrier's actions were not unreasonable. See, e.g., Clauss v. Fortune Ins. Co., 523 So. 2d 1177 (Fla. 5th DCA 1988); Caldwell v. Allstate Ins. Co., 453 So. 2d 1187, 1190 (Fla. 1st DCA 1984).

reasonable basis for STATE FARM's position. Plaintiffs' "bad faith" claim was based on a hodge-podge of perceived misdeeds which, when viewed singly or collectively, do not support an inference that STATE FARM had failed to "[attempt] in good faith to settle [the claim] when it could and should have done so, had it acted fairly and honestly toward its insured and with due regard for his interests." Fla. Stat. § 624.155 (1)(b)(1)(1986). Plaintiffs' evidence failed to establish either that STATE FARM "could" or "should" have settled the claim.

First, plaintiffs' own expert was forced to admit that plaintiffs were wrong in their belief that the policy provided $400,000 in UM benefits. (R. 395, 433).[10] Quite plainly, plaintiffs' misunderstanding regarding the available policy limits was the greatest impediment to settlement of the claim. Plaintiffs simply refused to budge from the initial $300,000 demand, which was $100,000 over the policy limits. This was a demand which STATE FARM was incapable of processing, and was unreasonable as a matter of law. In light of plaintiffs' steadfast belief that the policy provided $400,000 in UM coverage, without evidence of an opportunity to settle within the policy limits there is no basis for an inference that STATE FARM "could" have settled the case;

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[10] Under Florida law a husband's loss of consortium claim is part of the wife's "bodily injury" for the purpose of determining applicable limits of insurance coverage. Universal Underwriters Ins. Corp. v. Reynolds, 129 So. 2d 689 (Fla. 2d DCA 1961).

therefore, plaintiffs failed to prove the first requirement of section 624.155 (1) (b)(1).[11]

Even if it could be inferred that STATE FARM "could" have settled the claim, there is no basis for a finding that it "should" have done so. The legitimate controversy surrounding the extent to which plaintiff's damages were caused by the accident precludes a finding that STATE FARM "should" have settled the claim as a matter of law. STATE FARM had an objectively reasonable basis for its position that the post-accident surgeries were not caused by the accident. This included evidence regarding the minimal impact; plaintiff's failure to mention low back injuries on the application for PIP benefits one month after the accident; a six-month delay in seeking medical treatment, and another four month delay in telling the physician about the accident; the opinions of three physicians that the post-accident surgeries were not related to the accident; and Dr. Jacobson's own opinion that 50% of plaintiff's complaints were caused by the pre-existing condition.

Notwithstanding the presence of this legitimate controversy, plaintiffs primarily relied upon two related arguments in support of their claim for bad faith. First, plaintiffs argued that STATE FARM was essentially estopped to deny the UM claim on the ground that the post-accident treatment was not related to the accident

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[11] This case does not present the circumstances which the court in Powell v. Prudential Property & Casualty Ins. Co., 584 So. 2d 12 (Fla. 3d DCA 1991), rev. denied, 598 So. 2d 77 (Fla. 1992), found to impose an affirmative duty to initiate settlement negotiations in a third-party case, i.e., clear liability and injuries so serious that the insured is likely to suffer exposure to an excess judgment.

because it had paid plaintiff's medical expenses under the PIP and med-pay coverage. Secondly, plaintiffs argued that STATE FARM inadequately investigated the claim, relying upon an asserted failure to investigate the nature and extent of the claim prior to paying the PIP and med-pay claims.

Plaintiffs' argument that STATE FARM acted in bad faith because it paid plaintiff's medical bills, instead of resisting payment, cannot support the jury's verdict as a matter of law. Initially, this argument totally ignores the different standards which apply to payment of PIP and UM claims. See Race v. Nationwide Mut. Fire Ins. Co., 542 So. 2d 347 (Fla. 1989)(refusing to apply "liberal" PIP standard of causation to UM claim). As defendant's expert testified, an insurer is required to pay PIP benefits if the accident was in any way related to the medical treatment sought. (R. 467-468). Unlike UM coverage, PIP is an all or nothing proposition. In light of the nature and purpose of no-fault coverage, STATE FARM's conduct in giving plaintiff the benefit of the doubt on the issue of causation, and promptly paying the medical bills, is to be condoned and promoted, not punished.

