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IN THE SUPREME COURT OF FLORIDA

Case No.: SC13-1607
DCA 5D12-428

ADRIAN FRIDMAN,

Petitioner,

vs.

SAFECO INSURANCE COMPANY

OF ILLINOIS,

Respondent.

ON REVIEW FROM THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT, STATE OF FLORIDA CASE NO.: 5D10-1852.

REPLY BRIEF OF ADRIAN FRIDMAN

Michael S. Rywant, Esquire
Andrew F. Russo, Esquire
Kerry McGuinn, Jr., Esquire
Carla Sabbagh, Esquire
RYWANT, ALVAREZ, JONES, RUSSO & GUYTON
Counsel for Adrian Fridman
109 N. Brush Street, Suite 500
Tampa, FL 33602
(813) 229-7007 (Telephone)
(813) 223-6544 (Fax)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES PAGE

STATUTES

RULES

CITATION TO RECORD

Reference to the documents in the record on appeal in the Fifth District Court of Appeals are noted with this citation ñR, followed by reference to the page number.ò The Answer Brief of Safeco is cited as ñAB, followed by reference to page number.ò The Amicus Curiae Brief is cited as ñACB, followed by reference to the page number.ò

I. SAFECO'S PAYMENT DID NOT RENDER FRIDMAN'S CLAIM MOOT.

Safecoôs payment of the UM limits at the eleventh hour did not render Fridmanôs case moot. The Fifth District misunderstood Florida law. A case is only moot when there are no judiciable issues remaining to be determined and that all actual controversies have ñceased to exist.ò Godwin v. State, 592 So.2d 211-212 (Fla. 1992); Fonte v. State Dept. of Env. Reg., 634 So.2d 663 (Fla. 2d DCA 1994); Soud v. Kendale Inc., 788 So.2d 1051 (Fla. 1st DCA 2001); Mazer v. Orange County, 811 So.2d (Fla. 5th DCA 2002).

In his Complaint, Fridman alleged that he was ñentitled to recover damagesé in accordance with the provisions of 627.727, Fla. Statutesé ò This allegation was admitted by Safeco both in its answer and its confession of judgment. Florida Statute §627.727(10) permits the recovery of damages in excess of policy limits. In addition, prior to filing suit, Fridman filed a Civil Remedy Notice of Insurer Violation in accordance with Florida Statute §624.155(3)(a). Safeco neither responded to nor attempted to cure the Civil Remedy Notice, creating a presumption of statutory bad-faith. Oak Casualty Ins. Co. v. Travelers Indemnity Co. 778 So.2d 483-484 (*citing* Imhof, 643 So.2d at 619 and Talat Enterprises, Inc. v. Aetna Casualty & Surety Co., 753 So.2d 1278, 1282 (Fla. 2000)).

Fridman sought recovery of the full measure of his damages; specifically, §627.727(10) provides the damages recoverable in an action against a UM insurer ñinclude the total amount of the claimantôs damages, including the amount in excess of the policy limits,ò and those damages are recoverable ñwhether caused by an insurer or third-party tort feasor.ò Safecoôs confession did not render Fridmanôs claim for a determination of his damages moot since he pled no limitation of his right of recovery. As such, in spite of Safecoôs belated acknowledgment that it owed the policy limits, Fridmanôs claim for the full measure of his damages remained unresolved for the trial courtôs determination.

Just as in third party cases, a UM case must be allowed to proceed to trial for a final determination of liability and damages. In Whritenour v. Thompson, 2014 WL 2536830 (Fla. 2d DCA 2014), the Second District held that ñ[a] plaintiff must be allowed to proceed to trial and liquidate her damages before bad-faith becomes an issueò (*citing* Cummingham v. Standard Guaranty Ins. Co., 630 So.2d 179, 181 (Fla. 1994) in explaining that a third-party must ordinarily obtain a judgment against the insured in excess of the policy limits before prosecuting a bad-faith claim against the insuredôs liability carrier). The Second District further stated that ñif a plaintiff chooses to pursue a trial, the trial court cannot compel her to accept the defendantôs policy limits.ò Id. at *3. Despite Whritenour addressing a third-party bad-faith situation, the same rationale applies. The trial court in Fridman permitted the action

to correctly proceed to determine ñliability and the amount of resulting damages because that determination is essential to a potential suit against an insurance company for its bad-faith in handlingò of the UM claim.

