IN THE SUPREME COURT OF FLORIDA

MICHELLE MACOLA and INGE QUIGLEY,
Appellants,

vs.

GOVERNMENT EMPLOYEES INSURANCE COMPANY,
Appellee.
_____/

Case No.: SC05-1021

U.S. Ct. App. No.: 04-10436

APPELLANT MICHELLE MACOLA'S REPLY BRIEF ON THE MERITS

Proceeding to Review Questions Certified from the United States Court of Appeals for the Eleventh Circuit

Submitted by:

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RESPONSE TO APPELLEE'S STATEMENT OF THE CASE AND OF THE FACTS

Appellant Michelle Macola disagrees with the Statement of the Case and of the Facts in GEICO's amended answer brief in several respects, particularly GEICO's argumentative and speculative accusation that Michael Roe "embarked on what appears to have been an intentional campaign to obfuscate the extent of Macola's injuries from GEICO and to equivocate about her property damages, including efforts to remain *incommunicado* during settlement dealings with GEICO on behalf of Macola …." Amended answer brief of Appellee, p. 7. There is ample record evidence that contradicts this allegation by GEICO, but it will not be detailed herein because the allegation is not relevant to either of the two questions that have been certified for resolution by this Court. For the purpose of this proceeding, it is sufficient to note that the trial court has determined that there are genuine issues of material fact precluding summary judgment on the question of whether GEICO committed bad faith. (Dkt. 215). That ruling is not on appeal in this proceeding.

Appellant Macola would also note that portions of Mr. Jeffares' deposition testimony, which form the basis for many of the assertions made in footnote 3 of GEICO's brief, are contradicted by Mr. Jeffares' own prior written statements. (Dkt. 147, Exh. E, p. 24; Dkt. 156, pp. 63, 78 – 82, Plaintiff's Exhibit G). These inconsistencies should be resolved by a jury.

ARGUMENT

FIRST CERTIFIED QUESTION: GEICO'S TENDER OF THE POLICY LIMITS IN RESPONSE TO THE CIVIL REMEDY NOTICE WAS NOT AN ADEQUATE CURE OF ANY BAD FAITH FOR THE PURPOSES OF SECTION 624.155(3)(D), FLORIDA STATUTES (2003)

Page 20 of GEICO's brief argues that, "The determination of the objective standard for the cure of section 624.155(1)(b)1 allegation cannot begin with the proposition that the mere filing of the notice establishes bad faith." However, although the filing of the civil remedy notice does not itself result in an adjudication of liability for bad faith, the standard for the cure must be sufficient to protect the insured from excess liability in those cases where the insurer actually *has* committed bad faith. Therefore, the determination of what constitutes a sufficient cure must start with the premise that bad faith has actually been committed. Section 624.155(3)(d) states, "No action shall lie if, within 60 days after filing notice, the damages are paid or the circumstances giving rise to the violation are corrected." This language has effect only in those cases where the carrier has already committed bad faith, and has caused damage to the complainant that must be paid by the insurer or left as a liability of the innocent insured.

If the insurer has *not* committed bad faith, then it has nothing to cure, and need not pay a dime. However, if it is in violation, the determination of what constitutes a sufficient cure cannot be based on a presumption that a belated tender

of the policy limits resolves the damages to the insured, because it does not. In a third-party setting, a late payment that does not settle a case that should already have been settled is no cure at all, just as GEICO's tender of its policy limits to Ms. Quigley in response to her civil remedy notice was not a cure because it provided her no protection from excess liability.

At page 21 of its brief, GEICO admits that when a civil remedy notice is filed after an excess judgment has been entered against the insured, the insurer must pay the excess judgment in order to cure the claim of bad faith. GEICO then argues that if the civil remedy notice is filed *before* an excess judgment has been entered, then the standard for what constitutes a cure must necessarily be different.[1] However, whether the civil remedy notice is filed before or after the entry of an excess judgment does not affect the damage that the insured suffers as a result of the insurer's bad faith. Once an insurer has committed bad faith by failing to settle a case it could have and should have settled, and that opportunity has passed, the harm that is caused to the insured is measured as the full value of the claim. The only thing that changes when an excess judgment is entered is that the amount of the insured's damages becomes liquidated. Before that point, the same damages

[1] GEICO cites Vest v. Travelers Ins. Co., 753 So. 2d 1270 (Fla. 2000), in support of this argument, but the opinion in Vest does not say any such thing.

exist, but are not yet reduced to a judgment. The insurer's tender of only its policy limits does not cure the damages caused by bad faith in either instance.

GEICO argues that the insurer should not have to pay more than the policy limits to cure when a civil remedy notice is filed prior to the excess judgment, because at that point it cannot be determined with certainty that an excess judgment will be entered or what its amount will be. However, insurers regularly have to make informed decisions regarding the valuation of uncertain or disputed claims. Every time an insurer negotiates the settlement of a liability claim that does not exceed the policy limits, it must place a value on the claimant's damages, estimate the probability that the insured would be found liable, and if there is an issue of comparative fault, approximate how the jury would likely apportion fault.

