IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO. SC-05-1021
11TH Circuit Case: 04-10436-AA
LT Case No.: 8:02-cv-1675-T-26MAP
8:03-cv-1349-T-26EAJ

MICHELLE MACOLA, and
INGE QUIGLEY,

Appellants,
vs.

GOVERNMENT EMPLOYEES
INSURANCE COMPANY,

Appellee.
_____/

AMICUS CURIAE BRIEF ON BEHALF OF APPELLEE
On Review of Certified Questions from the
Eleventh Circuit Court of Appeal

JANIS BRUSTARES KEYSER
Florida Bar No.: 353167
Billing, Cochran, Heath, Lyles, Mauro,
and Anderson, P.A.
400 Australian Ave. South, Suite 500
West Palm Beach, FL 33401
Phone: (561) 659-5970
Fax: (561) 659-6173
Attorneys for Amicus Curiae
Florida Defense Lawyers' Association

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases Page

Other Authorities:

FLORIDA STATUTES:

INTRODUCTION

The Florida Defense Lawyers' Association (FDLA), pursuant to Florida Rule of Appellate Procedure 9.370, hereby moves for leave to appear as Amicus Curiae in this case, to file a brief supportive of the Appellee. The undersigned has contacted all counsel of record and they have advised that they consent to the filing of this Amicus Curiae Brief on behalf of Appellee.

The Florida Defense Lawyers' Association has a substantial interest in the issue presented in these cases and desires to provide the court with assistance in the proper resolution of this issue from the standpoint of that other than the immediate parties. The Florida Defense Lawyers' Association is a voluntary organization whose membership is composed of attorneys in private practice and engaged in civil litigation primarily for the defense. The purposes of the Florida Defense Lawyers' Association include improvement in the administration of justice and support of the adversary system of jurisprudence in our courts.

The issues presented in these consolidated appeals are of substantial significant interest to the members of the Florida Defense Lawyers' Association inasmuch as they involve the question of whether the plaintiffs are precluded from bringing a common law bad faith action because the defendants properly cured all

alleged acts of bad faith within the sixty day cure period afforded by Section 624.155, Florida Statutes, prior to the entry of any excess judgment. The Florida Defense Lawyers' Association generally supports the position of the Appellee, Government Employees Insurance Company, in these consolidated appeals.

CERTIFIED QUESTIONS

The Eleventh Circuit certified the following questions:

(1) IN THE CONTEXT OF A THIRD PARTY BAD FAITH CLAIM WHERE THERE IS A POSSIBILITY OF AN EXCESS JUDGMENT, DOES AN INSURER "CURE" ANY BAD FAITH UNDER 624.155 WHEN, IN RESPONSE TO A CIVIL REMEDY NOTICE, IT TIMELY TENDERS THE POLICY LIMITS AFTER THE INITIATION OF A LAWSUIT AGAINST ITS INSURED BUT BEFORE THE ENTRY OF AN EXCESS JUDGMENT?

(2) IF SO, DOES SUCH A CURE OF THE STATUTORY BAD FAITH CLAIM CONSTITUTE A FULL SATISFACTION OF THE JUDGMENT SUCH THAT THE INSURED AND DERIVATIVE INJURED THIRD PARTIES ARE BARRED FROM BRINGING A COMMON LAW BAD FAITH CLAIM TO RECOVER THE DIFFERENCE BETWEEN THE POLICY LIMITS AND THE EXCESS JUDGMENT?

Macola v. Government Employees Insurance Co.
410 F.3d 1359 (11th Cir. 2005)

SUMMARY OF THE ARGUMENT

The questions certified by the Eleventh Circuit Court of Appeal address the interpretation and application of the "cure" provision set forth in Section 624.155, Florida Statutes in the context of a third party bad faith claim. The district court's decision in this case is consistent with Florida case law governing third party claims and furthers the legislative intent of resolving bad faith claims thereby avoiding unnecessary litigation. Acceptance of Plaintiffs' construction of the statute would render the notice and cure provisions set forth in Section 624.155 meaningless within the context of a third party claim, a result that was surely never intended by the Legislature in enacting Section 624.155.

