IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

CASE NO. 88,338

STATE FARM FIRE & CASUALTY COMPANY,

Petitioner,

4TH DCA CASE NO. 94-02626

vs.

WAYNE ZEBROWSKI and CAROL ZEBROWSKI, his wife, a/k/a CAROL LORD,

Respondents.
_____/

On Certified Conflict from the District Court of Appeal of the State of Florida, Fourth District

RESPONDENTS'. ANSWER BRIEF ON THE MERITS

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PREFACE

This case is before this Court on certified conflict from the Fourth District Court of Appeal. The petitioner, State Farm Fire & Casualty Company, was the appellee/defendant in the lower courts and the respondents, Wayne and Carol Zebrowski, were the appellants/plaintiffs. They are referred to herein as plaintiffs and defendant.

The following symbols are used:

A - Petitioner's Appendix

R - Record on Appeal

STATEMENT OF THE CASE AND FACTS

The plaintiffs cannot accept the defendant's statement of the case and facts as it is incorrect and replete with argument. Accordingly, the plaintiffs restate the case and facts as follows:

Carol Zebrowski sustained personal injuries while attending a Halloween block party at the Martin Downs Shopping Plaza in October of 1988 (R 34). Haisfield Enterprises owned the Shopping Plaza, which the defendant, State Farm Fire & Casualty Co., insured (R 34).

Before filing suit, the plaintiffs provided State Farm with an outline of their damages and Haisfield's liability (R 34-35). State Farm refused to resolve the case and challenged the plaintiffs to sue them (R 35). Plaintiffs notified the insurance commissioner of their intent to sue State Farm under Section 624.155, Florida Statutes (R 21-31, Ex. 2, 35). Plaintiffs then filed suit in the Circuit Court for Broward County (R 21-31, Ex. 2). The plaintiffs subsequently amended the complaint to add, among other counts, Count IV against State Farm, seeking damages for State Farm's bad faith in failing to settle the plaintiffs' claim (R 21-31, Ex. 2). The trial court abated the bad faith count against State Farm pending resolution of the underlying personal injury lawsuit (R 22).

The case proceeded to trial in the fall of 1991, with the plaintiffs' obtaining a verdict for $502,000 (R 45). The amended judgment against Haisfield did not exceed its policy limits with State Farm (R 35). The verdict was affirmed on appeal and the final judgment satisfied by State Farm (R 35, 45).

The plaintiffs then revived their bad faith action against State Farm (R 35). State Farm moved for summary judgment on the basis that an injured third party plaintiff has no direct cause of action against the tortfeasor's insurance carrier for statutory bad

faith under Section 624.155(1) (a) and/or (b), Florida Statutes (R 21-31). The plaintiffs filed a response (R 34-43).

The trial court granted State Farm's motion for summary judgment (R 44-47) and found in pertinent part as follows:

> The Plaintiffs, as third parties to the State Farm policy of insurance with Haisfield Enterprises, have no direct cause of action against State Farm for Statutory Bad Faith under Florida Statute §624.155. Cardenas v. Miami-Dade Yellow Cab Co. 538 So. 2d 491 (Fla. 3d DCA 1989). Further, third parties (non-insured) cannot assert a statutory claim for bad faith refusal to settle pursuant to Florida Statute Section 624.155(1)(b)(1) [sic] against Haisfield Enterprises' insurer (State Farm) where the underlying tort case did not result in Final Judgment in favor of the Plaintiffs in excess of the Haisfield Enterprises' policy limit. Conquest v. Auto-Owners Insuance Company, 19 F.L.W. D1095 (Fla. 2d DCA 1994) . . . .
>
> [B]oth the Third District Court of Appeal and Second District Court of Appeal have held that a third-party claimant does not have a statutory cause of action for bad faith to settle. Cardenas v. Miami-Dade Yellow Cab Co., 538 So. 2d 491 (Fla. 3d DCA 1989) and Conquest v. Auto-Owners Insurance Company, 19 F.L.W. D1095 (Fla. 2d DCA 1994) .... R 45-46)

The plaintiffs appealed to the Fourth District (R 49-50).

