IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO. SC-05-1021
11TH Circuit Case: 04-10436-AA
LT Case No.: :02-cv-1675-T-26MAP
9:03-CV-1349-T-26EAJ

MICHELLE MACOLA and
INGE QUIGLEY,
Appellants,
vs.

GOVERNMENT EMPLOYEES
INSURANCE COMPANY,
Appellee.
_____/

AMICUS CURIAE BRIEF OF PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA ON BEHALF OF APPELLEE

On Review of Certified Questions from the
Eleventh Circuit Court of Appeal

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TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF INTEREST OF THE AMICUS CURIAE

The Property Casualty Insurers Association of America ("PCI") is a trade group representing more than 1,000 property and casualty insurance companies. PCI members are domiciled in and transact business in all 50 states, plus the District of Columbia and Puerto Rico. Its member companies account for $173 billion in direct written premiums. They account for 50.5% of all personal auto premiums written in the United States, and 38.3% of all homeowners' premiums, with personal lines writers of commercial and miscellaneous property/casualty lines.

In addition to the diversified product lines they write, PCI members include all types of insurance companies, including stocks, mutuals, and companies that write on a non-admitted basis. The PCI membership is literally a cross-section of the U.S. property and casualty insurance industry. In 2003, PCI members accounted for 36.4% of the homeowners' insurance premiums in Florida, 54.3% of the personal automobile insurance policies issued in Florida and wrote $12,849,157,000 of direct written premiums in Florida. Forty-two (42) PCI members are domiciled in Florida.

In light of its involvement in Florida, the PCI is particularly interested in the resolution of the issue before the Court on behalf of its members and their interests.

QUESTIONS CERTIFIED

The PCI adopts and incorporates as though fully set forth herein appellee GEICO's Questions Certified as set forth in Initial Consolidated Response Brief Of Appellee Government Employees Insurance Company.

SUMMARY OF ARGUMENT

The PCI and its member companies have filed this amicus curiae brief because this appeal involves important issues that transcend the interests of the named parties in this case. The ruling made by this Court will likely have broad implications in the insurance industry and on policyholder's and third party claimants' rights to file bad faith claims against insurers.

The PCI believes that the district court in this case properly decided the issues certified to this Court by the United States Court of Appeals for the 11th Circuit. The decision by the district court is consistent with the Florida legislature's clear preference that insurance claims be resolved without unnecessary litigation. The Florida legislature's intent was furthered when the district court in this case granted GEICO's Motion for Summary Judgment.

The Plaintiff-Appellants, Macola and Quigley, have argued a construction of Section 624.155 in this case that, if adopted by this Court, would effectively abolish the "cure" mechanism that the Florida legislature specifically intended to include in Section 624.155. The statutory construction

that Macola and Quigley urge this Court to adopt would render the notice and cure provisions set forth in Section 624.155 meaningless within the context of third party claims.

The statutory construction that Macola and Quigley urge this Court to adopt would also increase, and not decrease, bad faith litigation in Florida. This Court should reject any construction of Section 624.155 that deviates from the Legislature's original intent when it passed Section 624.155 into law in 1982. Because the statutory construction of 624.155 proposed by Macola and Quigley cannot be reconciled with the plain language of the statute, statutory intent, or constitutional provisions, it should be flatly rejected.

ARGUMENT

Section 624.155, and in particular Section 624.155(3)(d), clearly reflect the Florida legislature's intent to reduce unnecessary litigation in the context of insurance claims. However, the circumstances that gave rise to this appeal threaten to frustrate the Florida legislature's intent. Here, the facts in the record indicate that GEICO complied with Section 624.155 and acted in good faith to attempt to "cure" any possible bad faith. Despite this, Macola asserts that GEICO can be sued for bad faith under the common law. In circumstances like this, if third party claimants like Macola are entitled to still bring their bad faith claim, the "cure" provision in Section 624.155(3)(d) would be rendered

meaningless and would ignore the Florida legislature's intent. That result was properly rejected by the district court in this case, when it underscored the gravity of the issues of this appeal and said:

> 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.

(R. 180).

Macola and Quigley have advanced no legitimate reason for this Court to depart from the specific provisions in Section 624.155 and from the Legislature's intent when that act was passed into law. Accordingly, this Court should endorse GEICO's construction of 624.155 and rule in GEICO's favor.

A. This Court's Prior Reasoning In The Talat Case Should Be Applied Here To Ensure A Just and Consistent Application Of Florida Section 624.155.

This Court's prior decision in Talat Enterprises v. Aetna Casualty and Surety Company, 753 So. 2d 1278, 1284 (Fla. 2000), has addressed the issue presently before this Court in this appeal. In Talat, this Court held that when an insurer paid "contractual damages" during the sixty (60) day notice period required by Section 624.155(2)(d), any subsequent claim of bad faith for extra-contractual damages was barred.

