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)

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

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## INTRODUCTION

This brief shall serve as a consolidated reply to the briefs filed by respondents and by the Academy of Florida Trial Lawyers, Amicus Curiae. In this brief, respondents will be referred to collectively as LAFORET and petitioner will be referred to as STATE FARM; alternatively, the parties will be referred to as they stood in the trial court.

## ARGUMENT

### POINT I

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

The briefs of plaintiffs and amicus curiae do not meet the substance of STATE FARM's position. Plaintiffs and amicus skim over the grave constitutional questions and glibly point to the legislature's expressed intent that the amendment be applied retrospectively, and its characterization of the statute as a "clarifying" amendment.[1] In McLeod v. Continental Ins. Co., 591

[1] The Staff Report on which LAFORET relies to support its statement that section 624.155 has "included the excess judgment among recoverable damages for first party bad faith" since its enactment in 1982, was given a contrary interpretation by this Court in McLeod. Brief of LAFORET, page 11. There the Court found that the statement in the Staff Report "merely indicates that the measure of damages is not limited to the policy limits, if such damages are incurred." The Court further stated: "Nowhere does the report evidence an intent that the measure of damages be fixed at the excess judgment amount." Id. at 625-626. Staff Report, 1982 Insurance Code Sunset Revision (HB 4F: as amended HB 10G) (June 3,

So. 2d 621, 625 (Fla. 1992), however, this Court closely examined section 624.155 and was "unable to find any evidence" that the legislature intended to assess the amount of the excess judgment on the insurer. Given the Supreme Court's decision in McLeod, it is clear that there is nothing in the legislative history to support the legislature's statement that newly-created section 627.727(10) was intended merely as an expression of its original intent in 1982 when a different statute--section 624.155--was enacted[2].

In State Dept. of Transportation v. Knowles, 402 So. 2d 1155 (Fla. 1981), the Supreme Court rejected an argument similar to the one presented by LAFORET. In that case, the 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 [emphasis added].

Id. at 1157. Hence, the legislature may not declare a new,

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1982).

[2] LAFORET's reliance on Ivey v. Chicago Ins. Co., 410 So. 2d 494 (Fla. 1982) is misplaced. The court in Ivey did not apply the subject amendment retroactivly, but considered a subsequent amendment when construing the legislative intent of the statute which was in effect at the time the cause of action accrued. In this case, however, there is no cause to resort to the rule of stautory construction which was used in Ivey.

previously unexpressed, "legislative intent" to support retroactive application of a substantive change in the law in the guise of a "clarifying amendment."

In placing such heavy reliance on the expressed intent, LAFORET overlooks the fact that even a clear expression of legislative intent that a statute be applied retrospectively will be ignored if the statute impairs vested rights, creates new obligations or imposes new penalties. Anderson v. Anderson, 468 So. 2d 528, 530 (Fla. 3d DCA), rev. denied, 476 So. 2d 672 (Fla. 1985). . Contrary to the contention of plaintiffs and amicus, the amendment to the UM statute marks a significant change in the law. Here it resulted in STATE FARM being charged with **ten** times the amount of damages determined by the jury! See L. Ross, Inc. v. R.W. Roberts Construction Co., 466 So. 2d 1096 (Fla. 5th DCA 1985), approved, 481 So. 2d 484 (Fla. 1986)(a statutory change which affects and changes the measure of damages is substantive and not remedial).

Contrary to plaintiffs' assertion, section 627.727 (10) is not "remedial." The Supreme Court in McLeod made it clear that a claimant does not have an existing right to recover the excess judgment damages from an insurer which were not caused by the insurer's bad faith.[3] Because the statute imposes a new and

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[3] LAFORET's "causation argument" totally overlooks the fact that unlike other types of damages recoverable for a violation of section 624.155, such as attorney's fees and interest, the amount of the excess judgment does not serve to compensate the insured for losses caused by the insurer's bad faith.

increased obligation for past acts, it is substantive in nature, and retroactive application to existing cases violates due process. L. Ross, Inc. v. R.W. Roberts Construction Co., 481 So. 2d 484 (Fla. 1986).

Section 627.727 (10) clearly imposes a new penalty after the cause of action arose and thereby violates due process. See Florida Patient's Compensation Fund v. Scherer, 558 So. 2d 411 (Fla. 1990)(damages and penalties, including attorney's fees, cannot be constitutionally enlarged after date cause of action arose).