The Fourth District Court of Appeal reversed and held that Section 624.155(1)(b)1. afforded plaintiff a direct action against the tortfeasor's insurer for statutory bad faith, Zebrowski v. State Farm Fire & Cas. Co., 673 So. 2d 562 (Fla. 4th DCA 1996). The Fourth District thoroughly discussed and analyzed Conquest v. Auto-Owners Ins. Co., 637 So. 2d 40 (Fla. 2d DCA 1994), and Cardenas v. Miami-Dade Yellow Cab Co., 538 So. 2d 491 (Fla. 3d DCA), rev. dismissed, 549 so. 2d 1013 (Fla. 1989), and rejected the holdings in those cases. The Fourth District held as follows on pages 563-564 of the opinion:

> ...In approving the second district opinion which allowed the injured party to bring a direct action against the insurer under section 624.155(1) **(a),** the supreme court stated:
>
> > Section 614.155 is the mechanism by which a person may bring a civil suit against an insurer who violates the Insurance Code and provides that "[a]ny person may bring a civil action against an insurer when such person is damaged." We find the section's use of the words 'any person" dispositive. The words are precise and their meaning unequivocal.
> >
> > 658 So.2d at 929.
>
> Although the second district held in Conquest v. Auto-Owners that a third party may not bring a direct action under section 624.155(1)(b) (1), the supreme court did not address that finding because Auto-Owners sought review of the court's findings only with respect to section 624.155(1)(a).

Further, the second district's determination that section 624.155(1)(b)1 did not permit a direct third party action was consistent with the third district's opinion in Cardenas v. Miami-Dade Yellow Cab Co., so there was no basis for the supreme court to assert its conflict jurisdiction to review the issue. Auto-owners v. Conquest, 658 So.2d at 929.

Based on the supreme court's holding in Auto-Owners v. Conquest that an injured party may bring a claim directly against the insurer when the injured party alleges a business practice of unfair dealing under section 625.155(1) (a), we see no reason that the result would be different when the injured party brings suit directly against the insurer based on an alleged unfair failure to settle a particular claim under section 624.155(1)(b)1. The words 'any person" contained in section 624.155(1) **are** not limited to subsection (a), but would apply to subsection (b) as well. The notion that the term "any person" in section 624.155(1) meant 'any insured person" was dispelled by the supreme court in Auto-Owners Insurance Co, v. Conquest. The words 'any person" are "precise and their meaning unequivocal." 658 So.2d. at 929.

* * *

On the contrary, there is no indication in the statute that the injured party's cause of action against the insurer is merely subordinate to, and derivative of, the insured's cause of action, or that an excess judgment is an essential ingredient of the injured **party's cause of action.** Indeed, in Cope, which discussed the derivative nature of a third party's right to sue the insured for common law bad faith, the court in a footnote may **have** forecast the statutory cause of action.

> Should this court recognize a duty from an insurer to a third party injured party to settle a claim within its policy limits, the damages of that third party would be entirely different from the damages of an insured. At best such damages would be the extra cost of going to trial and loss of the money that earlier should have been paid.

462 So.2d at 461, n. 5. More directly on point, section 624.155(7) reads in pertinent part as follows:

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

* * *

> Accordingly, the trial court's order on summary judgment, predicated on the conclusion that an injured party, in the absence of an excess judgment, may not bring a direction cause of action against an insured under section 624.155 (1) (b)1 is reversed.

The Fourth District properly interpreted Section 624.155(1) (b)1.

SUMMARY OF ARGUMEN

Section 624.155(1) clearly authorized 'any person" to bring a civil action under Section 624.155 (1) (a) for a violation of insurer unfair claims settlement practices and Section 624.155(1) (b)1. for

bad faith failure to settle. "Any person" includes insureds and third party claimants, as this Court held in Auto-Owners Ins. Co. v. Conauest, 658 So. 2d 928 (Fla. 1995). Interpreting the statute as imposing no duty on the insurer to third parties except where the third party can prove unfair claims settlement practices, violates the statute and provides the insurer with one free bad claims practice before it can be liable.

