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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC13-1607
DCA Case No. 5D12-428

ADRIAN FRIDMAN,

Petitioner,

vs.

SAFECO INSURANCE COMPANY
OF ILLINOIS,

Respondent. /

AMICUS CURIAE BRIEF OF THE AMERICAN INSURANCE ASSOCIATION, THE PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA, THE NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, AND THE FLORIDA INSURANCE COUNCIL IN SUPPORT OF RESPONDENT

On Discretionary Review from a
Decision of the Fifth District Court of Appeal

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES

Page

Statutes

TABLE OF AUTHORITIES

Page

Rules

Constitutional Provisions

STATEMENT OF IDENTITY OF AMICUS CURIAE AND INTEREST IN THE CASE

The *Amici*, the American Insurance Association ("AIA"), the Property Casualty Insurers Association of America ("PCI"), the National Association of Mutual Insurance Companies ("NAMIC"), and the Florida Insurance Council ("FIC"), believe that by virtue of their experience and broad membership, they have perspectives and information that will serve as a useful supplement to the issues presented to the Court.

AIA is a leading national trade association representing over 300 major property and casualty insurance companies that collectively underwrite more than $100 billion in property and casualty insurance nationwide, including over $4 billion in commercial lines of insurance in Florida. AIA members, ranging in size from small companies to the largest insurers with global operations, underwrite virtually all lines of property and casualty insurance, including liability coverage for nonprofit organizations.

PCI is a diverse national trade association with over 1,000 member companies, both small and large, located in all 50 states. PCI members write $195 billion in annual premiums, or 46% of the United States automobile insurance market, 32% of the homeowners market, 37% of the commercial property and liability market, and 41% of the private workers compensation market.

NAMIC is the largest property/casualty insurance trade association in the United States with 1,400 property/casualty insurance companies serving more than 135 million auto, home, and business policyholders writing more than $196 billion in premiums. NAMIC companies have 50% of the automobile/homeowners market and 31% of the business insurance market.

FIC is the result of the 1962 merger of three separate state insurance trade organizations. It is Florida's largest company trade association, representing 31 insurer groups – consisting of 236 companies – which write over $33 billion a year in premiums and provide all lines of coverage. FIC members hold more than 90% of Florida's market share in residential and private passenger automobile coverage.

The issue presented in this case is whether the district court correctly found that in an action for uninsured motorist benefits, an insurer's payment of policy limits and confession of judgment fully resolves the substantive issues framed by the pleadings, rendering the issues moot and requiring dismissal of the action.

The *Amici* have an interest in this case because of its importance to the insurance industry, policyholders, and the marketplace. AIA, PCI, NAMIC, and FIC advocate sound public policies on behalf of insurers in legislative and regulatory forums at the federal and state levels and file *amicus curiae* briefs in significant cases before federal and state courts.

The *Amici* offer this brief to support the majority opinion issued by the Fifth District Court of Appeal in *Safeco Ins. Co. of Illinois v. Fridman*, 117 So. 3d 16 (Fla. 5th DCA 2013) and the position advanced by Respondent, Safeco Insurance Company of Illinois ("Safeco"). Additionally, the *Amici* dispute the Petitioner's contention that, notwithstanding the confession of judgment by an insurer and tender of the full amount of uninsured or underinsured motorist ("UM") benefits, an insured can proceed to a jury trial in that UM action to determine the "total damages" potentially available under Section 627.727(10) in prospective, unfiled litigation seeking extra-contractual or "bad faith" damages.

SUMMARY OF ARGUMENT

Every lawsuit must involve a real case or controversy as to the issues presented. When an insurer resolves a case through voluntary payment of the entire amount available under existing policy limits and confesses judgment, dismissal is required because the case is moot as a matter of law. The insured should not be authorized to proceed in this same action to a jury trial to obtain an advisory verdict on a moot issue, particularly when the additional relief sought is outside the scope of the pleadings. A verdict that purports to address and resolve matters never placed at issue and that no longer present a viable controversy is void.

