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IN THE SUPREME COURT OF FLORIDA

AUTO-OWNERS INSURANCE COMPANY,

Petitioner,

vs.

BONITA CONQUEST,

Respondent.

CASE NO. 83,827

ON CERTIFIED CONFLICT FROM THE SECOND DISTRICT COURT OF APPEAL

PETITIONER'S INITIAL BRIEF

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PRELIMINARY STATEMENT

Petitioner, Auto-Owners Insurance Company, the Defendant and Appellee below, is referred to as "Auto-Owners."

Respondent, Bonita Conquest, the Plaintiff and Appellant below, is referred to as "Plaintiff."

References to the record on appeal are designated by the prefix "R."

References to the amicus brief filed in this Court by State Farm Mutual Automobile Insurance Company, et al., are referred to as "amici brief."

STATEMENT OF THE FACTS AND CASE

Introduction:

Auto-Owners seeks review of the Second District's ruling permitting Plaintiff to sue it for bad faith. Plaintiff was not Auto-Owners' insured. She obtained a judgment against Auto-Owners' insured for less than half the policy limits. Plaintiff had consistently demanded policy limits to settle her case. The Second District's ruling would subject insurers to bad faith claims where they insisted plaintiffs try their cases, rather than capitulated to excessive settlement demands such as the Plaintiff made here.

The Second District's ruling would create a litigation explosion for Florida's trial and appellate courts.

The underlying case:

In April, 1987, Plaintiff filed a negligence action against Fred Sorscek. Plaintiff claimed a piece of paper from a pile of trash on Sorseck's property blew across the face of the horse she was riding, causing it to throw and injure her. (R 39-40, 49) Auto-Owners insured Mr. Sorseck under a premises liability policy with $300,000 limits. (R 56).

Plaintiff made a demand for policy limits in December, 1989, when she claimed it became apparent damages could exceed policy limits. (R 2) Auto-Owners rejected this demand in its letter of January 3, 1990, in which it stated it had evaluated the facts and was confident a jury would return a defense verdict. (R 46).

Through trial, Plaintiff never made a demand for less than the $300,000 policy limits and Auto-Owners offered $1,000. (R 41, 56). In September, 1990, after a three-day trial, the jury awarded Plaintiff $130,800. (R 3; this reflected the comparative negligence reduction as applied to the $327,000 damage finding).

The Second District *per curiam* affirmed the appeal of the judgment in December, 1991. *Sorscek v. Conquest*, 592 So. 2d 685 (Fla. 2d DCA 1991). Auto-Owners then satisfied the judgment in January, 1992. (R 41, 56).

The bad faith case:

In September, 1992, Plaintiff sued Auto-Owners alleging unfair claims settlement practices under F.S. §§624.155(1)(a)1 and 626.9541(1)(i)3. a, c and d., bad faith failure to settle under F.S. §624.155(1)(b)1, and common law bad faith. (R 1-7)

Auto-Owners moved to dismiss the complaint on several grounds. Among them, Auto-Owners pled Plaintiff did not have an independent statutory case of action under F.S. §§624.155 and 626.9541, pursuant to *Cardenas v. Miami-Dade Yellow Cab Company*, 538 So. 2d 491 (Fla. 3d DCA 1989), *review dismissed*, 549 So. 2d 1013 (Fla. 1989), since she was a third-party claimant who had obtained a judgment of less than policy limits. Auto-Owners also moved to dismiss because the verdict recovered by Plaintiff was for less than one-half of applicable policy limits which negated Plaintiff's claims that Auto-Owners failed to properly investigate or otherwise handle the claim. (R 18-21)

The trial court granted Auto-Owners' motion to dismiss Plaintiff's complaint, without prejudice, for failure to state a cause of action. (R 38) Plaintiff filed an amended complaint and Auto-Owners moved to dismiss the amended complaint, stating essentially the same reasons as those in its initial motion to dismiss. (R 39-55, 56-58). The trial court dismissed the amended complaint with prejudice for failure to state a cause of action. (R 65).[1]

The Second District decision:

Plaintiff appealed the trial court's dismissal of her lawsuit against Auto-Owners. The Second District rendered its opinion in *Conquest, supra*, on the issue of "whether section 624.155, Florida Statutes (1991), permits an action by a third party (non-insured) against an insurance company for damages other than those resulting from an excess verdict."

The Second District affirmed the trial court's dismissal of Counts II and III of Plaintiff's amended complaint. The Second District held Count II failed to state a cause of action because the language of §624.155(1)(b)1 indicates the duty to settle runs only to the insured and provides protection only for the insured. *Id.*, p.42. The Second District affirmed the dismissal of Count

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[1] The Second District found in *Conquest v. Auto-Owners*, 637 So.2d 40 (Fla. 2d DCA 1994), the trial court correctly relied on *Cardenas, supra,* in dismissing Plaintiff's amended complaint with prejudice, since, at the time, the Second District had not considered whether a third-party action could be maintained under §624.155.