The statutory obligation of good faith extends to first-and-third party claimants. Conquest is dispositive and supports the Fourth District's holding. This Court should approve Zebrowski and disapprove Cardenas and the Second District's opinion in Conquest.

ARGUMENT

ISSUES ON APPEAL (Restated)

WHETHER SECTION 624.155(1)(b)1., FLORIDA STATUTES, PERMITS AN INJURED PARTY TO BRING A DIRECT ACTION AGAINST THE TORTFEASOR'S INSURER FOR BAD FAITH FAILURE TO SETTLE.

In Auto-Owners Ins. Co. v. Conquest, 658 So. 2d 928, 929 (Fla. 1995), this Court resolved the conflict among the districts and held that a third-party non-insured was authorized to bring suit under Section 624.155(1), Florida Statutes, for insurer bad faith:

> Section 624.155 is the mechanism by which a person may bring a civil suit against an

> insurer who violates the insurance code and provides that "[a]ny person may bring a civil action against an insurer when such person is damaged." We find the section's use of the words 'any person" dispositive. The words are precise and their meaning unequivocal.

This Court rejected the Third District's contrary interpretation of the statute in Cardenas v. Miami-Dade Yellow Cab Co., 538 So. 2d 491 (Fla. 3d DCA), rev. dismissed, 549 So. 2d 1013 (Fla. 1989), and approved the Second District's interpretation in Conquest v. Auto-Owners Ins. Co., 637 So. 2d 40 (Fla. 2d DCA 1994), which acknowledged that Section 624.155 authorizes third-party suits by injured claimants against the tortfeasor's insurer. This Court did not address the second part of Conquest, which erroneously refused to extend the subsection(l) (b)1. duty of good faith to injured third persons, because Auto-Owners did not seek review of this.

The Fourth District "[saw] no reason that the result would be different when the injured party brings suit directly against the insurer based on an alleged unfair failure to settle a particular claim under Section 624.155(1)(b)1." Zebrowski v. State Farm Fire & Cas. Co., supra, 564. As the Fourth District observed on page 564 of the opinion, the words 'any person" apply equally to subsections (a) and (b); thus, no basis exists to distinguish between subsections (a) and (b):

> While the statutory cause of action has certain elements which are stated in relation to the insurer's duty to the insured, the language of the statute implicitly recognizes that persons other than the insured may be injured by the insurer's conduct in handling the claim. One person who may potentially be damaged by the insurer's failure to settle an insurance claim in good faith is the injured third-party, who stands to benefit from an expeditious resolution of his damages demand if for no other reasons than the time-value of money and the costs associated with protracted litigation. Section 624.155 plainly creates a classic statutory cause of action; the statute itself creates the insurer's duty to the third party claimant.

This Court's analysis in Conquest extends to actions under subsection (1)(b)1.. The preliminary language in subsection (1) applies to both subsections and authorizes 'any person" to sue for bad faith.

State Farm Mut. Auto. Ins. Co, v. Laforet, 658 So. 2d 55 (Fla. 1995), recognized that the statutory duty of good faith in subsection (1)(b)1. extends to third-parties who can sue the insurer for violating the statutory duty:

> Additionally, as previously discussed, section 624.155 provides remedies for both first- and third-party causes of action. Section 624.155 provides that an insurer has acted in bad faith if it has "[n]ot attempt[edl 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 [the insured's] interest." §624.155(1)(b)1.
>
> * * *
>
> Interestingly, in the 1990 amendment to section 624.155, the Legislature, in addition to other changes, provided that "any person may obtain a judgment under either the common **law** remedy of bad faith or this statutory remedy, but shall not be entitled to a judgment under both remedies." §624.155(7), Fla. Stat. (Supp. 1990). Because the statute otherwise makes specific reference to third-party causes of action brought under the statute, see, e.g., 624.155(2)(4)., it is clear that a third-party action can now be brought under either section 624.155 or the common law. This is untrue for first-party actions because, as discussed previously, first-party actions do not exist at common law. For consistency, however, we find that the standard set forth in this opinion should apply equally to third-party actions brought at common law. (Emphasis added).