Retroactive application of the amendment to the UM statute, which is made a part of all contracts for UM coverage in Florida, impairs the contract between the parties. The statute creates exposure to liability for damages significantly different in character and degree than that which existed at the time the contract was executed. That increased exposure, which would not exist absent the contract, does impair the contract between the parties. See Dewberry v. Auto-Owners Ins. Co., 363 So. 2d 1077 (Fla. 1978); Yamaha Parts Distributors, Inc. v. Ehrman, 316 So. 2d 557 (Fla. 1975).

The two federal cases on which LAFORET relies are distinguishable. Lussier v. Dugger, 904 F.2d 661 (11th Cir. 1990); Davis v. City and County of San Francisco, 976 F.2d 1536, 1549-1551 (9th Cir. 1992). In both cases, the courts noted that retroactive application of a statute is not allowed when manifest injustice would result (especially between private parties) or the

legislative history is to the contrary. In the two cited cases, unlike the present case, there was no manifest injustice and the legislative history did not conflict with the the statutory amendment. Here, however, manifest injustice clearly results to STATE FARM and other insurers for payment of money the insurer was not previously obligated to pay. In addition, there is nothing in the legislative history of section 624.155 to support an insurer's obligation to pay any damages other than those caused by its own conduct.

LAFORET's brief also leaves the erroneous impression that STATE FARM consented to the application of section 627.727 (10) to this case. It did not. After learning at trial of the new amendment counsel for STATE FARM expressly stated: "I want to preserve any objection I have as to the application to this case...." (R. 319).

The additur awarded by the trial court should be reversed. Retroactive application of the substantive statutory changes is unconstitutional because it impairs the contract between the parties and it violates federal and state due process rights.

## POINT II

**STATE FARM IS ENTITLED TO A MOTION FOR DIRECTED VERDICT; 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 a directed verdict or new trial because the evidence conclusively demonstrated an objectively reasonable basis for its position. The arguments relied by LAFORET in support of a finding of bad faith in this case are legally insufficient to overcome the overwhelming evidence that STATE FARM had an objectively reasonable basis for its evaluation of the merits case. STATE FARM'S evaluation was based on the reasonable conclusion that Mrs. LaForet's injuries were not causally related to the accident with the underinsured motorist.

Contrary to plaintiffs' position, the fact that STATE FARM promptly paid Mrs. LaForet's medical bills under the PIP and med-pay coverages is absolutely irrelevant to the issue of bad faith. In continuing to argue that STATE FARM's payment of medical bills under those two coverages was evidence of bad faith in its handling of the claim under the separate UM coverage, plaintiffs have failed to address the different legal standards which apply to PIP and UM claims. See, e.g., Race v. Nationwide Mutual Fire Ins. Co., 542 So. 2d 347 (Fla. 1989). Plaintiffs' argument -- which boils down to the spurious contention that, in order to avoid a bad faith claim,

STATE FARM would have been required to engage in the statutorily-prohibited practice of "leveraging" -- is wrong.

Plaintiffs' reliance on purported violations of STATE FARM'S own claims manual is similarly unavailing because there is no basis for a finding that STATE FARM's internal recommendations for handling of uninsured motorist claims represented the standard of "good faith." Cf. Swartz v. Billington, 528 So. 2d 1371 (Fla. 3d DCA 1988)(evidence of hospital's violation of internal rule not evidence of negligence unless jury determined that internal rule represented standard of care). STATE FARM is free to promulgate internal rules which exceed the standards of good faith, as the procedure allegedly violated in this cases demonstrates.

There is nothing in Florida law which suggests a duty on the part of the insurer to anticipate and affirmatively investigate a potential first-party claim before it is even presented.[4] Yet the failure to do so in this case is precisely the "violation" which plaintiffs argue demonstrates STATE FARM's "bad faith."

The facts of this case demonstrate the unreasonableness of plaintiffs' contention. The undisputed evidence was that STATE FARM had no notice that a UM claim was being presented until September, 1987. (R. 255). The information available to STATE FARM

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[4] See Haapanen v. Mid-South Ins. Co., 564 So. 2d 894, 897-898 (Ala. 1990) (no bad faith as a matter of law where insured never submitted claim for benefits); Davis v. Sheriff, 762 P.2d 221, 225, 234 Mont. 126 (1988)("bad faith cannot be found for not providing what has not been requested") S. Ashley, Bad Faith Actions: Liability and Damages sec. 5:05 (1984).

showed a minor impact with minor property damage.[5] (R. 223). Mrs. LaForet was treated in the emergency room and released, and did not receive treatment for the injuries allegedly sustained in the accident until six months later. (R. 120-122, 147). Based on the initial information regarding the nature of the accident and Mrs. LaForet's injuries, it was reasonable to conclude that no UM claim would be presented because the tortfeasor's limits of liability would have been adequate to compensate Mrs. LaForet for what appeared to be minor soft-tissue injuries. (R.180. 185, 226-227).