III, the common law bad faith claim, since Plaintiff did not obtain an excess verdict in the underlying case. *Id.*

The Second District reversed and remanded the trial court's dismissal of Count II of Plaintiff's amended complaint holding the language of §626.9541(1)(i)3.a, c and d did not restrict claims to insureds. *Id.*, p. 43. In its holding, the Second District certified conflict with the Third District in *Cardenas*.

Auto-Owners seeks review of that portion of the *Conquest* opinion holding Plaintiff, as a third party who has not recovered an excess judgment, can maintain a bad faith action against Auto-Owners (i.e., the Second District's reversal of the trial court's dismissal of Count II of Plaintiff's amended complaint).

ISSUES ON APPEAL

I. WHETHER THE SECOND DISTRICT ERRED IN HOLDING §624.155 CREATES A CAUSE OF ACTION FOR BAD FAITH BY A THIRD PARTY WHICH HAS NOT OBTAINED AN EXCESS JUDGMENT?

II. WHETHER THE SECOND DISTRICT ERRED WHEN IT INTERPRETED THE TERM "ANY PERSON" IN ISOLATION FROM THE LANGUAGE OF §624.155(1) PROVIDING THAT "ANY PERSON MAY BRING A CIVIL ACTION AGAINST AN INSURER WHEN SUCH PERSON IS DAMAGED..."?

SUMMARY OF ARGUMENT

The Second District erred in reversing the trial court's dismissal of Count II of Plaintiff's complaint alleging unfair claims practices against Auto-Owners under §624.155(1)(a)1 and §626.96541. The trial court correctly applied *Cardenas* which holds a third party who has not obtained an excess judgment may not bring a bad faith action under §624.155.

As the Third District concluded in *Cardenas*, "any person" means any insured who is injured by his or her insurer's bad faith. In enacting §624.155, the legislature intended to alter the existing common law only to the extent it allowed an insured to bring a bad faith suit arising from the insurer's treatment of the insured's own claims. Section 624.155 contains repeated references to the rights of the insured, not third parties, with respect to the insurer. The language of §624.155 demonstrates the legislature's intent to impose the duties of good faith and fair dealing, contractual duties running from the insurer to the insured only.

Interpreting "any person" as any injured third party would have numerous deleterious effects, including a dramatic increase in litigation since every unhappy claimant would follow its liability suit with a second suit alleging unfair claims settlement practices. Plaintiff's case is a prime example. The Plaintiff obtained a judgment that was less than half of the policy limits, and thus less than half of the lowest amount she ever demanded.

Yet she still sued in bad faith because Auto-Owners made her try her case, instead of capitulating to her excessive demand.

The Second District decision would also produce unwarranted settlement demands; coerced settlements from insurers; costs passed on to the consumer in the form of premiums. It would place insurance companies in the untenable position of owing a duty to both the insured and the insured's adversary, the injured third party.

Of the 24 other states which have considered the issue of a direct third-party action under an unfair claims and practices act, only one state allows such actions. This year the Texas Supreme Court refused to allow a direct third-party action under a statute with wording similar to §624.155. The California Supreme Court overruled its own decision approving such a cause of action because of the fiasco which had resulted. One other state approved, but later removed, the cause of action.

The legislature has not taken any action to change the *Cardenas* ruling during the numerous sessions held since the decision. By not changing §624.155 after *Cardenas*, and by specifically readopting it, the legislature has evidenced its recognition that *Cardenas* correctly interpreted the statute.

The Second District essentially defined "any person" in §624.155 as "any appropriate" person, even though it purported to apply the plain and unambiguous meaning of "any person." The Second District's analysis does not comport with the rules of construction of an unambiguous term and, actually, creates

ambiguity. If §624.155 were to apply to any appropriate third party, each subsection of §624.155 would have to be construed to determine if "any person" meant insured, third party, or something else.

The reference to third party in §624.155 proves nothing more than that the legislature intended to codify the common law right of a third party who obtains an excess judgment to sue for those damages in bad faith. It was a mistake for the Second District to assume the reference to a third party, added to the statute in 1987, was contemplated by the legislature when it chose the "any person" language in 1982, because it is incorrect to construe a statute by looking ahead to statutory language adopted at a later date.

Finally, in order to bring a cause of action under §624.155 the claimant must suffer damages. Auto-Owners correctly analyzed Plaintiff's case as not being worth the policy limits demand Plaintiff consistently made. Plaintiff never asserted she had made a demand equal to or less than the $130,800 she actually recovered, an amount well less than one-half of the policy limits. Absent allegations and proof that Plaintiff made a demand to settle for less than the actual net judgment, she cannot prove any damage.