By focusing on common law notions of duty, rather than on the damaged persons who are statutorily authorized to enforce the obligation, Cardenas and Conquest misinterpreted the cause of action Section 624.155 created. Section 624.155(1)(b)1. does not limit the remedy to those in privity of contract. Conquest and Dunn v. National Sec. Fire and Cas. Co., 631 So. 2d 1103 (Fla. 5th DCA 1993), misinterpreted the reference in Section 624.155 (1)(b)1.,

to an insurance company's duty to its insured, as an indication by the legislature that it only meant to extend the duty to the insured. If one were to accept the rationale of Dunn, neither statutory nor common law bad faith would exist.

Prior to the enactment of Section 624.155, Florida Statutes, in 1983, there was no requirement for an insurance company to promptly settle claims and little incentive to do so. In first-party situations, the insured-insurer relationship was deemed to be that of debtor-creditor, with no fiduciary responsibility imposed upon the insurer. Baxter V. Roval Indem. Co., 285 So. 2d 652 (Fla. 1st DCR 1973), cert. discharged, 317 So. 2d 725 (Fla. 1975). In third-party cases, the injured victim, while a third-party beneficiary of a liability contract, had no rights against the liability insurer until a judgment was obtained against a negligent insured. See, Fla. Stat. §627.7262. There was no remedy afforded to the injured third-party victim if the insurance company refused to negotiate fairly or promptly, unless an excess judgment was eventually obtained against the wrongdoer following a trial. This remedy of 'common law" bad faith arose only if the insurer's actions prejudiced the negligent insured's rights as the insurer owed a fiduciary responsibility to its insured in handling the defense of the claim. Thus, while the duty or obligation was owed to the insured, an injured third-party claimant had a cause of

action for third-party bad faith if the insured tortfeasor's interests were prejudiced.

Initially following the enactment of Section 624.155, it appeared unquestioned that the statute applied to third-party actions for bad faith. See, Fortson v. St. Paul Fire and Marine Ins. Co., 751 F.2d 1157 (11th Cir. 1985). Thereafter, insurers began to question whether the statute applied to third-party claimants. The Third District first considered this new position in Cardenas v. Miami-Dade Yellow Cab Co., supra, which held that Section 624.155 did not create a direct third-party cause of action against an insurer. According to the Third District, interpreting the words "any person" in subsection (1) to mean "any person" would achieve "an **unreasonable result" -** allowing third-parties to sue **when** an **insurer** fails to settle in good faith **-** and would lead to undesirable social and economic effects, i.e. multiple litigation, unwarranted bad faith claims, coercive settlements, excessive jury awards and escalating insurance, legal and other transactions costs. The Third District did not explain how these fears of undesirable consequences were avoided in the first-party context.

Following Cardenas, the legislature amended Section 624.155(7) in 1990 to clarify that third-party claimants could pursue either

a statutory or common **law** bad faith action, but not both. The 1990 amendment stated:

> (7) The civil remedy specified in this section does not preempt any other remedy or cause of action provided for pursuant to any other statute or pursuant to the common law of this state. Any person may obtain a judgment under either the common law remedy of bad faith or this statutory remedy, but shall not be entitled to a judgment under both remedies. ... (Emphasis added).

The 1990 amendment left no doubt that Cardenas was wrongly decided. McLeod v. Continental Ins. Co., 591 So. 2d 621 (Fla. 1992), reinforced this legislative clarification and held that "Section 624.155 does not differentiate between first- and third-party actions and calls for the recovery of damages in both instances." Id., at 623.