Even more basic, STATE FARM could not have properly refused to pay PIP and med-pay benefits in order to place itself in a more favorable position vis a vis the UM claim. Such manipulation of coverage is called "leveraging,"[12] and is expressly barred by section 624.155 (1)(b)(3), Florida Statutes (1986), which prohibits

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[12] See Juedeman v. National Farmers Union Property and Casualty Co., 833 P.2d 191 (Mont. 1992).

> ... failing to promptly settle claims, when the obligation to settle a claim has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage.

Thus, plaintiffs' argument that STATE FARM was somehow foreclosed from denying the causal relationship between the accident and the medical treatment when evaluating the UM claim is wrong as a matter of law. While the fact that a jury may not understand the different standards was a valid concern in attempting to place a settlement value on the UM case, the fact that payment of the medical expenses was not resisted does not preclude STATE FARM from arguing that the medical treatment was not necessitated by the accident.

Similarly, plaintiffs' contention that the failure to fully investigate the causal relationship between the accident and the treatment before paying plaintiff's PIP claim does not give rise to an inference that STATE FARM acted in bad faith with respect to plaintiff's claim under the separate UM coverage. The undisputed testimony was that it would not have made any difference. STATE FARM still would have paid the medical expenses, giving plaintiff the benefit of the doubt, and still would have evaluated the UM claim in the same manner.

Despite alleged "flaws" in its investigation, the evidence established that STATE FARM's investigation enabled it to come to a "fair, honest and intelligent" evaluation of the case. Liberty Mut. Ins. Co. v. Davis, 412 F.2d 475, 483 (5th Cir. 1969). This is not a case in which STATE FARM acted with reckless disregard of the

lack of a reasonable basis for denying the claim. See Anderson v. Continental Ins. Co., supra. It had before it abundant objective evidence that the plaintiff's post-accident surgeries were not related to the automobile accident. The fact that it did not take Mrs. LaForet's statement is simply no basis for a claim of "bad faith."

That a flawed investigation, standing alone, will not support a first-party claim for bad faith was recognized in Pace v. Ins. Co. of North America, 838 F.2d 572 (1st Cir. 1987)(applying Rhode Island law). In that case, the court, following Anderson v. Continental Ins. Co, supra, stated:

> To remove the objective component of the test -- to permit recovery against an insurer because of flaws in the investigation even though the insurer has, in fact, an objectively reasonable basis for denying coverage -- would be to remove most of the protection for insurers and premium payers announced in Anderson, since it is almost impossible to conduct an investigation as to which some question of its adequacy, sufficient to get to the jury, cannot, in hindsight, be raised. Thus, if there is an objectively reasonable basis to deny coverage, the existence of investigative flaws, standing alone, are not enough to permit recovery in tort against an insurer...

Id. at 584.

Finally, plaintiffs argued that STATE FARM acted in bad faith when it delayed approving the settlement with the tortfeasor. The evidence plainly established, however, that any delays in this regard were brought about by plaintiffs, not STATE FARM. It was plaintiffs' counsel who volunteered to find out whether the driver had additional insurance coverage, and it was plaintiffs' counsel who delayed for several months in getting that information to STATE

FARM. Once the information was relayed to STATE FARM, it promptly agreed to waive its subrogation rights. Where the delay in settlement has been brought about by plaintiffs' conduct, there is no bad faith. See, e.g., Juedeman v. National Farmers Union Property and Casualty Co., supra, (no bad faith claim where plaintiff's conduct prevented carrier from effectuating prompt settlement; bad faith claim would be rejected where plaintiff's conduct caused the delay in payment). Cf. Fernandez v. South Carolina Ins. Co., 408 So. 2d 753 (Fla. 3d DCA), rev. denied, 417 So. 2d 329 (Fla. 1982)(where delay in making PIP payments attributable to plaintiff's conduct, insurer not liable for attorney's fees).