ARGUMENT

I. THE SECOND DISTRICT ERRED IN HOLDING §624.155 CREATES A CAUSE OF ACTION FOR BAD FAITH BY A THIRD PARTY WHICH HAS NOT OBTAINED AN EXCESS JUDGMENT.

A. Florida courts have consistently construed §624.155 as expanding bad faith claims to first-party claims, but not to third parties who have not recovered an excess judgment.

With the exception of the Second District in *Conquest*, no court has read §624.155 to extend a direct cause of action to a third party. *Cardenas v. Miami-Dade Yellow Cab Co.*, 538 So. 2d 491 (Fla. 3d DCA 1989), *review dismissed*, 549 So. 2d 1013 (Fla. 1989). *See also, Dunn v. National Security Fire and Casualty Company*, 631 So. 2d 1103 (Fla. 5th DCA 1993); *Fidelity and Casualty Co. of New York v. Cope*, 462 So. 2d 459, n.5 (Fla. 1985).

The Third District concluded in *Cardenas* that the words "any person" in §624.155 mean any insured who is injured by his insurer's bad faith refusal to settle. The Court reached this conclusion for several reasons: (1) in enacting §624.155, the legislature changed existing law only to the extent it allowed a policy holder to bring a cause of action against his or her insurer for bad faith refusal to settle the insured's first-party claims; (2) there is repeated reference in §624.155 to the rights of the *insured*, not to third parties, in his or her dealings with the

insurance company;[2] (3) the statutory language demonstrates the legislature clearly intended to impose a duty of good faith and fair dealing, a contractual duty which the insurer owes only to the insured; (4) Interpreting "any person" to include an injured third party would achieve unreasonable results, including "'multiple litigation, unwarranted bad faith claims, coercive settlements, excessive jury awards, and escalating insurance, legal and other 'transaction' costs.'" *Cardenas*, (citing *Moradi-Shalal v. Fireman's Fund Insurance Companies*, 758 P.2d 58 (Cal. 1988).

In the Second District, Plaintiff and her amicus relied heavily on the use of the word "any" in §624.155. This Court has long warned that "**The statute** must be read with reference to its manifest intent and spirit and **cannot be limited to the literal meaning of a single word**. It must be construed as a whole and interpreted according to the sense in which the words are employed, regard being had to the plain intention of the Legislature." *Barrington v. State*, 145 Fla. 61, 199 So. 320, 323 (1940)(emphasis added); *see also, e.g., Board of Optometry v. Florida Society of Ophthalmology*, 538 So. 2d 878, 886 (Fla. 1st DCA 1988).

More recently this Court observed that "legislative intent must be given effect even though it may contradict the strict letter of the statute." *Vildibill v. Johnson*, 492 So. 2d 1047, 1049 (Fla. 1986). This Court held:

> Thus, under a strict literal reading of section 768.21(6)(a)2 as urged by appellees, Steven Allen Paul's estate would be precluded from recovering prospective net

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[2] As discussed in detail in the amici brief.

> accumulations. We refuse to read the statute in such a manner.

492 So. 2d at 1049.

Even more recently, this Court construed an eminent domain statute requiring the petitioner to pay "all" costs of the proceeding including reasonable attorney's fees, except in an appeal taken by the defendant. This Court's unanimous decision held that, despite the literal language of the statute, the landowner in an inverse condemnation was only entitled to appellate fees if the claim is ultimately successful. *Department of Transportation v. Geffen*, 19 Fla. L. Weekly, S376 (Fla. July 7, 1994).

In sum, rules of statutory construction provide that the strictly literal interpretation of a statute need not be adopted if the results would be unreasonable or not intended by the legislature. *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984). An analysis of §624.155, and the case law preceding it and construing it, demonstrate the legislature did not intend the result *Conquest* reached.

The legislature is presumed to know the existing law at the time it enacted the statute. *Opperman v. Nationwide Mutual Fire Insurance*, 515 So. 2d 263 (Fla. 5th DCA 1987), *review denied*, 523 So. 2d 578 (Fla. 1988). The legislature's intent to define "any person" as any insured must be viewed in context of the common law existing when §624.155 was enacted. Common law bad faith claims were available only if arising from an excess judgment against the

insured. The insured could file a bad faith cause of action against his or her insurer based on the insurer's breach of the duty to the insured to settle a third-party's claim in good faith, because the breach could expose the insured to liability in excess of his insurance coverage. *Opperman*, 515 So. 2d at 265; *Cardenas*, 538 So. 2d at 495.

After obtaining a judgment, an injured third party, as a third-party beneficiary of the contract between the insured tort-feasor and the tort-feasor's insurer, could also maintain a bad faith suit directly against the tort-feasor's insurer. *See Thompson v. Commercial Union Insurance Company of New York*, 250 So. 2d 259 (Fla. 1971).