Following McLeod, this Court again in Imhof v. Nationwide Mut. Ins. Co., 643 So. 2d 617, 618 (Fla. 1994), discussed the purpose of the bad faith statute and noted that its protection extends to "a person", including third-parties:

> What the statute does requires is that the insurer make a good-faith effort to settle claims. Section 624.155(1)(b)1. allows a person to bring a civil action when the insurer does not attempt "in good faith to se le claims when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward

> its insured and wit[redacted] regard for his interest." Id.
>
> * * *
>
> Section 624.155 follows longstanding public policy and promotes quick resolution of insurance claims.... (Emphasis added).

No rational reason exists for not extending the duty to third-parties.

The language of Section 624.155(1)(b)1. is a classic restatement of third-party bad faith which evidenced the legislature's intent to include third-party claimants within the statutory scheme. The legislature's inclusion of the common law duty of good faith within section 624.155(1)(b)1. is the clearest indication that it intended to include third-party victims. To hold otherwise makes no sense since both first- and third-party claimants are in an adversarial relationship with the insurer when presenting a claim. Moreover, interpreting the statute as imposing no duty on the insurer to third-parties, except where the third-party can prove unfair claim settlement practices, as held in Conquest v. Auto-Owners Ins. Co., supra, violates the statute and provides the insurer with one free bad claims practice before it can be held liable.

A third-party victim seeking recovery from the insurer is in substantially the same position as a first-party insured seeking benefits under a casualty policy. Both have been injured and both look to the insurance company for payment. Both are in an adversary relation with the insurance company when seeking payment. Both are in a weaker bargaining position than the insurance company and both can suffer as result of the insurer's bad faith in settlement practices and may incur additional damage if payment of the claim is delayed.

Section 624.155(1)(b)1. has no underlying excess judgment requirement. Imhof v. Nationwide Mutual Insurance Co., supra, 618, addressed this precise issue and held:

> [T]here is no need to allege an award exceeding the policy limits to bring an action for insurer bad faith.

The 1990 amendment to Section 624.155 clarified the damages recoverable in first- and third-party bad faith and provided:

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

While the statute permits recovery of an excess judgment, it does not require it as a prerequisite to the cause of action.

Insurance is a recognized method for compensating the third-party victim for injuries caused by another. Insureds purchase liability insurance to protect their assets and to provide financial protection to anyone they may injure. Imposing a duty on the insurer to negotiate in good faith with the third-party victim is consistent with the intent of the insured and the legislature and with the popular concept of insurance which views the third-party victim as an intended third-party beneficiary of the insurance contract. Section 624.155 imposes on the insurer a duty of good faith to the third-party victim, despite the absence of a contractual relation between the insurer and the victim. The equitable principle of good faith is not limited to contractual relationships.

Recognizing a statutory bad faith cause of action for third-party claimants creates no more conflict for an insurance company than a common law third-party bad faith action. This is because the obligation imposed on the insurer is the same, i.e. to act in the best interests of its own insured. It is only when the insurer acts in its own best interest and refuses to settle a claim which clearly should be resolved, that a third-party bad faith action under common **law** or 624.155(1)(b)1. arises. Without a uniform sanction for bad faith, insurers can act with impunity and no incentive to resolve meritorious claims. See, Baxter v. Royal

Indem. Co., 285 So. 2d 652 (Fla. 1st DCA 1973), cert. discharged, 317 so. 2d 725 (Fla. 1975).