This Court held that the purpose of the statutory sixty (60) day period in Section 624.155(2)(d) was to afford the insurer sufficient time in which the insurer could "cure" any acts or omissions that could give rise to a bad faith claims. This Court correctly decided that once the insurer makes a payment during the cure period, then there is no claim for bad faith against that insurer. Id. at 1284. In fact, this Court held where the insurer "cured" any potential bad faith during the sixty (60) day period, no claim for punitive damages existed. This Court held in that case that the statutory cause of action for extra-contractual bad faith damages does not exist until the sixty (60) day statutory "cure" period expires and the insurer fails to make a payment prior to the expiration of the sixty (60) day period.

In this appeal, the ruling sought by Plaintiff-Appellants Macola and Quigley, if granted by this Court, would eliminate the "cure" provision the Legislature afforded to insurers transacting insurance business in Florida. As noted by Judge Ryskamp in Francois v. Illinois National Insurance Company, 01-8070-CV-Ryskamp, p. 7 (S.D. Fla. March 28, 2002) (unpublished), affd, case no.: 02-12499 (11th Circuit, September 19, 2002)(unpublished), where, like here, there is no excess judgment over the policy limits at the time of cure, the insurer would be required to speculate as to what damages the insureds faced.

The district court's opinion in this case is entirely consistent with Florida

case law and this Court's prior rulings where it has been held 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, if Mr. Quigley's cause of action for bad faith against his insurer has been extinguished, then so has any potential bad faith claim by Plaintiff Macola. Accordingly, this Court should endorse GEICO's construction of 624.155 and rule in GEICO's favor by answering both certified questions in the affirmative.

B. The Appellants' Statutory Construction of Section 624.155 Cannot Be Reconciled With Various Provisions Of The Florida And United States Constitutions

There are numerous protections afforded to persons, including insurance companies, that may be in conflict with the Appellants' statutory construction of Section 624.155. Through this brief, PCI seeks to alert this Court to these potential constitutional concerns and to request that this Court examine these constitutional concerns when the Court makes its ruling on the Questions Presented.

1. Due Process

Article I, Section 9 of the Florida Constitution provides:

ARTICLE I

> **SECTION 9. Due process.** No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against oneself.

The 5th and 14th Amendments to the United States Constitution also afford insurers fundamental due process protections.

In its Initial Consolidated Response Brief at p. 13, GEICO asserts that its due process rights would be violated under the Appellees' construction of Section 624.155. PCI and its more than 1,000 member insurance companies, 42 of which are domiciled in this State, agree. Due Process is a fundamental constitutional right afforded to all "persons" in Florida, including GEICO, and those Due Process rights must be protected here.

PCI believes that the Appellants' construction of Section 624.155 violates GEICO's and PCI's member insurers' due process rights in many ways. Each of these ways, some of which are described below, serves as an independent justification to flatly reject the Appellants' erroneous construction of Section 624.155.

Appellants' erroneous construction of Section 624.155 would violate GEICO's Due Process rights because it would eliminate all consistency and predictability in the application of Section 624.155. The Due Process clauses in the Florida and United States Constitutions prohibits arbitrary deprivations of

property. Due Process requires that the law be applied equally to all, and it further requires that the law provide prior notice to potential wrongdoers of what consequences they may face for wrongful acts.

In this case, GEICO has a constitutional due process right to be afforded prior notice of the consequences it could face if its commits bad faith. The Appellants' construction of Section 624.155 disposes of GEICO's Due Process rights in this regard. GEICO, as well as all other insurers transacting insurance business in Florida, would be left to speculate what the consequences of potentially improper claims decisions would be. Some examples are provided below to illustrate how the Appellants' construction of Section 624.155 would create chaos and uncertainty in Florida in the context of insurance claims:

(1) Whether an insurer would "cure" bad faith under Section 624.155 would be left to be determined by a third party claimant in the third party claimant's sole discretion;

(2) One third party claimant could take different positions in different claims;

(3) Multiple third party claimants could take inconsistent positions in different cases having virtually identical facts; and

(4) Multiple claimants could take inconsistent positions against one insurer.

Each of these illustrations depicts how the Appellant' construction of Section 624.155 would deny GEICO and other insurers in Florida their Due Process rights to have some degree of specificity and predictability concerning the potential consequences of committing bad faith. Each of these illustrations is only a fraction of the possible circumstances where inconsistency could breed in Florida law concerning bad faith. Subjectivity and inconsistency in the application of the law denies persons their Due Process rights. United States Supreme Court Justice Breyer said as much in his concurring opinion in BMW v. Gore, 517 U.S. 559 (1996):

> Requiring the application of law, rather than a decision maker's caprice, does more than simply provide citizens notice of what actions may subject them to punishment; it also helps to assure the uniform general treatment of similarly situated persons that is the essence of law itself. 517 U.S., at 587.