Courts did not recognize an insured's bad faith action for the insurer's bad faith failure to settle the insured's own claim. In that situation, an insured's only recourse was a breach of contract claim unless insured could assert an independent tort, such as intentional infliction of mental distress. *Opperman*, 515 So. 2d at 265; *Cardenas*, 538 So. 2d at 495.

In enacting §624.155, the legislature did not intend to change the common law obligation of good faith nor the measure of damages due an insured once bad faith is proven; rather, it created a bad faith cause of action for an insured against his insurer arising from insured's own claims and added the procedural step of notifying the insurer of a bad faith claim. *See Hollar v. International Bankers Insurance Company*, 572 So. 2d 937 (Fla. 3d

DCA 1990), *review dismissed*, 582 So. 2d 624 (Fla. 1991)[3]. *See also, United Guaranty Residential Insurance Company of Iowa v. Alliance Mortgage Company*, 644 F.Supp. 339 (M.D. Fla. 1986)

As the Middle District noted in *Rowland v. Safeco Insurance Company of America*, 634 F.Supp. 613 (M.D. Fla. 1986), in addition to the language of the statute, the legislative history of §624.155 indicates an intent to create a bad faith cause of action to allow an insured to sue his or her insurer for refusal to settle the insured's own claims:

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

Id. (citing 1982 Staff Report to the House Committee on Insurance).

Expanding the duty of good faith to encompass third-party claims when there is not an excess judgment would drastically alter existing common law. As the Fifth District Court of Appeal stated last year in *Dunn, supra*:

> Our Supreme Court has not recognized the existence of a fiduciary duty owed by an insurer to a third party injured by its insured to settle within the policy limits. *Fidelity & Casualty Co. of New York*, 462 So. 2d at 461, n.5. If it did, then recovery of attorney's fees expended by the injured party after the time a court decides settlement should have been made, would be recoverable. But, recognizing such a duty under section 624.155 would greatly expand the theory and extent of liability of insurance carriers beyond that established

[3] And, as discussed below, it may have expanded the potential recovery of a third party with an excess judgment by permitting attorney's fees.

> by common law, for third party bad faith cases. Although the legislature can expand by statute the common law concept of third party suits and recoverable damages, we are reluctant to interpret the statute as having made such a drastic change without clear and more express language in the statute indicating that intent.

Id., p. 1108 (emphasis added).

Florida courts recognize that §624.155 did not alter the existing common law cause of action for bad faith by a third party which is available only in the event of an excess judgment. Section 624.155 did expand upon the common law to the extent it granted a cause of action to insured against insurer for the insured's own claims and, as discussed herein, the statute may have expanded a third party's potential recovery to include attorney fees.

In *Conquest*, the Second District relied on *Opperman*, *supra*, in finding "any person" clear, unambiguous and not in need of interpretation of legislative intent. But, the Second District looked to only one-half of the *Opperman* holding. The Fifth District did find the language of §624.155 clear and unambiguous. The court defined "any person" as one who is "injured as a result of an insurer's **bad faith** dealing." *Id.* (emphasis added).

Thus, "any person" could mean only an insured (or possibly an injured third party who had obtained an excess judgment). The source of the claimed injury would be the insurer's breach of the duty of good faith owed to the insured. The duty is breached when the insurer fails to settle in good faith a third-party's claim and the third party receives an excess judgment. *Id.* *Opperman* also held, agreeing with *United Guaranty* and *Rowland*, that the plain

meaning of §624.155(1)(b) extended a bad faith cause of action to an insured against his or her insurer. *Opperman*, 515 So. 2d at 266. Neither the case law nor legislative history supports an extension of §624.155 to third-party claimants who have not recovered an excess judgment.

B. The legislature is deemed to have adopted the construction in *Cardenas*.

The Third District issued the *Cardenas* decision in January, 1989. The legislature has met in six regular sessions (and other special sessions) since then and has never sought to change the interpretation adopted by *Cardenas*. As the amici brief notes, the legislature has twice amended §624.155 since *Cardenas*, and has failed to take any action to change the *Cardenas* ruling.

As noted above, the legislature is presumed to know the law, including judicial decisions on the subject. *E.g.*, *Ford v. Wainwright*, 451 So. 2d 471, 475 (Fla. 1984); *see also*, *Hollar*, 572 So. 2d at 939. Even more pertinent here, the Florida legislature is deemed to have adopted the *Cardenas* construction of §624.155 by its reenactment of the statute after the decision.