In an action for UM benefits, as presented in the case at hand, the policy limits reflect the extent of recoverable damages. Thus, once an insurer tenders its UM policy limits and allows a judgment to be entered against it for that amount, the trial court loses jurisdiction. It would be contrary to Florida law and sound public policy to require an insurer to proceed to trial to have a jury issue a verdict that purports to award the "total damages" recoverable under section 627.727, Florida Statutes, in a potential future lawsuit the insured may elect to pursue following disposition of the UM claim.

Furthermore, the procedure allowed by the trial court in this case and advocated by the Petitioner would violate insurers' due process rights, and the Fifth District majority correctly rejected it. Florida appellate courts review judgments, not merely non-final verdicts based upon unfiled causes of action. To hold that the excess verdict entered in the UM action establishes an insured's potential "total damages" recoverable under section 627.727 would deprive the insurer of the right to appeal the damages reflected by the premature, non-final verdict. For these reasons, the *Amici* urge the Court to reject Petitioner's argument and to affirm the Fifth District's majority opinion.

ARGUMENT

I. IN AN ACTION FOR UM BENEFITS, THE INSURER'S PAYMENT OF THE POLICY LIMITS AND CONFESSION OF JUDGMENT RENDERS THE ISSUES MOOT AND REQUIRES DISMISSAL OF THE ACTION.

"Every case must involve a real controversy as to the issues presented." *Department of Revenue v. Kuhnlein*, 646 So. 2d 717, 721 (Fla. 1994). "An issue is moot when the controversy has been so fully resolved that a judicial determination can have no actual effect." *Goodwin v. State*, 593 So.2d 211, 212 (Fla. 1992). "A case is 'moot' when it presents no actual controversy or when the issues have ceased to exist." *Id*.

Once a case becomes moot, dismissal is required because parties are not permitted to obtain an advisory opinion. *Id.; Merkle v. Guardianship of Jacoby*, 912 So. 2d 595, 600 (Fla. 2d DCA 2005) (noting that "[p]arties to an appeal may not, by means of a private agreement, keep the case pending and prevent its dismissal on grounds of mootness in order to obtain what amounts to an advisory opinion."). As this Court explained, Florida courts will not render "what amounts to an advisory opinion at the insistence of parties who show merely the *possibility* of legal injury on the basis of a hypothetical 'state of facts which have not arisen' and are only 'contingent, uncertain, [and] rest in the future.'" *Santa Rosa County v. Administrative Commission, Div. of Admin. Hearings*, 661 So. 2d 1190, 1193 (Fla. 1995).

The settlement of a case renders it moot. *See Santa Rosa County*, 661 So. 2d at 1193; *Merkle*, 912 So. 2d at 600; *Jones v. Champion*, 675 So. 2d 244 (Fla. 2d DCA 1996); *Seslow v. Seslow*, 625 So. 2d 1248, 1248-49 (Fla. 4th DCA 1993). So too does the voluntary payment of a disputed debt. *Merkle*, 912 So. 2d at 600 (citing *Lieber v. Lieber*, 40 So. 2d 111, 113 (Fla. 1949)). As this Court explained:

> [The voluntary] payment by the plaintiff-appellant of the [disputed debt] relieves this Court of its duty under the law to rule upon the contention as the assignment becomes moot and is equivalent to an abandonment or waiver of the contention. Any attempt by a mere colorable dispute to obtain the opinion of the court upon a question of law, where in fact there is no real controversy, is not countenanced by the courts.

Lieber, 40 So. 2d at 113; *Jones v. Champion*, 675 So. 2d 244, 245 (Fla. 2d DCA 1996) (affirming dismissal because the case settled, and the court was jurisdictionally precluded from granting any of the requested relief).

In an action for UM benefits, the insurer's payment of the policy limits and confession of judgment renders the case moot. *See Wollard v. Lloyd's & Cos. Of Lloyd's*, 439 So. 2d 217, 218 (Fla. 1983) (holding that when insurer settles by paying a claim, it is the functional equivalent of a confession of judgment). Once a UM insurer tenders the policy limits, the full extent of available recovery, and confesses judgment, the Court should dismiss the lawsuit because there is no pending controversy and no additional relief available through that proceeding. *Id.* Contrary to the position espoused by the Petitioner, an insured should not be

entitled to have a jury in a moot UM action enter a verdict that purports to represent the potential "total damages" recoverable under section 627.727(10) in the event the insured later pursues and ultimately prevails in a subsequent bad faith claim. An advisory verdict on a moot claim that awards an amount greater than policy limits, the maximum available recovery in a UM suit, is completely contrary to settled principles of Florida law and procedure.