Florida law requires all issues raised in the controversy be ñso fully resolved that a judicial determination can have no actual effect.ò Merkle v. Guardianship of Jacoby, 912 So.2d 595 (Fla. 2d DCA 2005). Safecoôs acknowledgement that Fridman was entitled to Safecoôs policy limits did not resolve all claims as alleged by Fridman in his Complaint. As such, Safecoôs mootness argument, as well as the mootness argument set forth in the Amicus Brief, are without merit and must fail.

II. SAFECO APPEALED THE EXCESS VERDICT AND HAS NOT BEEN DENIED PROCEDURAL DUE PROCESS.

Contrary to Safecoôs arguments (and those in the Amicus Brief), jury verdicts in excess of UM policy limits have been subject to appellate review. In Nationwide Mutual Fire Ins. Co. v. Darragh, 95 So.3d 97 (Fla. 5th DCA 2012), the Fifth District reviewed a $3.99 million jury verdict entered in favor of Nationwideôs insured. Nationwide provided uninsured motorist coverage in the amount of $200,000. The Fifth District reversed the portion of the verdict awarding future economic damages and remanded for a new trial as to future economic damages only. Therefore, any argument by Safeco that it would be denied its due process rights to challenge a jury verdict is unfounded. In fact, Safeco did challenge the verdict for past lost earnings

and future lost earnings. (AB 40-42). Safeco also challenged the jury award based on improper arguments made by trial counsel. (AB 42-43).

The Second District has also permitted appellate review of a jury verdict in excess of the UM policy limits. In Geico Indemnity Co. v. DeGrandchamp, 99 So.3d 625, (Fla. 2d DCA 2012) and Geico Indemnity Co. v. DeGrandchamp, 102 So.3d 685 (Fla. 2d DCA 2012), the Second District reviewed a jury verdict which was in excess of the underinsured motorist coverage provided by Geico. Geico had issued a policy with underinsured motorist coverage in the amount of $10,000. DeGrandchamp, 99 So.3d 625. A jury trial ensued and the jury awarded $1,250,000 for future medical expenses, reduced to a present value of $250,000. DeGrandchamp, 102 So.3d 686. The Second District stated ñwhen a jury award of damages is clearly excessive or inadequate in action arising out of the operation of motor vehicles, the trial court shall, upon proper motion, order a remittitur or additur of the juryôs award.ò Id. at 687, (*citing* Truelove v. Blount, 954 So.2d 1284, 1287 (Fla. 2d DCA 2007)). A review of the two DeGrandchamp cases establishes that a judgment was entered in the amount of $10,000 (based on the policy limits) but the Second District reviewed the jury verdict of $250,000.

Just as in the DeGrandchamp and Darragh, Safeco has challenged the juryôs verdict which was in excess of the judgment entered for Safecoôs policy limits of

$50,000. Safeco has not been denied its procedural due process in challenging Fridmanôs verdict.

Appellate courts can and regularly do consider potential errors in jury verdicts. For example, orders granting remittiturs are reviewed for an abuse of discretion. Appellate courts must look at whether the verdict was so high as to be against the manifest weight of the evidence. Normius v. Eckerd Corp. 813 So.2d 985, 988 (Fla. 2d DCA 2002). Likewise, orders granting judgments notwithstanding the verdicts are reviewed. Appellate courts must consider whether any reasonable jury could have rendered such a verdict. Duclos v. Richardson 113 So.3d 1001, 1003-4 (Fla. 1st DCA 2013). Despite there being a judgment that is different than the amount of the jury verdict, appellate courts have reviewed the verdicts and the evidence supporting the verdicts to determine whether the judgment was appropriate.

In Geico General Ins. Co. v. Bottini, 993 So.3d 476 (Fla. 2d DCA 2012), the majority court entered a per curiam affirmance with a brief opinion holding that ñeven if Geico were correct that errors may have affected the juryôs computation of damages, in the context of this case and the amount of the judgment, any such errors were harmless.ò Id. at 476. The majority in Bottini had to have reviewed the verdict and the potential errors affecting the verdict in order to find that those errors were harmless.