This Court has also observed that "when the legislature reenacts a statute which has a judicial construction placed upon it, it is presumed that the legislature is aware of the construction and intends to adopt it, absent a clear expression to the contrary." *Gulfstream Park Racing Association, Inc. v. Department of Business Regulation*, 441 So. 2d 627, 628 (Fla. 1983);

see also, Peninsular Supply Company v. C.B. Day Realty of Florida, Inc., 423 So. 2d 500, 502 (Fla. 3d DCA 1982)("When the legislature reenacts a statute, it is presumed to know and adopt the construction placed thereon by courts or administrators, except to the extent to which the new enactment differs from prior constructions.").

In 1990, the legislature amended §624.155 in Ch. 90-119, §30, *Laws of Florida*. Section 30 of Chapter 90-119 contains the full text of §624.155, including the language which *Cardenas* had construed. And the following year, the legislature again readopted §624.155 in its entirety.

Section 624.155 is in Part I of Chapter 624, and was scheduled for repeal pursuant to the Sunset Act. In 1991 the legislature provided that, "Notwithstanding the Regulatory Sunset Act or any other provision of law enacted before Jan. 14, 1992, which schedules any of the following statutes for expiration or repeal on October 1, 2001, sections ... 624.155 ... shall not expire or stand repealed on October 1, 2001, as scheduled by such laws, but are hereby revived and **readopted**." Ch. 91-429, §4(2)(i), *Laws of Florida* (emphasis added; this Chapter is actually located at page 92 of Vol. 1 of the 1992 *Laws of Florida*).

Thus, by not changing the statute after *Cardenas*, and by twice readopting it, the legislature has evidenced its recognition that *Cardenas* correctly interpreted the statute.

As *Cardenas* and other decisions (see below) have recognized, allowing direct third-party actions would promote multiple litigation. The initial liability suit would be followed by a second suit against the insurer alleging unfair claims settlement practices. Other results would include unwarranted settlement demands by claimants and coercion of inflated settlement offers by insurers seeking to avoid further exposure. The increased litigation would create an overwhelming burden on the courts. Also, since an insurer cannot absorb the enormous cost of either inflated settlements or defending these actions, costs would be passed on to the public in the form of increased premiums.

As discussed below, the §624.9541 duties are duties owed to an insured. As the amici discuss, the expansion of bad faith to third parties in the manner the Second District suggests would create conflicts between an insurer trying to satisfy those new duties and the insurer's duties to its insured.

If the Second District were correct regarding the definition of "any person," one could argue its suggested limitation that a person must be damaged is no limitation. How long would it be before some enterprising "any person" files suit arguing all citizens are damaged by the alleged bad faith actions of insurers?

C. The Second District used an erroneous and inconsistent analysis to hold "any person" encompassed non-insureds who have not obtained an excess judgment.

The Second District held "any person" in §624.155 was unambiguous and all-inclusive but then immediately created an

exception. In affirming the trial court's dismissal of Count II of plaintiff's complaint, the Second District determined "any person" in the context of §624.155(1)(b)1 meant only the insured.

In order to resolve this inconsistency, the court held "the plain reading of 'any person' to authorize **appropriate** third-party suits." 637 So. 2d at 42 (emphasis added). However, the statute does not contain the word "appropriate" or any language suggesting "appropriate" third-party claims are authorized.

Thus, although the court purported to use the plain meaning of "any person," it effectively defined "any person" as "any appropriate person." The fallacy in this reasoning is obvious. Either "any person" does not require construction (as the Second District purported to hold), or it does. The Second District's addition of the term "appropriate" is the same type of construction the Second District criticized in *Cardenas*, where the Third District construed "any person" to mean "any insured person."

Further, the Second District's definition of "any person" creates ambiguity. If the plain reading of "any person" authorizes **appropriate** third-party suits, there really cannot be a "plain reading" of the term "any person." The language of each subsection would have to be construed to determine whether, for that particular subsection, "any person" meant insured or third party or something else. As discussed herein, and in the amici brief, the §626.9541 duties the Second District permitted Plaintiff to proceed under are not duties owed to a third-party non-insured.

The Second District relies on §624.155(2)(b)(4), which excuses a third-party claimant from the requirement of attaching policy language if it has not been provided by the insurer, as further support of its conclusion that "any person" authorizes third-party suits without an excess judgment. This reliance is misplaced for several reasons.

As discussed in the amici brief, there are a number of situations where an insured may not be a named insured and thus not have a copy of the policy. In that sense they are a "third party" to the insurance contract, but are not tort victims who have not recovered an excess judgment. Even if one construed §624.155 to permit bad faith actions by third-party tort victims, the more reasonable construction of the statute would be to permit a third party who had recovered an excess judgment to also seek attorney's fees.