Finally, the fact that STATE FARM elected not to arbitrate was not evidence of bad faith. See Sharpe v. Physicians Protective Trust Fund, supra (wherein the court recognized that conduct by the insurer which is contemplated by the express policy terms does not support a claim for bad faith by the insured where there has been no exposure to an excess judgment). Similarly specious was the contention that ordering surveillance evidenced bad faith. See Dodson v. Persell, 390 So. 2d 704 (Fla. 1980)(recognizing value of surveillance in preventing fraudulent and overstated claims).

In sum, the evidence plainly established the absence of bad faith in this case as a matter of law. The evidence established that STATE FARM undertook a fair and honest evaluation of the case, and had an objectively reasonable basis for not settling the claim

for policy limits, even assuming it could have done so. The trial court erred in denying STATE FARM's motion for directed verdict.

Even if this case could not properly have been decided as a matter of law, the jury's verdict was contrary to the manifest weight of the evidence, and the trial court abused its discretion in denying STATE FARM's motion for new trial on that ground. It is clear that the jury was swayed by irrelevant and misleading testimony and argument, particularly with respect to plaintiffs' misdirected contention that STATE FARM was somehow in bad faith because it paid the plaintiff's medical bills instead of forcing her to file a PIP suit. The competent evidence adduced at trial simply did not support the jury's finding of bad faith.

STATE FARM is entitled to the entry of judgment in its favor as a matter of law, or alternatively, a new trial.

POINT III

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN INSTRUCTING THE JURY THAT AN INADEQUATE INVESTIGATION CONSTITUTED BAD FAITH WITHOUT REFERENCE TO THE ELEMENT OF CAUSATION.

The trial court's instructions to the jury were misleading, and did not constitute a proper statement of the law. Plaintiffs' requested jury instruction regarding the "duty to investigate" was tantamount to a directed verdict against STATE FARM; therefore, it constituted prejudicial error which requires reversal. See Goldschmidt v. Holman, 571 So. 2d 422 (Fla. 1990)(prejudicial error arises where instructions are reasonably calculated to confuse or mislead the jury.)

The trial court instructed the jury that

> 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 has occurred between the insurance company and its insureds.

(R. 559). This instruction improperly advised the jury that if it found flaws in the investigation, a finding of bad faith follows. That is not the law in Florida. Because it did not embody any causation requirement, the instruction was not a proper statement of the law.

In Liberty Mut. Ins. Co. v. Davis, supra, the court approved as a proper statement of Florida law an instruction which advised the jury that an insurer's duty to investigate requires "an investigation ... thorough enough to permit it to come to some fair, honest, and intelligent decision regarding the settlement opportunities in the light of the then existing probabilities." The requirement in this instruction that the investigation be sufficient to enable the insurer to make a fair and honest evaluation of the case properly characterizes the requirement of causation when the claim of bad faith is based upon claimed inadequacy of the investigation.

In contrast, the jury instruction given in this case did not advise the jury that the duty to investigate only requires that the insurer have sufficient information to make a "fair, honest, and intelligent" decision. The absence of any reference to the element of causation rendered the instruction misleading, and a misstatement of the law.

In this case, as outlined in Point II, supra, the undisputed testimony was that no amount of additional investigation would have changed STATE FARM's evaluation of the case. It had ample evidence from which to make a reasoned, honest, intelligent evaluation of Mrs. LaForet's claim, which involved complicated medical issues regarding causation of her injuries. The fact that it did not take Veronica LaForet's statement did not mean that it did not have sufficient information to make a "fair, honest, and intelligent" evaluation of the case.