In the subsequent bad-faith case United States District Judge Elizabeth A. Kovachevich entered a Partial Summary Judgment ñas to the binding effect of the underlying verdict as to liability and damages.ò Bottini v. Geico General Ins. Co., United States District Court, Middle District of Florida, Tampa Division Case No.: 8-13-cv-365-T-17AEP (Sept. 23, 2014). In Bottini, a jury in the underlying UM action returned a verdict that exceeded Geicoôs UM policy limits of $50,000. Geico filed both a Motion for Remittitur and Motion for a New Trial which were denied by the trial court. Thereafter, Geico sought a review addressing the verdict in excess of the policy limits on appeal to the Second District. The Second District considered the issue raised but determined that the errors were harmless.

Judge Kovachevich reasoned:

> The Florida Legislature has chosen to make the amount of damages in excess of the policy limits identical in first-party claims and third-party claims.
>
> The court relies on the plain language of the statute and on Florida case law in adjudicating Plaintiffôs motion. The amount of damages caused by the tortfeasor was necessarily determined in the underlying action, in which GEICO participated fully. The due process right underlying in the issue of whether a litigant has a full and fair opportunity to litigate is whether the litigant has the opportunity to be heard. Defendant GEICO raised the issue of the alleged excessive amount of the damages in Defendantôs Motion for Remittitur and Motion for a New Trial, and on appeal. Defendant GEICO did not pursue further relief after the decision of the Second District Court of Appeal. While this case is distinct from the Underlying Action, in light of §627.727(10), Fla. Statutes, it was foreseeable that the amount of damages could be important in future litigation. There was no failure of due process,

> where a defendant GEICO had the opportunity to, and did, raise the issue of excessive damages by post-trial motions and on appeal.

Judge Kovachevich granted Bottinioôs Motion for Partial Summary Judgment and held that the excess verdict in the underlying UM action was binding on Geico in the bad-faith action.

ñAn appeal from a final order calls up for review all necessary interlocutory steps leading to that final order, whether they were separately appealable or not.ò Saul v. Basse, 399 So.2d 130, 133 (Fla. 2d DCA 1981). While verdicts themselves may not be appealable, that does not mean that appellate courts do not have jurisdiction to consider verdicts in conducting review of potential trial errors. Safeco has no valid claim that its due process rights or its constitutional right to access the courts has been violated, since it has not been deprived of any appellate rights to challenge Fridmanôs full measure of his damages awarded by the jury. In fact, Safeco challenged Fridmanôs full measure of his damages in its appeal in the Fifth District.

Safecoôs position that the procedure used in Fridman has frustrated its appellate rights because it was unable to challenge the full amount of the juryôs verdict in the underlying UM case is untenable. Florida Rule of Civil Procedure 1.530(a) provides that a ñnew trial may be granted to all or any of the parties and on all or a part of the issues.ò The motion for a new trial must be served ñnot later than

15 days after the **return of the verdict** in a jury action.ò Fla. R. Civ. P. 1.530(v) [emphasis added]. In Fridman, Safeco filed both a Motion for Remittitur and a Motion for a New Trial. Because the damages awarded by the jury fixed the amount of the bad-faith damages, an order denying a Motion for a New Trial or Motion for Remittitur, does in fact, address the damages awarded by the jury for Fridmanôs full measure of his damages. This afforded Safeco due process.

III. THE FIFTH DISTRICT'S OPINION DOES NOT COMPORT WITH HOW THIS COURT AND THE FLORIDA LEGISLATURE ASSERT FIRST-PARTY BAD-FAITH ACTIONS SHOULD BE CONDUCTED.

Fla. Stat. §627.727(10) specifically provides that the damages recoverable in an action against an UM carrier shall ñinclude the total amount of the claimants damages, including the amount in excess of the policy limits,ò and that those damages are recoverable ñwhether caused by an insurer or by a third-party tortfeasor.ò The only way such a determination of the amount in excess of the policy limits can be established is by a jury verdict in the original uninsured motorist case.