In addition to being premature, an excess verdict returned in a lawsuit for UM benefits is a legal nullity. "As the courts of this state have repeatedly held, a trial court lacks jurisdiction to hear and determine matters that were not the subject of proper pleadings and notice." *BAC Home Loans Servicing, Inc. v. Headley*, 130 So. 3d 703, 705 (Fla. 3d DCA 2014). "To allow a court to rule on a matter without proper pleadings and notice is violative of a party's due process rights." *Carroll & Associates, P.A. v. Galindo*, 864 So. 2d 24, 29 (Fla. 3d DCA 2003); *Mullne v. Sea-Tech Constr., Inc.*, 84 So. 3d 1247, 1249 (Fla. 4th DCA 2012) (holding that trial court is without jurisdiction to award relief that was not requested by the complaint, and that a verdict awarding unpled relief constitutes fundamental error and is void). As a result, a plaintiff "[c]annot get more than [he or she] asked for in the complaint." *Hooters of America, Inc. v. Carolina Wings, Inc.*, 655 So. 2d 1231, 1235 (Fla. 1st DCA 1995); *Yampol v. Turnberry Isle S. Condominium Ass'n,*

Inc., _ _ So. 3d _ _, No. 3D13-2667, 2014 WL 3844028, *1 (Fla. 3d DCA Aug. 6, 2014) (reversing order to the extent it imposed relief not sought in the pleadings).

When an insured sues a UM insurer for benefits, recovery is limited to available policy limits. An insured cannot sue for damages beyond policy limits without first establishing a coverage obligation and a breach thereof, and is then obligated to file a separate bad faith lawsuit. See *Nationwide Mut. Fire Ins. Co. v. Voigt*, 971 So. 2d 239, 241-42 (Fla. 2d DCA 2008) (reversing a judgment against a UM insurer and remanding for entry of judgment limited to policy limits). Indeed, this principle is not only recognized by Florida courts, but is also captured within section 627.727(10), Florida Statutes, which references recoverable damages in excess of policy limits, through "an action brought under s. 624.155." Accordingly, under Florida statute and long-standing precedent, an insured pursuing a UM claim is limited to recovery of UM benefits and is only then authorized to pursue a separate suit under section 624.155, Florida Statutes. *See Blanchard v. State Farm Mut. Auto. Ins. Co*., 575 So. 2d 1289, 1291 (Fla. 1991) (holding that claim against UM insurer for failing to settle in good faith does not accrue before conclusion of underlying suit for UM benefits).

Thus, as the Fifth District majority observed, the Petitioner did not, and could not, sue Safeco for bad faith because such a claim would be premature absent a determination of liability on the policy. *Safeco Ins. Co. of Illinois*, 117

So. 3d at 19. The trial court had no jurisdiction to submit to the jury a claim for damages outside the UM policy limits to set a benchmark for recoverable damages in an unfiled, potential future lawsuit. The Fifth District majority correctly found that Safeco's tender of the policy limits to the Petitioner before the trial of Petitioner's UM claim rendered the case moot and the subsequent jury verdict a nullity. This Court should affirm the Fifth District's conclusion.

II. AN INSURER HAS NO ABILITY TO APPEAL AN EXCESS VERDICT RETURNED IN A UM TRIAL AND, THEREFORE, THE PROCEDURE ADVOCATED BY THE PETITIONER AND THE DISSENTING OPINION BELOW WOULD DEPRIVE INSURERS OF PROCEDURAL DUE PROCESS.

In an action for UM benefits, the judgment against the UM insurer cannot exceed policy limits as a matter of Florida law. *See Nationwide Mut. Fire Ins. Co. v. Voigt*, 971 So. 2d 239 (Fla. 2d DCA 2008); *see also GEICO Gen. Ins. Co. v. Bottini*, 93 So. 3d 476, 478 n.1 (Fla. 2d DCA 2012); *King v. Gov't Employees Ins. Co.*, 2012 WL 4052271, *5 (M.D. Fla. Sept. 13, 2012). This is consistent with general insurance principles. If an insured sues an insurer and alleges a breach of a coverage obligation, the insured must first establish the existence of coverage and a breach thereof as a prerequisite to advancing a claim for bad faith liability.