As noted by the district court in its order granting GEICO's Motion for Summary Judgment, "it makes no logical sense that the Florida Legislature would, as the Florida Supreme Court stated in Zebrowski, codify a cause of action for third party bad faith against an insurance company based on Thompson and Cope, promulgate a procedure by which an insurance company could cure the underlying facts and circumstances giving rise to such a cause of action, but still allow the insurance company to be subjected to a civil action for damages under the common law based on the 'cured' underlying facts and circumstances." The district court properly concluded that both Quigley and Macola are precluded from bringing

common law bad faith claims where GEICO cured all allegations of insurer bad faith within the sixty-day cure period afforded by Section 624.155, Florida Statutes. For these reasons, the Certified Questions should be answered in the affirmative.

ARGUMENT

I. Third Party Bad Faith Actions under Florida's Common Law

In Florida, a third party bad faith action, which arises under a policy which provides coverage to an insured for a liability claim made by a third party, was recognized as early as 1938. See Auto Mutual Indemnity Company vs. Shaw, 184 So. 852 (Fla. 1938). An implied covenant of good faith and fair dealing arising from the contract creates a fiduciary relationship between the insured and its liability carrier. State Farm Mutual Auto Insurance Company vs. Laforet, 658 So. 2d 55, 58 (Fla. 1995); Florida Farm Bureau Mutual Insurance Company vs. Rice, 393 So. 2d 552, 559 (Fla. 1st DCA 1980). In liability policies, the insurer is contractually afforded both the right and the duty to defend liability claims and it is that contractual right to control the defense and make decisions regarding the litigation of disputed claims that is the very underpinning of a third party bad faith claim. Laforet, 658 So. 2d at 58; Baxter vs. Royal Indemnity Company, 285 So. 2d 652 (Fla. 1st DCA 1973).

The insurer, in settling claims and conducting a defense, has a duty to

exercise that degree of care which a person of ordinary care and prudence would exercise in the management of his own business. Boston Old Colony Insurance Company vs. Gutierrez, 386 So. 2d 783, 784 (Fla. 1980); Doe v. Allstate Insurance Company, 653 So. 2d 371, 374 (Fla. 1995). In its landmark decision, the Florida Supreme Court summarized the insurer's common law duty of good faith as follows:

> For when the insured has surrendered to the insurer all control over the handling of the claim, including all decisions with regard to litigation and settlement, then the insurer must assume a duty to exercise such control and make such decisions in good faith with due regard for the interest of the insured. This good faith duty obligates the insurer to advise the insured of settlement opportunities, to advise as to the probable outcome of litigation, to warn of the possibility of an excess judgment, and to advise the insured of any steps he might take to avoid same. The insurer must investigate the facts, give fair consideration to a settlement offer that is not unreasonable under the facts, and settle, if possible, where a reasonably prudent person, faced with a prospect of paying the total recovery, would do so.

Boston Old Colony, 386 So. 2d at 785 (Fla. 1980) [citations omitted].

The essence of a third party bad faith action is that the insurer breached its contractual duty, thereby exposing its insured to an excess judgment. Rosen v. Florida Insurance Guaranty Association, 802 So. 2d 291, 294 (Fla. 2001); Kelly v. Williams, 411 So. 2d 902, 904 (Fla. 5th DCA 1982). A cause of action for third party bad faith failure to settle within the policy limits, whether brought by the

insured or a third party, does not arise until after a judgment in excess of the policy limits. See Kelly, 411 So. 2d at 904; Cope, 462 So. 2d at 460; See also State Farm Fire and Casualty Company v. Zebrowski, 706 So. 2d 275 (Fla. 1997).

Even though the bad faith occurs between an insurer and its insured, Florida courts allowed the injured third party to bring a bad faith action directly against the first party's insurer even absent an assignment. See Thompson v. Commercial Union Insurance Company of New York, 250 So. 2d 259, 264 (Fla. 1971). This was permitted because the injured third party, as a beneficiary to the bad faith action, was the real party in interest, in a position similar to that of "judgment creditor". Id. In Fidelity and Casualty Company of New York v. Cope, 462 So. 2d 459, 460 (Fla. 1985), the Florida Supreme Court clarified its earlier holding in Thompson and noted that it did not extend the duty of good faith by an insurer to its insured to a duty of an insurer to a third party. Instead, the Court held that the basis for an action remained the damages of an insured from the bad faith action of the insurer which caused the insured to suffer a judgment for damages above his policy limits. Id. at 461.