The reference to a third-party claimant not being required to attach the policy is consistent with the statute permitting a third party to sue for bad faith when that third party had obtained an excess judgment. Thus, this portion of §624.155 would prove nothing more than that the legislature intended to codify the common law right of a third party who obtains an excess judgment to sue for those damages in bad faith,[4] and to permit that third party to recover attorney's fees for the bad faith action if successful.[5]

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[4] *Thompson, supra.*

[5] The third party would not otherwise have a claim for attorney's fees in a bad faith action if he proceeded at common (continued...)

The Second District's attempt to rely on the reference to third-party claimants in §624.155(2)(b)(4) evidences a further error in statutory construction. As the plaintiff's amicus pointed out before the Second District, this subsection was not added to §624.155 until 1987. Chapter 87-278, *Laws of Florida*. Thus, it was a mistake for the Second District to assume that the "third party" language added in 1987 was contemplated by the legislature when it chose the "any person" language in originally promulgating the statute in 1982.

This Court has twice recently observed that it is incorrect to construe a statute by looking ahead to statutory language adopted at a later date. In *Silva v. Southwest Florida Blood Bank, Inc.*, 601 So. 2d 1184, 1189 (Fla. 1992), this Court held the legislature could not have been thinking of the definition in a subsequently adopted section when it enacted a statute two years earlier. The Court cited its decision in *Brown v. St. George Island, Ltd.*, 561 So. 2d 253, 256 (Fla. 1990) ("rejecting that a subsequently enacted statute could be used to define a term in a preexisting statute").

This Court's recent decisions have recognized the danger of taking too broad a view of construing statutes in *pari materia*, where such a construction would require an assumption that the legislature was looking ahead to action it would take years later (namely, going "back to the future" only works in movies, and not

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[5](...continued)
law, as he would if he proceeded pursuant to an assignment of the insured's rights. *Safeco Insurance Company of America v. Albriza*, 365 So. 2d 804 (Fla. 4th DCA 1978); *see also, Roberts v. Carter*, 350 So. 2d 78 (Fla. 1977).

for legislative construction). The Second District erred when it assumed the 1982 "any person" language must refer to **any** third person by relying on a 1987 statutory amendment.

D. The duties under §626.9541 are restricted to insureds.

Conquest is also inconsistent, because the Second District did not apply the same reasoning to §626.9541 that it applied to §624.155(1)(b)1. Section 624.155(1)(b)1 imposes liability on an insurer for "[not] attempting in good faith to settle claims when, under all the circumstance, it could and should have done so, had it acted fairly and honestly toward its insured and with due regard for his interests." The Second District found "Section 624.155(1)(b)1 defines bad faith refusal to settle in terms of acting fairly and in the insured's best interest. By the very language of the statute, the insurer's duty runs to its insured and not to third parties."

The Second District found that Section 626.9541(1)(i)3.a, c and d did not offer protection only for the insured. However, if the insurer's duty to settle runs only to the insured, the relevant insurer activities described in that section, "failing to adopt and implement standards for the proper investigation of claims, failure to acknowledge and act promptly upon communications with respect to claims and denying claims without conducting reasonable investigations based upon available information", *a fortiori* are breaches of duties which run to the insured. Accordingly,

Plaintiff could have no basis for a claim under this section. Plaintiff did not obtain an excess judgment; thus, the insured was unharmed. As discussed further below, the Plaintiff cannot validly claim she suffered harm, since her award was well under one-half of the insured's policy limits (and any demand she made).

E. Other states have declined to expand bad faith statutes in the manner the Second District would.

Other states have refused to allow direct third-party actions.[6] In *Allstate Insurance Company v. Watson*, 876 S.W. 2d 145 (Tex. 1994), the Texas Supreme Court held in order for a third-party claimant to assert a cause of action for unfair claim settlement practice against tort-feasor's insurer, she would have to do so through the reasoning of *Vail v. Texas Farm Bureau Mutual Insurance Company*, 754 S.W.2d 129 (Tex. 1988). *Vail* allowed an **insured** to bring an unfair claim settlement practices suit against his insurer. The Texas statute in question, §16 of article 21.21 of the Insurance Code, "permits recovery by **any person** who has been injured by another's engaging in" conduct which is proscribed by enumerated code sections.

Vail held the insured had a cause of action against its insured, because (1) the Code defined failure to settle in good faith as an unfair practice; (2) Texas courts had determined that

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[6] The amici brief notes that of the 24 jurisdictions which have considered the issue of a third party's standing to sue an insurer under their unfair claims and practices act, only West Virginia allows such actions (two states had approved the cause of action but later removed it).

the insurer's lack of good faith in processing a claim breached the duty of good faith owed the insured and was an unfair or deceptive act (the Code prohibited trade practices determined pursuant to law to be unfair or deceptive); and (3) the jury's finding that Texas Farm had engaged in a deceptive act by failing to exercise good faith established an unfair or deceptive trade practice under the Code.