Courts have routinely rejected the same parade of horribles the defendant posits regarding the potential ramifications of imposing liability against insurance companies in third- and first-party bad faith suits. Following Thompson v. Commercial Union Ins. Co. of New York, 250 So. 2d 259 (Fla. 1971), this Court, in Boston Old Colony Ins. co. v. Gutierrez, 386 So. 2d 783, 785 (Fla. 1980), again rejected the insurance company's contention that the injured tort plaintiff could not bring an action directly against the insurance company for its alleged bad faith in failing to settle his claim against the insured. The specially concurring opinion in Gutierrez made the same arguments the defendant makes here:

> In the "Alice-in-Wonderland" world created by the Thompson rule, it is to the injured party's benefit if the insurer breaches its duty to its insured and to his detriment if there is no breach. This is so since, if the insurer settles, the plaintiff will receive no more than the policy limits, but if it does not, the plaintiff may end up with both the policy limits and an excess judgment. . . .
>
> [A]n injured tort plaintiff should not be allowed to bring an action directly against a tortfeasor's insurer for bad faith failure to settle a claim because... the insurers good faith duty to settle runs only to its insured. Id. at 786.

The majority rejected these arguments and held that the duty of good faith runs to the injured tort victim. Boston Old Colony Ins. Co. v. Gutierrez, supra.

State Farm's examples of forecasted problems are ludicrous. State Farm cites professional malpractice policies which have provisions requiring the consent of the insured before an insurer can settle a claim. If the insurance company is concerned about potential conflict, it can remove the provision from its policy. Because problems with these provisions have arisen outside of the bad faith context, most carriers have already removed them so that the insurer retains sole control of the defense.

Moreover, the fear that a conflict will arise when a third-party claimant requests an explanation of his claim denial has no basis in reality. Work-product privilege exists in first- and third-party situations. If an insurance company denies a settlement claim, it simply disputes liability, alleges comparative negligence, or takes issue with the causation and extent of the claimant's injuries. Insurance companies do not reveal any detailed information as a rule of thumb, and there is nothing in the bad faith statute which would compel a disclosure such as the defendant suggests.

As for the suggested potential dilemma for single limit policies or big deductible policies, the concerns are ridiculous. These concerns exist regardless of whether a bad faith action is involved, and is the risk any person takes when they buy a single limit policy or one with a large deductible. The same is true for the problems that the defendant suggests would arise between excess carriers and primary carriers. These are inherent conflicts which exist by the very nature of the relationship. As for a wealthy insured being damaged by a prompt settlement of his claim, it would seem that the exact opposite would be true. A person with assets would want their case settled within the policy limits of their insurance coverage.

What all these far-fetched scenarios highlight is that there are no valid policy reasons not to extend a statutory cause of action to third-party claimants. Obviously, the insurance company would prefer to be able to act with impunity and without regard to the effect that their actions might have on others, but the Florida Legislature has determined that they may not have that privilege.

Existing common law bad faith remedies are inadequate. Individuals with small claims have no redress if their claim is wrongfully denied. The duty to negotiate fairly should exist whether the damages are $5.00 or $50,000 and should not rest solely

on the ability of the individual to obtain an excess judgment. Further, even the third-party claimant with significant injuries has no redress where there is a large liability policy involved. This is typically faced when bringing a claim against a large company who maintains millions and millions of dollars in excess coverage. The insurer should not be permitted to escape liability for its abusive tactics solely because of the amount of the insurance policy.

The Legislature enacted Section 624.155 to encourage the settlement of meritorious claims promptly and fairly. When the settlement value of a plaintiff's claim is near or below the tort-feasor's policy limits, there is little motivation for the tort-feasor's liability insurer to act in good faith toward anyone. The insurer could simply stonewall the plaintiff and make preparation of the case so expensive that the plaintiff will abandon it. Or the insurer could make a low ball offer, hoping that the plaintiff would agree to recovering at least something. An insurer loses nothing by this tactic, but the costs to the system are enormous. Settlements and recoveries are delayed, victims lose the use of the monies they would have had years earlier and are forced to incur enormous expense in preparing for trial, reducing their recovery even further.

The Fourth District correctly held that the statutory obligation of good faith set forth in Section 624.155(1)(b)1. extends to third-party claimants. This Court should approve Zebrowski and disapprove Cardenas and Conquest.

CONCLUSION

This Court should approve Zebrowski and disapprove Cardenas and Conquest.

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