II. First and Third Party Bad Faith Claims under Section 624.155, Florida Statutes

Unlike a third party bad faith action, there was no first party action by an

insured against an insurer for bad faith in Florida common law. State Farm Mutual Insurance Company v. Laforet, 658 So. 2d 55, 58-59 (Fla. 1995). In contrast to a third party bad faith action, in first party bad fath actions, the insured is also the injured party who is to receive the benefits under the policy. Id. Essentially, Florida courts had refused to recognize the tort of first party bad faith because the type of fiduciary duty that exists in third party actions is not present in first party actions, and the insurer is not exposing the insured to excess liability. Id. at 59. If an insurer acted in bad faith in settling a claim filed by its insured, the only remedy available to the insured, in the absence of an independent tort committed by the insurer such as fraud, was to file a breach of contract claim against its insurer and recover only those damages contemplated by the parties to the policy. Baxter v. Royal Indemnity Co., 285 So. 2d 652, 657 (Fla. 1st DCA 1973), cert. discharged 317 So. 2d 725 (Fla. 1975).

In 1982, the Florida Legislature enacted Section 624.155 which, for the first time, created a statutory bad faith claim and extended the claim to first party insureds. See Section 624.155, Florida Statutes (Supp. 1982). The statute provided for recovery of: (1) damages proximately caused by the insurer's bad faith, together with court costs and reasonable attorney's fees, and (2) punitive damages when appropriate. Id. In 1990, the Legislature amended Section 624.155,

adding the following pertinent subsection:

> (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 bad faith or this statutory remedy, but shall not be entitled to a judgment under both remedies. This section shall not be construed to create a common law cause of action. 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.

The Florida Supreme Court in State Farm v. Laforet, supra, held that because the statute otherwise makes specific reference to third party causes of action brought under the statute, see e.g. 624.155(2)(b)(4), it was clear that a third party action could now be brought under either Section 624.155 or the common law. 658 So. 2d at 63. The Supreme Court in Laforet noted that this was untrue for first party actions because, as discussed previously, first party actions did not exist in common law. Id. For consistency, however, the Supreme Court found that the "totality of the circumstances" standard in evaluating statutory first and third party bad faith claims is equally applicable to third party actions brought at common law. Id.

In State Farm Fire and Casualty Company v. Zebrowski, 706 So. 2d 275

(Fla. 1997), the Florida Supreme Court held that the enactment of Section 624.155(1)(b)(1) had the effect of codifying Thompson and Cope, thereby authorizing a third party to file a statutory bad faith claim pursuant to Section 624.155(1)(b)(1) directly against the liability insurer without an assignment by the insured, upon obtaining a judgment in excess of the policy limits.

Florida case law recognizes that the standard for insurer good faith in both first and third party statutory bad faith actions is the standard for common law bad faith set forth in Boston Old Colony Insurance Company vs. Gutierrez, 386 So. 2d 783 (Fla. 1980). See Farinas v. Florida Farm Bureau General Insurance Company, 850 So. 2d 555, 558-559 (Fla. 4th DCA 2003); State Farm Mutual Auto Insurance Co. v. Laforet, 658 So. 2d 55, 62 (Fla. 1995). This standard of care is further reflected by Section 624.155, which states that an insurer has a cause of action for bad faith, when the insurer did not attempt "in good faith to settle claims when, under all circumstances, it could and should have done so, had it acted fairly and honestly toward its insured and with due regard for her or his interest". See Section 624.155(1)(b)(1), Fla. Stat. (2002).

The filing of a written notice to the Department of Insurance and the insurer as set forth in Section 624.155(3)(a), Florida Statutes, is a condition precedent to bringing an action under Section 624.155. Section 624.155(3)(d) provides that "no

actions shall lie if, within sixty days after filing notice, the damages are paid and the circumstances giving rise to the violation are corrected."

III. The District Court's Ruling is Consistent with Florida Case Law

The Florida Supreme Court in Talat Enterprises v. Aetna Casualty and Surety Company, 753 So. 2d 1278, 1284 (Fla. 2000), held that payment of "contractual damages" before expiration of the sixty-day period following the Civil Remedy Notice of Insurer Violation pursuant to Section 624.155(2)(d) precludes a subsequent bad faith claim for extra-contractual damages. The Court noted that it was plain that the sixty-day period was a time in which the insurer could act to "cure" a violation of subdivision(1)(a) or (b) about which it had been served notice and that it naturally follows that for there to be a "cure", what had to be "cured" is the non-payment of the contractual amount due the insured. Id at 1283. The Court recognized that if the insurer pays during the cure period, then there is no remedy. Id at1284.