In State Farm Fire and Casualty Co. v. Balmer, supra at 875, the court stated:

> However recklessly an insurer conducts its investigation, a bad faith claim cannot succeed where the insurer had an arguably lawful basis for denying the claim. "When a claim is 'fairly debatable,' the insurer is entitled to debate it, wither the debate concerns a matter of fact or law ... A debatable reason for denying a claim is 'an arguable reason, one that is open to dispute or question.' [citations omitted]

See also Pace v. Ins. Co. of North America, supra (flawed investigation is not enough to support a claim for first-party bad faith); Mills v. Regent Ins. Co., supra (same).

The jury instruction given in this case virtually negated all other instructions on the bad faith issue, including the "fairly debatable" instruction. The instruction which advised the jury that a failure to promptly investigate constituted a breach of the duty of good faith amounted to a directed verdict in favor of plaintiffs. In McLeod v. Continental Ins. Co., 573 So. 2d 864 (Fla. 2d DCA 1991), aff'd 591 So. 2d 621 (Fla. 1992) the district

court held that a jury instruction which essentially told the jury that the insurer had acted in bad faith as a matter of law constituted reversible error, and ordered a new trial on that basis.

The same result is required here. The instruction which advised the jury that a failure to properly investigate constituted a breach of the promise of good faith and fair dealing "led almost inevitably to an award of damages." Id. The trial court abused its discretion in denying defendant's motion for new trial because the jury instructions were legally erroneous and misleading. STATE FARM is entitled to a new trial on the issue of bad faith.

POINT IV

THE JUDGMENT FOR ATTORNEY'S FEES AND COSTS SHOULD BE REVERSED IF THIS COURT REVERSES THE FINAL JUDGMENT.

If the final judgment entered by the trial court is reversed as a result of this Court's decision and a new trial or directed verdict ordered, the attorney's fee and cost award must also reversed. See Stahl v. Metropolitan Dade County, 438 So. 2d 14, 24 (Fla. 3d DCA 1938) (on motion for clarification).

CONCLUSION

Based on the foregoing arguments and authorities, this Court is respectfully requested to exercise its jurisdiction and quash the Fourth District decision. On the first point, this Court is requested to answer the certified question in the negative and remand with instructions to enter judgment in the amount of the jury's verdict. On the second point, this Court is requested to

remand the case with instructions to enter judgment in favor of State Farm; alternatively, this Court is requested to remand the case with instructions to order a new trial. On the third point, this Court is requested to find that the giving of the jury charge was reversible error and remand with instructions for a new trial. If this Court determines on Point I that the trial court erred in granting plaintiffs' motion for additur but determines that neither directed verdict nor new trial are appropriate, under Points II or III, this Court is requested to remand with instructions to reverse the final judgment which awarded plaintiffs the amount of the excess judgment and remand with instructions to enter judgment in the amount of the jury's verdict. Finally, this Court is requested to send additional instructions to vacate the award of attorney's fees if the final judgment is reversed.

Respectfully submitted,

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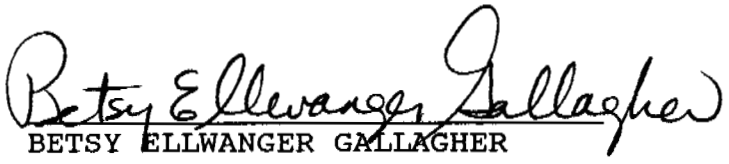
CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the above and foregoing Initial Brief of the Petitioner on the Merits was mailed this 13th day of June, 1994 to: George H. Moss, Esq., Moss, Henderson, Van Gaasbeck, Blanton & Koval, P.A., 817 Beachland Blvd Vero Beach, Fl. 32964-3406; Jane Kreusler-Walsh, P.A., Suire 503 - Flagler Center, 501 South Flagler Dr., West Palm Beach, Fl. 33401; Louis K. Rosenbloum Esq., Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A., P.O. Box 12308, Pensacola, Fl. 32581; George Vaka, Esq., P.O. Box 1438, Tampa, Florida 33601, Fowler, White, Gillen, Boggs, Villareal & Banker, P.A.; James K. Clark, Esq., Clark, Sparkman, Robb & Nelson, Suite 1003 Biscayne Building, 19 West Flagler Street, Miami, Florida 33130.



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