Moreover, where the undisputed evidence was that additional investigation would not have changed STATE FARM's evaluation of the case, which was based on Mrs. LaForet's long standing prior back problems[6], the alleged failure to initiate an earlier investigation cannot support a finding of bad faith. See Point III, infra; Cheek v. Agricultural Ins. Co., 432 F.2d 1267, 1269 (5th Cir. 1970) (plaintiff must demonstrate causal connection between alleged bad faith and damages sustained to support claim of bad faith).

Where the undisputed evidence established that plaintiffs never wavered from their above-policy limits settlement demand of $300,000, they may not now rely upon self-serving testimony that

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[5]The testimony of Mr. and Mrs. LaForet to the contrary in the trial of the bad faith case is utterly irrelevant to the question of whether STATE FARM acted in bad faith, but only serves to demonstrate that the merits case involved a dispute on the issue of the force of impact.

[6] In this regard, Mrs. LaForet's testimony at trial that she never had pain radiating down her leg before the accident was disputed by her prior medical records which reflected just such a complaint. (R. 345-346).

they would have accepted a settlement "in the low $100,000's" to support a claim of bad faith. (R. 231). In light of the fact that there was absolutely no evidence that LAFORET ever communicated to STATE FARM a willingness to accept the policy limits or less, there is no support for the contention that plaintiffs were damaged because "STATE FARM refused to entertain meaningful negotiations." Brief of Respondents, page 27.

Plaintiffs fail to cite to a single Florida case in which liability for first-party bad faith has been upheld where the insurer had an objectively reasonable basis for its evaluation of the claim. Robinson v. State Farm Fire & Cas. Co., 583 So. 2d 1063 (Fla. 5th DCA 1991) and Powell v. Prudential Property & Cas. Ins. Co., 584 So. 2d 12 (Fla. 3d DCA 1991), rev. denied, 598 So. 2d 77 (Fla. 1992) are distinguishable because both involved third-party claims and therefore involve a different standard than the "fairly debatable" standard applicable in first-party cases. The case of Opperman v. Nationwide Mutual Fire Ins. Co., 515 So. 2d 263 (Fla. 5th DCA 1987), rev. denied, 523 So. 2d 578 (Fla. 1988), the only first-party case cited by LAFORET, involved dismissal of a complaint. The issue was whether the complaint stated a cause of action for first-party bad faith. All three cases, therefore, are improperly relied on by LAFORET as cases in which "[c]ourts have found bad faith under analogous circumstances." Brief of Respondents, page 27.

Plaintiffs' waiver argument is without merit. STATE FARM moved for directed verdict when plaintiff rested and at the close

of the evidence. (R. 445-450; 515). STATE FARM's post-trial motion specifically argued that the trial court should have granted STATE FARM's motion for directed verdict on the ground that its position was fairly debatable as a matter of law. (R. 934-935). The trial court was clearly apprised of the basis for the motion, and was given an opportunity to rule on the specific issue which has been raised on appeal. In any event, STATE FARM alternatively asserts here, as it did in the Fourth District, that STATE FARM is entitled to a new trial as the trial court abused its discretion in finding that the result was not contrary to the manifest weight of the evidence.

Finally, LAFORET and amicus curiae argue that this Court should not apply the "fairly debatable" standard recently recognized by this Court in Imhof v. Nationwide Mut. Ins. Co., 19 Fla. L. Weekly S257 (Fla. May 12, 1994), revised, 19 Fla. L. Weekly S441 (Fla. Sept. 8, 1994). See also McLeod v. Continental Ins. Co., 573 So. 2d 864 (Fla. 2d DCA 1990), aff'd 591 So. 2d 621 (Fla. 1992). LAFORET and amicus curiae argue that this Court should not apply the standard because Florida's recognition of a cause of action for first-party bad faith came by statute rather than by case law. It makes no sense to argue that the standard by which to judge insurer conduct is any different when the right is provided by statute rather than common law. Contrary to plaintiffs' assertion, the absence of a meaningful standard in the statute gives rise to a real need for judicial guidance in determining what constitutes "good faith" in the first-party context.