The Supreme Court in Talat held that for this statutory language to comport with logic and common sense, the statute has to mean that extra-contractual damages that can be recovered solely by reason of this civil remedy statute cannot be recovered when the remedy itself does not ripen if the insurer pays what is owed on the insurance policy during the cure period. The Supreme Court in Talat held

that the statutory cause of action for extra-contractual damages simply never comes into existence until expiration of the sixty-day window without the payment of the damages owed under the contract. The court in Talat found that in creating this statutory remedy for bad faith actions, the legislature provided the sixty-day window as a last opportunity for insurers to comply with their claims handling obligations when a good faith decision by the insurer would indicate that contractual benefits are owed. Id.

The Academy of Florida Trial Lawyers attempt to distinguish Talat on the grounds that the decision arose solely in the context of a first party claim is without merit. The Supreme Court in Talat expressly stated "to cure an alleged violation and to avoid a civil action, an insurer must pay the claim **(sometimes** in excess of policy limits in the third party context) before the sixty days expire" (emphasis added). The use of the word "sometimes" by the Florida Supreme Court in Talat can only be interpreted to mean that when a Civil Remedy Notice is filed after an excess judgment has been entered, the insurer must pay the excess judgment to cure the alleged violation. However, by use of the word "sometimes", the Supreme Court in Talat recognized that where no excess judgment has been entered, as in this case, the cure is payment of the policy limits. Acceptance of the Plaintiffs' and Amicus' construction of Section 624.155 would render the notice and cure

provisions entirely meaningless under the facts presented in this case.

Hollar v. International Bankers Insurance Company, 572 So. 2d 937 (Fla. 3d DCA 1990), relied on by Plaintiffs as well as Amicus, is distinguishable from the facts of this case because in Hollar, at the time of the filing of the Civil Remedy Notice and the attempt by the insurer to cure and tender the policy limits, an excess judgment had already been entered. In contrast to the facts of Hollar, here, where no excess judgment had been entered at the time of the filing of the Civil Remedy Notice and the sixty day cure period, the "damages" that the insurer must pay to cure any alleged violation and extinguish all bad faith claims by the injured third party and the insured are the contractual amounts due under the policy (i.e. the policy limits). See: Clauss v. Fortune Insurance Company, 523 So. 2d 1177 (Fla. 5th DCA 1988) (insurer's tender of policy limits before entry of excess final judgment and within sixty-day cure period afforded by injured third party Civil Remedy Notice under Section 624.155, Florida Statutes cured all potential bad faith claims of injured third party).

The district court's opinion in this case is entirely consistent with Florida case law indicating that a potential third party beneficiary, such as the Plaintiff Macola, derives her cause of action for bad faith against Defendant from the insured, Mr. Quigley. See Revoredo v. South Pacific Professional Insurance

Company, 632 So. 2d 1123, 1124 (Fla. 3d DCA 1994) citing to Fidelity and Casualty Company of New York v. Cope, 462 So. 2d 459 (Fla. 1985). Accordingly, as correctly noted by the district court and the Eleventh Circuit, if Mr. Quigley's cause of action for bad faith against Defendant has been extinguished so has Plaintiff Macola's. Macola v. Government Employees Insurance Company, 410 F. 3d 1359, 1365 fn. 5 (11th Cir. 2005).

IV. The District Court's Ruling Furthers the Legislative Intent in Enacting Section 624.155, Florida Statutes

The district court's conclusion furthers the legislative intent in enacting Section 624.155. As noted by the Florida Supreme Court in Talat v. Aetna Casualty and Surety Company, 753 So. 2d 1278, 1282 (Fla. 2000), the sixty-day window set forth in Section 624.155 is designed to be a cure period that will encourage payment of the underlying claim, and avoid unnecessary bad faith litigation. Amicus suggests that to accept the reasoning of the trial court in this case would discourage insureds from utilizing the Civil Remedy Notice in an attempt to cure third party bad faith claims. Logic and common sense dictate, however, that in cases where an excess judgment has not been entered, if an insurer cannot cure by payment of the policy limits, any remedy afforded the insurer under the cure provisions would be purely illusionary. As indicated by the following language

set forth in the district court's opinion, acceptance of Plaintiffs' construction of the statute would clearly frustrate the legislative intent of avoiding unnecessary bad faith litigation:

> To accept Plaintiffs' construction of the statue would render these notice and cure provisions meaningless within the context of a third party bad faith claim because an insurance company, having complied with these safe harbor provisions, would nonetheless continue to be exposed to a storm of bad faith litigation. This Court cannot conceive that the Florida legislature ever intended such an absurd result. See, e.g., State Farm Mutual Automobile Insurance Company v. Universal Medical Center of South Florida, Inc., 2003 WL 22715675*2 (Fla. 3d DCA Nov. 19, 2003) (restating age-old principle that '[c]ourts must further construe statutes so as not to effect an absurd result that would defeat the intent of the legislature.'). That is, it makes no logical sense that the Florida legislature would, as the Florida Supreme Court stated in Zebrowski, codify a cause of action for third party bad faith against an insurance company based on Thompson and Cope, promulgate a procedure by which an insurance company could cure the underlying facts and circumstances giving rise to such a cause of action, but still allow the insurance company to be subjected to a civil action for damages under the common law based on the 'cured' underlying facts and circumstances.

®. 180, p. 12-13)

The foregoing holding of the district court is entirely consistent with the Florida Supreme Court's holding in Talat where the Court recognized that an insurer need not immediately pay 100% of the damages claimed to flow from bad faith conduct in order to avoid the chance that the insured will succeed on a bad faith cause of action. 753 So. 2d at 1282. The Supreme Court recognized that if

the insurer may avoid a bad faith action only by paying in advance every penny of the damages that it faces if it loses at trial, the insurer would have no reason to pay. Id. The Supreme Court in Talat stated that Section 624.155(2)(d) would have no effect or purpose under such an interpretation and that the law did not support such an expansive and illogical reading of Section 624.155 (2)(d). Id.

The foregoing demonstrates that contrary to the suggestion of Amicus that the trial court's ruling would discourage the use of the Civil Remedy Notice to expeditiously resolve bad faith claims, Plaintiffs' and Amicus' construction of the statute would entirely undermine the purpose of the cure provisions of Section 624.155 and frustrate the intent of the statute which is to encourage payment of the claim in order to avoid unnecessary bad faith litigation. Accordingly, the district court properly concluded that both Quigley and Macola are precluded from bringing common law bad faith claims where GEICO cured all allegations of insurer bad faith within the sixty-day cure period afforded by Section 624.155, Florida Statutes.

CONCLUSION

For the above-stated reasons, both of the certified questions should be answered in the affirmative.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY a true and correct copy of the foregoing was furnished by U.S. Mail to SHEA MOXON, ESQ., DALE SWOPE, ESQ., ANGELA RODANTE, ESQ., 1234 E. 5TH Ave., Tampa, FL 33605; RICHARD YOUNG, ESQ., and STEPHEN GILL, ESQ., 226 Palafox Place, Ste. 700, Pensacola, FL 32501; RAY HAAS, ESQ., 1901 N. 13th St., Tampa, FL 33605; PAUL CARDILLO, ESQ., 209 W. Verne St., Tampa, FL 33606; LEFFERTS MABIE, III, P.O. Box 499, Tampa, FL 33601; and ROY WASSON, ESQ., Gables Tower, Ste. 450, 1320 S. Dixie Hwy., Miami, FL 33146-2911; PHILIP M. BURLINGTON, ESQ., Philip M. Burlington, P.A., 2001 Professional Building, Suite 205, West Palm Beach, FL 33409 on this 30th day of August, 2005.

BILLING, COCHRAN, HEATH, LYLES &
MAURO & ANDERSON, P.A.
Attorneys for Amicus Curiae
Florida Defense Lawyers' Association
400 Australian Avenue South, Fifth Floor
West Palm Beach, FL 33401
(561) 659-5970
(561) 659-6173 (Facsimile)

By: _____
JANIS BRUSTARES KEYSER
FLORIDA BAR NO.: 353167

CERTIFICATE OF COMPLIANCE - TYPE SIZE AND STYLE

Counsel for Florida Defense Lawyers' Association hereby certifies that the type size and style of the Brief of Amicus Curiae is Times New Roman 14pt.

By:

Janis Brustares Keyser
Florida Bar No.: 353167
BILLING, COCHRAN, HEATH, LYLES & MAURO & ANDERSON, P.A.
Attorneys for Amicus Curiae
Florida Defense Lawyers' Association
400 Australian Avenue South, Fifth Floor
West Palm Beach, FL 33401
(561) 659-5970
(561) 659-6173 (Facsimile)