Watson refused to extend *Vail* to direct third-party claimants, stating *Vail* was predicated upon the "special relationship" between an insured and the insurer:

> Watson, however, is not an insured. Rather, she asserts her claims against Allstate as a third party to the contract between Allstate and its insured. The obligations imposed by art. 21.21 of the Insurance Code and *Vail* are engrafted onto the contract between the insurer and insured and are extracontractual in nature. A third party claimant has no contract with the insurer or the insured, has not paid any premiums, has no legal relationship to the insurer or special relationship of trust with the insurer, and in short, has no basis upon which to expect or demand the benefit of the extra-contractual obligations imposed on insurers under art. 21.21 with regard to their insureds. Nothing in *Vail* suggests that the extra-contractual obligations, rights, and remedies of art. 21.21, section 16 extend to third party claimants.

Watson, p. 149.

Watson also held that extending the statute to third-party claimants would force coextensive and conflicting duties upon the insurer. An insurer's duty to defend its insured against claims asserted by a third party would be compromised by the insurer's duties to the third party. The Texas Supreme Court held it would not construe art. 21.21 as including third-party claimants "absent explicit directive from the legislature." *Id.* Likewise, the

Florida legislature has given no such explicit directive for §624.155. *See, Dunn, supra.*

In *Moradi-Shalal v. Fireman's Fund Insurance Companies*, 758 P.2d 58 (Cal. 1988), a third-party claimant sued the tortfeasor's insurer, after settling with tortfeasor, under California statute §790.03 (h)(2), (3) and (5)[7] pursuant to *Royal Globe Insurance Company v. Superior Court*, 758 P.2d 58 (Cal. 1988). *Royal Globe* had held that either an insured or a third-party claimant could bring a statutory unfair claims settlement suit.[8] *Royal Globe* also held §790.03 imposed a duty running directly from the insurer to the third-party claimant, separate from the duty owed the insured.

In overruling *Royal Globe*, *Moradi-Shalal* relied on cases from other states, adverse scholarly comment and available legislative history in reaching its "irrefutable" decision that neither §790.03 nor §790.09 was intended to create a private cause of action against an insurer committing the acts described in §790.03(h). *Moradi-Shalal*, p. 68.

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[7] The California statute reads, in pertinent part: "The following are hereby defined as unfair methods of competition and unfair and deceptive acts...(h)(2) Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies (h)(3) Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance polices...(h)(5) Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear."

[8] To support this holding the court relied primarily on §790.09 providing that cease and desist orders issued by the Insurance Commissioner under the Unfair Practices Act shall not "'relieve or absolve' an insurer from any 'civil liability or criminal penalty under the laws of this State arising out of the methods, acts or practices found unfair or deceptive.'" *Moradi-Shalal*, p. 61.

The California Supreme Court found substantial administrative sanctions remained and *Royal Globe,* if not overruled, would continue to produce a legion of adverse consequences, such as unwarranted settlement demands, coercion of inflated settlements from insurers, threats of a second lawsuit filed by every injured party unhappy with the result of his or her liability suit, resulting escalation of insurance costs to the general public. *Id.*, p. 66. The conditions which led the California Supreme Court to overrule *Royal Globe* cannot be overlooked, because Florida undoubtedly would experience the same results if all third parties were allowed to sue an insurer for unfair claims practices.

F. The Second District correctly rejected Plaintiff's attempted reliance on dicta in prior cases.

Conquest properly did not rely on *McLeod v. Continental Insurance Company*, 591 So. 2d 621 (Fla. 1992). This Court's statement in *McLeod* at p. 623 -- "[s]ection 624.155 does not differentiate between first- and third-party actions and calls for the recovery of damages in both instances." -- is, indeed, dicta as recognized by the Second District. The statement does not mean this Court considers §624.155 to have created a cause of action for a third party who has not obtained an excess judgment.

As the Second District realized, the issue of whether a third-party claimant had to recover an excess judgment was not the issue addressed in *McLeod*. The Court's statement that §624.155 does not distinguish between first and third-party actions was merely an

introduction to its discussion of the differences between first- and third-party damages.

The Second District also did not rely on *Lucente v. State Farm Mutual Automobile Insurance Company*, 591 So. 2d 1126 (Fla. 4th DCA 1992), *review dismissed*, 601 So. 2d 552 (Fla. 1992), cited below by Plaintiff and her amicus. *Lucente* states only that a third party must obtain a judgment against the insurer before it can sue under the statute. The case does not indicate, as claimed below, that a third party may sue the insurer for failure to settle under any circumstances once he or she has obtained a judgment. The case is consistent with the common law which allows a third party to sue only after receiving an excess judgment.