If the Appellants' construction were adopted here, Florida courts would be left with the Herculean task of resolving these inconsistencies. The undertaking of such a monumental task by the courts could span many years or decades, leaving insurers to speculate on what their obligations were under Florida law. By answering the certified questions in the affirmative, this Court can ensure the consistency and predictability Due Process requires in the interpretation and application of Section 624.155.

2. Judicial Power Is Vested With The Courts And Not With Third Party Claimants

Florida courts, and not third party claimants, are the sole arbiters of whether or not an insurer has committed bad faith and whether or not an insurer has cured potential bad faith by tendering its limits pursuant to Section 624.155. Article V, Section 1 of the Florida Constitution specifically states that the judicial power in Florida must rest exclusively with this Court and the lower courts beneath it. The Florida Constitution provides, in relevant part:

ARTICLE V

> **SECTION 1. Courts.** The judicial power shall be vested in a supreme court, district courts of appeal, circuit courts and county courts. No other courts may be established by the state, any political subdivision or any municipality.

According to the Florida Constitution, this Court must reject the Appellants' theory to the extent that it affords third party claimants discretion to determine whether or not an insurer has cured potential bad faith by tendering its policy limits prior to the entry of an excess verdict. The Florida Constitution also requires that this Court reject the Appellants' construction to the extent all protections afforded to the insurer under Section 624.155's cure provision would be made subject to the arbitrary and self-serving positions of third party claimants.

3. The Florida Constitution Bars The Appellants' Proposed Modification Of Section 624.155

Article III, Section 6 of the Florida Constitution provides specific protocols and procedures to be followed when any provision in Florida law is amended. Thus, any amendment to Section 624.155 must comply with Article III, Section 6. It provides:

ARTICLE III

> **SECTION 6. Laws.** Every law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title. No law shall be revised or amended by reference to its title only. Laws to revise or amend shall set out in full the revised or amended act, section, subsection or paragraph of a subsection. The enacting clause of every law shall read: "Be It Enacted by the Legislature of the State of Florida:".

The Plaintiff-Appellants' "construction" of Section 624.155 is essentially a proposed amendment to that statute. The amendment the Appellants have proposed that this Court adopt would violate Florida's Constitution because modification of Section 624.155 in the manner proposed by Appellants is improper. Appellants have not, as is required under the Florida Constitution, set forth in full the revised or amended act, section or subsection. To the contrary, the Plaintiff-Appellants' position leave open what the specific parameters and limitations would be on bringing common law bad faith claims in circumstances where the insurer has "cured" any potential bad faith and where no excess

judgment has been entered against the policyholder. The open ended, unlimited and undefined freedom third parties would have to bring a subsequent common law bad faith claim is prohibited under Article III, Section 6 of the Florida Constitution.

C. The Plaintiff-Appellants' Position Eliminates All Incentives For Insurers to Comply With Section 624.155, And Would Foster More Bad Faith Litigation.

Where an excess verdict or judgment has not been entered, the insurer's right to cure potential bad faith was established by the Legislature when it enacted 624.155. To permit a subsequent common law bad faith claim would render the cure provisions useless and illusory. The district court properly recognized that the Plaintiff-Appellants' position and construction of the statute would frustrate the Florida Legislature's clear intent to minimize or to avoid unnecessary bad faith litigation:

> It follows, therefore, that Plaintiff Macola, having derived her cause of action from Mr. Quigley, and having stepped into his shoes, cannot now disavow his earlier election to invoke the remedial provisions of Section 624.155 to cure Defendant's alleged bad faith in not settling 'for policy limits' and Defendant's reliance on those provisions by tendering the 'policy limits.' 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.

(R. 180, p. 12-13)

The foregoing holding by the district court and this Court's holding in Talat are proper interpretations of the statute and those statutory constructions should not be abandoned in this case. 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. If the insurer may avoid a bad faith action only by paying in advance every penny of the damages that it potentially faces if it loses at a future trial, the insurer would have no reason to pay. Id. This Court properly concluded in Talat 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.

CONCLUSION

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. This Court's ruling in Talat also properly construed Section 624.155. For the above-stated reasons the judgment of the district court should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the undersigned delivered for filing by overnight mail to the Clerk of the Supreme Court of the State of Florida one (1) original and seven (7) copies of this brief and that a true and correct copy of the foregoing was furnished by U.S. Mail to all attorneys listed on the attached Service List on this 8th day of September, 2005, and that the brief was e-mailed to the Court.

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CERTIFICATE OF COMPLIANCE – TYPE SIZE AND STYLE

Counsel for Property Casualty Insurers Association of America hereby certifies that the type size and style of the Brief of Amicus Curiae is Times New Roman 14pt.

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