Interestingly, Safecoôs Answer Brief and the Amicus Brief spend little time in discussing this Courtôs precedent that addresses this issue. *See* State Farm Mut. Ins. Co. v. Laforet, 658 So.2d 55, 60 (Fla. 1995). In fact, it is only mentioned twice in Safecoôs answer brief without any discussion of damages in excess of the policy limits. (AB 31, 34). Likewise, the Amicus Brief offers no discussion or reference to Laforet. As the Supreme Court held in Laforet, if the statute had applied to that

first-party UM case, then the excess policy damages awarded by the jury in the first-party uninsured motorist case would have conclusively established those damages to be awarded in the bad-faith case. Laforet, 658 So.2d at 57 (ñ[u]nder the retroactive application of the new statute, State Farm was liable for the entire excess judgment awarded to the Laforets in their original case against State Farmò).

Safeco maintains that first-party bad-faith cases for UM benefits are available without an excess verdict beyond the policy limits. However, that is contrary to the Florida Supreme Courtôs decision in Blanchard v. State Farm Mut. Auto Ins. Co. 575 So.2d 1289, 1291 (Fla. 1991). This Court explained that a plaintiff must obtain a determination of the tortfeasorôs liability and the extent of the plaintiffôs damages before a cause of action for bad-faith will accrue. Id. Blanchard would not have imposed this requirement unless it meant for the determination of damages to be binding in the bad-faith case. There would be no reason to require a plaintiff to obtain a determination of damages only to have it discarded as meaningless in the subsequent bad-faith case. Further, absent a determination of damages in excess of the limits, how does a viable statutory bad-faith case exist?

Laforet supports the contention that §627.727(10) requires that, in a bad-faith action, the court shall award the excess amount determined by a jury in the underlying UM case. In Laforet, the claimant was injured in a motor vehicle accident and carried uninsured motorist coverage in the amount of $200,000 through

a policy provided by State Farm. Subsequently, after obtaining the $400,000 verdict, the claimant filed a bad-faith action against State Farm. At the time that lawsuit was filed, §627.727(10) had not been enacted. This Court ruled that the statute could not be applied retroactively. Nevertheless, this Court twice concluded that the amount in excess of the policy limits is established in the original uninsured motorist case: This Court stated:

> §627.727(10) provides that the damages recoverable from an uninsured motorist carrier in a bad-faith action under §624.155 and the 1990 amendment thereto shall include the total amount of a claimantôs damages, including any amount in excess of the claimantôs policy limits **awarded by a judge or jury in the underlying claim.** Laforet, 658 So.2d at 56-57 [emphasis added].

This Court repeated its conclusion that the excess amount is to be determined in the underlying uninsured motorist case by stating:

> The statute provides that the damages recoverable from an uninsured motorist carrier in a bad-faith action filed under §624.155, such as the one at issue here, are to include the total amount of the claimantôs damages, including any amount ñ**awarded in the underlying claim in excess of the claimant's policy limits**.ò Id. at 57 [emphasis added].

This Court further noted that the issue of retroactivity was determinative because ñunder the retroactive application of the new statute, State Farm was liable for **the entire excess judgment awarded** to the Laforets in their original uninsured motorist case.ò Id. at 57. [emphasis added].

On September 7, 2014, the Fourth District held ñthat the juryôs determination of damages in the first trial was binding on the insurance company in the bad-faith trial.ò Geico General Ins. Co. v. Paton, 2014 WL 4626860 (Fla. 4th DCA 2014). In Paton, Geico tried a UM case against Paton which resulted in a jury verdict of $469,247. As Geicoôs uninsured motorist policy limits were $100,000, the judgment was entered for that amount. Paton then pursued her bad-faith claim against Geico. Geico sought to exclude from evidence in the bad-faith trial the verdict returned in the UM trial and to require Paton to prove her damages anew in the bad-faith trial. The circuit court denied Geicoôs motions. The jury found for Paton and her total damages were $469,247. Thereafter, the final judgment was entered for a total of $369,247. Geico then appealed the verdict claiming that it was denied its procedural due process in violating its right to appeal an excess verdict to the courts. The Fourth District held that ñthe initial action between the insurer and the insured fixes the amount of damages in a first-party bad-faith action. The Fourth District reached that conclusion by its reliance on Blanchard quoting this Court:

> An insured underlying first-party action for insurance benefits against the insurer necessarily must be resolved favorably to the insured before the cause of action for bad-faith in settlement negotiations can accrue. It follows that an insuredôs claim against an uninsured motorist carrier for failing to settle the claim in good faith does not accrue before the conclusion of the underlying litigation for contractual uninsured motorist benefits. Absent a determination of the existence of liability on the part of the uninsured tortfeasor and *the extent of the plaintiff's*

damages, a cause of action cannot exist for a bad-faith failure to settle.ò [emphasis added].

In applying Laforet, the Fourth District stated:

> Applying §627.727(10), Laforet reiterated that the initial action for first-party benefits, which sets the plaintiffôs damages arising from an accident, determines the extent of the plaintiffôs damages in a first-party bad-faith case: §627.727(10) provides that the damages recoverable from an uninsured motorist carrier in a bad-faith action brought under §624.155 and the 1990 amendment thereto shall include the total amount of claimantôs damages, *including any amount in excess of the claimant's policy limits awarded by a judge or a jury in the underlying claim*. [emphasis added].

The Fourth District further reasoned:

> ñ[F]orcing retrial of a plaintiffôs damages at a first-party bad-faith trial, as Geico urges, is such bad policy that we do not glean even a hint of its existence in any case the Supreme Court has decided in this area. Under Blanchard, the recovery of damages in first-party action for insurance benefits is necessary for the accrual of the bad-faith claim. Geico fully participated in the first trial with an opportunity to challenge the plaintiffôs evidence and a powerful motive to suppress the amount of damages. When it comes to a judge or juryôs factual determination of damages, Floridaôs policy is not to give multiple bites at the same apple absent some legal infirmity in the first trial.

At no time did Fridman seek an advisory verdict following Safecoôs tender of its UM limits. Instead, as required in Blanchard, Fridman still had to establish the full measure of his damages. Blanchard, 575 So.2d at 1291.

In a case decided on August 15, 2014, Geico v. Barber, 2014 WL 3966053 (Fla. 5th DCA 2014) Judge Sawayaôs dissent succinctly summarizes the public policy reasons why this Court should reverse the instant case:

> The bad-faith statute is intended to protect insureds from insurers who act in bad faith in handling claims made under the pertinent insurance policy. As part of that protection, an injured insured has the right to have a jury determine the full extent of his or her damages in the UM case so the insured may pursue a bad-faith action against its insurer for failing to timely pay in good faith the policy benefits within the sixty-day window period provided under section 624.155(3)(a). These statutes are not intended to be utilized as a charade whereby insurers are allowed, through the expedient of a fictional confession of judgment made years into the litigation, to push and pull their insureds from one lawsuit to another only to require the insureds to try the same damage issues all over again. Id. at 7.

United States District Court Judge Roy B. Dalton, Jr. also addressed these issues in Batchelor v. Geico Cas. Co., 2014 WL 3906312 (M.D. Fla. 2014):

> If the extent of the plaintiffôs damages were not fixed by the juryôs verdict in the underlying claim, then there would be no way for her to plead the instant claim. To hold that the verdict is not binding would therefore utterly gut statutory first-party bad-faith claims, which the Court cannot do. See Overman v. State Board of Control, 62 So.2d 696, 701 (Fla. 1953) (ñThe courtôs function is find ways within the terms of the act to carry out the purpose of the legislature.ò).
>
> * * * *
>
> Freed of constitutional infirmity, policy considerations are, of course, the concern of the legislature. That said, the Court nevertheless finds the policy implications of the Defendantôs position quite troubling. Forcing plaintiffs to relitigate their damages in first-party bad-faith actions would have serious ramifications, including: running the almost certain risk of inconsistent verdicts; potentially raising comity

> issues between State and Federal Courts; creating a discrepancy (surely unintended and definitely illogical) between first- and third-party bad-faith claims; placing an inexplicable burden on plaintiffs to prove their cases twice; and causing a great deal of judicial inefficiency. *Cf.* Safeco Ins. Co. of Ill. v. Fridman, 117 So.2d 16, 29-30 (Fla. 5th DCA 2013) (Sawaya, J. dissenting) (opining, in a different procedural posture, on the negative repercussions of giving insurers a second bite at the damages apple). These perturbing consequences will further lend credence to plaintiffôs position.ò Id. at 3.