II. THE SECOND DISTRICT ERRED WHEN IT INTERPRETED THE TERM "ANY PERSON" IN ISOLATION FROM THE LANGUAGE OF §624.155(1) PROVIDING THAT "ANY PERSON MAY BRING A CIVIL ACTION AGAINST AN INSURER WHEN SUCH PERSON IS DAMAGED..."

Plaintiff's complaint and amended complaint alleged Plaintiff had made a demand for the policy limits of $300,000 (R 3, 41). But, Plaintiff never asserted she had made a demand equal to or less than the $130,800 she actually recovered, an amount less than one-half of the policy limits (R 56) (she actually continued to demand $300,000 throughout the underlying trial).

Plaintiff contends she should be able to pursue a "bad faith claim" based on Auto-Owners' alleged failure to adopt and implement

standards for investigation, alleged failure to acknowledge and act upon communications, and alleged denial of her claim without conducting a reasonable investigation. However, absent allegations (and proof) that Plaintiff made a demand to settle for less than the actual net judgment, she cannot prove any damage from these alleged actions.

There is no dispute that Auto-Owners provided counsel to defend its insured in the underlying suit. That suit was fully litigated to a judgment which netted Plaintiff less than half the policy limits. Thus, even if the Plaintiff could assert some lack of investigation or action, Plaintiff will be unable to demonstrate how it harmed her.

By the time the case went to trial and resulted in a judgment of less than half the policy limits, the defense would obviously have thoroughly investigated and prepared the case, and Auto-Owners would have been aware of the investigation and analysis through reports from the counsel it had retained to defend its insured.[9] Auto-Owners correctly analyzed the case as not being worth the policy limits demand Plaintiff consistently made. Because Plaintiff cannot plead or prove that she made a demand equal to or less than the amount she ultimately recovered, she cannot prove any damage. In other words, she cannot show that she demanded or would have accepted $130,800 short of going to trial.

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[9] This assumes, arguendo, that there had not been an earlier adequate investigation.

Put another way, the facts in this case show the disputed claim was "fairly debatable." Thus, Auto-Owners should not be subject to a bad faith claim from a third party (assuming that a third-party bad faith claim exists in the absence of an excess judgment).

This Court recently addressed the standard for bad faith under §624.155(1)(b)1 in *Imhof v. Nationwide Mutual Insurance Co.*, 19 Fla. L. Weekly S257 (Fla. May 12, 1994). *Imhof* stated, "an insurer has been found to have acted in bad faith when the disputed claim is determined not to be 'fairly debatable.'" The Court cited *Reliance Insurance Company v. Barile Excavating & Pipeline Co., Inc.*, 685 F. Supp. 839, 840 (M.D. Fla. 1988). In a case where the Plaintiff never demanded less than $300,000, but recovered less than $131,000, it is clear the insurer's decision not to pay policy limits was "fairly debatable."

Auto-Owners recognizes that *Imhof* arose in a first-party context.[10] However, assume for the moment the legislature intended to create a bad faith cause of action for third parties who recover less than policy limits. It is inconceivable the legislature intended to create a lower standard for a third party who has no contractual relationship with the insurer to seek bad faith damages, than the fairly debatable standard which applies to insureds seeking such damages.

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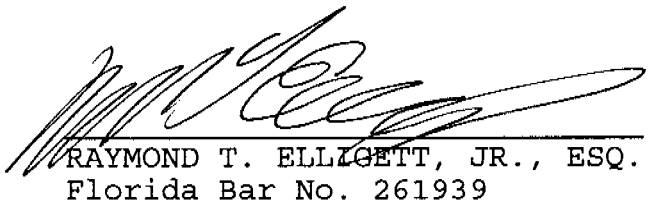
[10] It is in this first-party context that the opinion includes the sentence stating there is no need to allege an award exceeding policy limits to bring an action for insurer bad faith. *Imhof* specifically addressed the section on settling claims which the Second District has already held applies only to insureds.

CONCLUSION

Auto-Owners urges this Court to reverse the Second District's decision in *Conquest*, and approve the decision in *Cardenas*. In the alternative, and at a minimum, Auto-Owners requests this Court to clarify that Plaintiff, as a third party who has not obtained an excess judgment, cannot show the requisite damage to bring a bad faith claim under §624.155.

Respectfully submitted,



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I HEREBY CERTIFY that a copy of the foregoing has been furnished to: K. JACK BREIDEN, ESQ., 3101 Terrace Avenue, Naples, Florida 33942; JOEL D. EATON, ESQ., Podhurst, Orseck, et al., 800 City National Bank, 25 W. Flagler St., Miami, Florida 33130-1720, and PAUL B. BUTLER, JR., ESQ., Butler, Burnette & Pappas, Bayport Plaza - Suite 1100, 6200 Courtney Campbell Causeway, Tampa, Florida 33607-1458 by U. S. Mail this 15th day of August, 1994.

Attorney