The attempt by amicus curiae to argue that the rejection of the "fairly debatable" standard in the third-party context in Robinson v. State Farm Fire & Casualty Co., 583 So. 2d 1063 (Fla. 5th DCA 1991), is dispositive of the issue in this case fails to take into account the vast differences between first- and third-party cases. In a third-party case, the insured relinquishes any right to control the litigation on his own behalf, giving rise to a fiduciary relationship between the insured and the insurer. No such relationship arises in the first-party context, where the insurer is only obligated under the contract to pay claims. See Kujawa v. Manhattan National Life Ins. Co., 541 So. 2d 1168 (Fla. 1989). The nature of the relationship between the insured and the insurer is different in first- and third-party cases, giving rise to different duties.

For the same reason, plaintiffs' reliance on Hollar v. International Bankers Ins. Co., 572 So. 2d 937 (Fla. 3d DCA 1990), is misplaced. The duties outlined in that third-party case -- i.e. to settle "when a reasonable person faced with the prospect of paying the total recovery would do so," and 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 to any steps he might take to avoid same"-- have no meaningful application outside the third-party context. Id. at 939.

STATE FARM was entitled to a directed verdict on the issue of bad faith. In the alternative, STATE FARM is entitled to a new

trial as the trial court abused its discretion in finding that the result was not contrary to the manifest weight of the evidence.

## POINT III

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

Plaintiffs do not refute STATE FARM'S contention that additional or earlier investigation would not have changed STATE FARM'S evaluation of the case. Rather, plaintiffs defend the jury instruction on "inadequate investigation" as being a proper statement of Florida law. It was not. Proof of causation has always been required to support a bad faith claim. In Cheek v. Agricultural Ins. Co., supra at 1269, the court stated:

> To recover against the insurer, a Florida insured must produce evidence of the insurer's bad faith and the causal connection between that bad faith and the damages sustained.

McLeod v. Continental Ins. Co., at 625.

Where, as here, additional investigation would not have resulted in different actions by the insurer, the element of causation is lacking. The instruction given over STATE FARM'S objection improperly advised the jury that a "breach ... of good faith ... has occurred" where the insurer fails to properly investigate. (R. 559). Because the instruction failed to advise the jury of the requirement of causation, it was not a proper statement of the law and was misleading. Based on the erroneous

instruction, STATE FARM is entitled to a new trial on the issue of bad faith.

## POINT IV

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

LAFORET agrees with STATE FARM on this point except as it relates to Point I. LAFORET asserts that the judgment for attorneys fees and costs should not be reversed in the event that STATE FARM prevails only on Point I. LAFORET asserts that in this situation, STATE FARM would only be entitled to a reduction of damages and not a reduction for attorney's fees and costs. If STATE FARM prevails on Point I, however, the final judgment on damages would be reduced from $265,753.00 to $24,000,00. One of the factors the trial court is required to consider in determining the amount of reasonable fees is the result obtained by the attorney seeking fees. Florida Patient's Compensation v. Rowe, 472 So. 2d 1145, 1150-1151 (Fla. 1985). See also R. Regulating Fla. Bar 4-1.5 (b)(4); Fla. Bar Code Prof. Resp. D.R. 2-106(b)(4). Since one of the mandatory factors for determining the amount of fees would materially change, (i.e. the result would be less than 10% of the damages on which the original fee award was based) the final judgment on fees should be vacated and remanded to the trial court for a new evidentiary hearing on attorney's fees.

## CONCLUSION

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 vacate the final judgment and 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 and enter judgment in the amount of the jury's verdict. This Court is also requested to send additional instructions to vacate the award of attorney's fees and costs if the final judgment is reversed.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Reply Brief of the Petitioner on the Merits was mailed this 28th day of September, 1994, to: George H. Moss, Esquire, MOSS HENDERSON VAN GAASBECK BLANTON & KOVAL, P.A., 817 Beachland Boulevard, Vero Beach, FL 32964-3406; Jane Kruesler-Walsh, P.A., Suite 503 - Flagler Center, 501 South Flagler Drive, West Palm Beach, FL 33401; Louis K. Rosenbloum, Esquire, LEVIN MIDDLEBROOKS MABIE THOMAS MAYERS & MITCHELL, P.A., P. O. Box 12308, Pensacola, FL 32581; George Vaka, Esquire, FOWLER WHITE GILLEN BOGGS VILLAREAL & BANKER, P.A., P. O. Box 1438, Tampa, FL 33601; James K. Clark, Esquire, CLARK SPARKMAN ROBB & NELSON, Suite 1003 Biscayne Building, 19 West Flagler Street, Miami, FL 33130.

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