IV. THE TRIAL COURT DID NOT ERR IN DENYING SAFECO'S MOTION FOR REMITTITUR AND DENYING SAFECO'S MOTIONS FOR A MISTRIAL OR A NEW TRIAL.

Although fully briefed before the Fifth District, the Fifth District does not appear to have reached the issues as to whether the trial court was correct in denying Safecoôs Motions for Remittitur, for a Mistrial and for a New Trial. Fridman maintains that the trial court properly denied, based upon the facts and legal precedent, those motions. Without further argument here, Fridman stands by his arguments made in briefing before the Fifth District.

As set forth above, Safeco has not been denied due process in challenging the jury verdict and agrees that, if this Court reverses, the case should be remanded to the Fifth District to resolve any pending issues.

CONCLUSION

Judge Sawayaôs dissenting opinions in Fridman and Barber correctly analyzed the proper procedure for determining excess damages for subsequent first-party bad-faith actions. Likewise, Judge Kovachevich in Bottini, Judge Dalton in Batchelor and the Fourth District Court of Appeal in Paton are also correct. Accordingly, Fridman would request this Court reverse the decision of the Fifth District Court of Appeal. By doing so, this Court should establish the relevance of the juryôs verdict as establishing damages in first-party bad-faith cases as required by Blanchard and Laforet. The trial court was procedurally correct in retaining jurisdiction, allowing a post-verdict amendment, and permitting the jury trial to proceed to verdict.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by e-Service and by email on September 25, 2014 to Anthony Russo, Esq., arusso@butlerpappas.com, Butler Pappas Weihmuller Katz Craig LLP, 777 S. Harbour Island Blvd., #500, Tampa, FL 33602; Jeffrey M. Byrd,Esq., AttorneyByrd@aggressiveattorneys.com, 2620 E. Robinson Street, Orlando, FL 32803; Robert E. Vaughn, Esq. Robert.Vaughn@LibertyMutual.com, Law Office of Glenn G. Gomer, Esq. Employees of Liberty Mutual Ins. Co., 600 North Westshore Blvd., Tampa, FL 33609; Maddge B. Penton, Esq., maddge.penton@libertymutual.com, 300 S. Orange Ave., Ste 1275, Orlando, FL 32801; Mark A. Risi, Esq., mrisi@risilaw.com, The Law Office of Mark A. Risi, 2699 Lee Road, Suite 101, Winter Park, FL 32789.

/s/ Michael S. Rywant
Michael S. Rywant, Esquire
Andrew F. Russo, Esquire
Kerry McGuinn, Jr., Esquire
Carla Sabbagh, Esquire
RYWANT, ALVAREZ, JONES, RUSSO & GUYTON
Counsel for Adrian Fridman
109 N. Brush Street, Suite 500
Tampa, FL 33602
(813) 229-7007 (Telephone)
(813) 223-6544 (Fax)

CERTIFICATE OF COMPLIANCE

I CERTIFY this brief complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

/s/ Michael S. Rywant
Michael S. Rywant, Esquire
Florida Bar No.: 240354
Andrew F. Russo
Florida Bar No.: 508594
Kerry C. McGuinn, Jr., Esquire
Florida Bar No.: 982644
Carla Sabbagh, Esquire
Florida Bar No.: 72727

RYWANT, ALVAREZ, JONES, RUSSO & GUYTON
Counsel for Petitioner
109 N. Brush Street, Suite 500
Tampa, FL 33602
(813) 229-7007 (Telephone)
(813) 223-6544 (Fax)
Email address: Msrywant@rywantalvarez.com
arusso|@rywantalvarez.com
kmcguinn@rywantalvarez.com
csabbagh@rywantalvarez.com