The Petitioner contends, however, that once Safeco tendered its limits and confessed judgment on the full amount of policy coverage, the trial court retained jurisdiction to submit the amount of excess damages to a jury in the UM lawsuit.

As explained above, this is not only inconsistent with settled jurisdictional principles, but flies in the face of procedural due process because the insurer has no available mechanism for appealing a non-final, advisory verdict that the Petitioner seeks to impose against the insurer as a measure of damages. *See Bottini*, 93 So. 3d at 478 (Altenbernd, J., concurring) (noting that Florida appellate courts have constitutional authority to review only judgments, not verdicts, on appeal); *King*, 2012 WL 4052271, *5; *see* art. V, § 4(b)(1), Fla. Const; *Norm Burg Constr. Corp. v. Jupiter Inlet Corp.*, 514 So. 2d 1102, 1105 (Fla. 1987) ("[j]ury verdicts are not appealable"); *Menfi v. Exxon Co., U.S.A.*, 433 So. 2d 1327, 1329 (Fla. 3d DCA 1983) ("no appeal can be taken from a verdict"); *T.A. Enterprises, Inc. v. Olarte, Inc.*, 931 So. 2d 1016, 1018-19 (Fla. 4th DCA 2006) (article V, section 4(b)(1), and article I, section 21, grant constitutional rights to appeal and to access to courts, which must be read together).

The federal district court's decision in *King* is directly on point and helpful to the Court's analysis. There, a jury returned a verdict for plaintiff for more than $1.6 million in a trial for UM benefits, resulting in a judgment against the insurer in the amount of $25,000 – the limits available under the subject UM policy. 2012 WL 4052271, *1. In a subsequent bad faith action, the district court held that the excess verdict returned in the UM trial could not establish the amount of damages plaintiff could recover:

> The jury's verdict in excess of [the UM policy] limits cannot be reviewed on appeal for errors. *See, e.g.*, *Bottini*, 93 So. 3d [at 478] (Altenbernd, J., concurring) (finding that the court does not have the power to issue an opinion affirming the judgment but reversing the verdict as to elements of damages that were not included in the judgment); *Gov't Emps. Ins. Co. v. King*, 68 So. 3d 267, 269 (Fla. 2d DCA 2011) (explaining that "the judgment on appeal was not a judgment for the full amount of the jury's verdict but rather a judgment based on the $25,000 in insurance coverage" and it was "determined that there was no reversible error in that *judgment*." (emphasis added)). Appellate review affords procedural due process to litigants. Thus, insurers are left without due process if the verdicts returned in the underlying [UM] actions are held to be final determinations of the damages owed the insureds in subsequent bad faith actions.

Id. at *5.[1] The court further observed that, "to accord due process to insurers, insureds must prove their damages in the bad faith action and are not entitled to rely on the underlying verdict as conclusive proof of those damages." *Id.* at 6.

As in *King*, which relied upon the Second District's decision in *Bottini,* this Court should hold that an insured is required to pursue damages in a separate bad faith lawsuit and is not entitled to rely on an advisory verdict in a UM claim, much less a UM claim mooted by tender of policy limits, to establish such damages. Treating a verdict in excess of policy limits rendered during a UM trial as

[1] Although the court in *King* referred specifically to the concurring opinion in *Bottini*, it is clear that the concurring opinion was simply clarifying and expounding on the holding of the majority in *Bottini* that it would not consider the insurer's assertions of error leading to the $30 million excess verdict there because they were necessarily harmless in that no error was shown as to the judgment for the $50,000 UM policy limits. 93 So. 3d at 477. In other words, any error resulting in an advisory verdict awarding damages above the UM policy limit is not subject to review on appeal from a judgment specifically for policy limits.

conclusive proof of an insured's damages denies the insurer its constitutional rights to procedural due process and access to courts under the United States and Florida Constitutions because the insurer has no available appellate review from the advisory verdict. *See King*, 2012 WL 4052271, *5-6; Amend. 14, U.S. Const.; art. I, §§ 9, 21, art. V, § 4(b)(1), Fla. Const.

Florida case law addressing the effect of non-appealable contingent judgments for attorneys' fees in UM actions is apposite and supports this conclusion.[2] *See GEICO Ind. Co. v. DeGrandchamp*, 99 So. 3d 625 (Fla. 2d DCA 2012) (award of attorneys' fees in UM action is a preemptive determination of issues and is neither appealable nor binding on the finder of fact in any subsequent bad faith action); *Government Employees Ins. Co. v. King*, 68 So. 3d 267, 269-70 (Fla. 2d DCA 2011) (*en banc*) (a contingent judgment for fees entered in a UM action is premature and not binding on the trier of fact in any subsequent action for bad faith); *Allstate Ins. Co. v. Jenkins*, 32 So. 3d 163, 165 (Fla. 5th DCA 2010) (fees judgment is contingent upon future events occurring in bad faith litigation and, thus, is not final and not reviewable on appeal from the UM judgment).

The foregoing decisions hold that non-appealable, contingent judgments relating to attorneys' fees are not binding on the finders of fact in any subsequent

[2] Such contingent judgments award attorneys' fees to successful plaintiffs for fees incurred in the UM action contingent on the plaintiffs succeeding in subsequent bad faith actions against the UM insurers.

bad faith proceedings and, indeed, such "advisory" determinations should not even be entered. *DeGrandchamp*, 99 So. 3d at 626; *King*, 68 So. 3d at 269-70; *Jenkins*, 32 So. 3d at 164-66. As the Second District, *en banc*, concluded in *Gov't Emp. Ins. Co. v. King*:

> A contingent judgment is not an appealable order. Moreover, . . . there is no reason to believe that the [court presiding over the bad faith action] would . . . conclude[] that it was bound by the [UM] court's premature determination of fees in the subsequent bad faith action. Obviously, if the insurance company prevails in the bad faith action, the contingent judgment becomes moot or is a nullity. In other words, such a contingent judgment is actually a factual determination on an issue that is not yet in controversy at the time of the determination.
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> * * * *
>
> An action for bad faith usually is filed as a separate proceeding after the initial case is finished. The damages in a bad faith action involving underinsured motorist coverage are specified in section 627.727(10) . . . . If attorneys' fees for this [UM] appeal are an element of damages under the language of that statute . . . , those damages are awardable under section 627.727(10) [in the bad faith action]. *It is the finder of fact in the subsequent [bad faith] lawsuit that is entitled to determine the amount of those fees. We are aware of no legal authority granted to this court or the trial court [in the UM case] to predetermine those fees for the trier of fact in the subsequent [bad faith] lawsuit*.

68 So. 3d at 270 (citations and footnotes omitted; emphasis added).

An excess verdict returned in a UM trial is analogous to a contingent fees award. Both an excess verdict and a contingent judgment for fees purport to "award" damages that are contingent on a later finding of liability against the insurer in a separate bad faith action. But only the jury in a bad faith action is

authorized to determine the amount of the insured's damages, and there is no authority granted to the jury in a UM action to predetermine those damages. *See id.*; *see also DeGrandchamp*, 99 So. 3d at 626; *Jenkins*, 32 So. 3d at 164-66.

Thus, the Court should reject the Petitioner's assertion that an insured can obtain an advisory verdict following the insurer's tender of UM limits and confession of judgment in order to predetermine damages that fall beyond the purview of a UM lawsuit. This would impose improper findings of so-called fact upon insurers and violate principles of due process due to the unavailability of appellate review. The Court should affirm the Fifth District's conclusion in this case and reject the Petitioner's argument that the trial court had the authority to submit the damages question to the jury after Safeco tendered its limits and confessed judgment for the full recovery available in the UM action.

CONCLUSION

For the reasons asserted herein, the *Amici* respectfully request the Court to reject the position advanced by the Petitioner and to affirm the well-reasoned majority decision issued by the Fifth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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CERTIFICATE OF TYPE STYLE

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