Therefore, when a civil remedy notice is filed alleging that the insurer missed an opportunity to settle a claim against the insured within the policy limits, and an excess judgment has not yet been entered, there is no reason why the insurer, with sixty additional days to investigate, should not be able to make an informed prediction of the likely outcome of the underlying litigation and at least make a good faith offer to settle the injured third party's claim for its full value without regard to the policy limits. This, and nothing else, will protect the insured from excess liability, while shielding the insurer from claims for interest, attorney's fees, and other statutory bad faith damages.

GEICO relies on language from Judge Glazebrook's opinion in Talat Enter., Inc. v. Aetna Cas. & Sur. Co., 952 F.Supp. 773, 778 (M.D. Fla. 1996), which this Court quoted with approval in Talat Enter., Inc. v. Aetna Cas. & Sur. Co., 753 So. 2d 1278, 1282 (Fla. 2000), to the effect that an insurer should not be required to pay in advance 100% of the damages that it faces if it loses at trial in order to satisfy the cure provision of the statute. However, Talat was a first-party case, and an essential distinction between first-party and third-party cases is that there is no cause of action for first-party bad faith except under the statute. Therefore, this Court held in Talat,

> For Talat, there is no remedy without the statute. Pursuant to the statute, there is no remedy until the notice is sent by the insured and the insurer has the opportunity to "cure" the violation. If the insurer pays the damages within the cure period, then there is no remedy. For this to comport with logic and common sense, this has to mean that extra-contractual damages that can be recovered solely by reason of this civil remedy does not ripen if the insurer pays what is owed on the insurance policy during the cure period.

753 So. 2d at 1284 – 1285.

By contrast, in a third-party case, the insured's cause of action for bad faith will accrue under the common law, and the insurer will ultimately be required to pay the excess judgment, whether or not the insurer cures under section 624.155(3)(d), or even if no civil remedy notice is ever filed. Therefore, in third-party cases, the excess judgment is not an element of damages that is recoverable solely by virtue of the statute. The additional damages that are available only in a

statutory action for third-party bad faith include, at a minimum, the attorney fees of the third-party claimant for bringing the bad faith action. § 624.155(4), Fla. Stat. (2005); see also State Farm Fire & Cas. Co. v. Zebrowski, 706 So. 2d 275, 277 (Fla. 1997). The insurer can avoid liability for such statutory damages by tendering the full value of the claim.

GEICO argues, at pages 22 - 23 of its brief, that an insurer's due process rights would be violated if the insurer were required to do anything more than tender the policy limits in response to a civil remedy notice. This is not so, because the insurer will not be deprived of any liberty or property interest by the mere filing of a civil remedy notice. No determination of liability is made at that point, and no judgment is entered against the insurer. Because the insurer does not suffer any deprivation of liberty or property at that stage, its due process rights are not implicated. Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 59 (1999).

GEICO claims that to require more than a tender of the policy limits as a cure would subject the insurer to an unconstitutional presumption because, GEICO claims, the insurer's failure to cure will result in a presumption that it has committed bad faith in a subsequent lawsuit. This is incorrect. The presumption of bad faith arises only if the insurer fails to make any response at all to the civil remedy notice. Imhof v. Nationwide Mut. Ins. Co., 643 So. 2d 617, 619 (Fla. 1994), *receded from in part on other grounds*, State Farm Mut. Auto. Ins. v.

LaForet, 643 So. 2d 55, 63 (Fla. 1994). A failure to cure does not create a presumption of bad faith, as long as the insurer responds to the notice.

Therefore, if an insurer who receives a civil remedy notice has not already committed bad faith, the insurer is entitled to simply deny the allegation and do nothing more. No cure is required. If a bad faith suit is filed later, then the insurer will have a full opportunity to respond to the complaint and defend against the claim of bad faith, which is what due process requires. See Keys Citizens for Responsible Gov't, Inc. v. Florida Keys Aqueduct Auth., 795 So. 2d 940, 948 (Fla. 2001) (holding that procedural due process requires fair notice and a real opportunity to be heard). Ultimately, the question of whether the insurer committed bad faith will be resolved by a jury.

GEICO also argues that the measure of a cure required by section 624.155(3)(d) should not exceed the policy limits, because such a standard would impose an obligation on the insurer that was not contemplated by the insurance contract. However, as this Court has recognized since as early as 1938, a liability insurer may so conduct itself as to become liable for the entire judgment recovered against the insured, although it exceeds the policy limits. Berges v. Infinity Ins. Co., 896 So. 2d 665, 683 (Fla. 2004), *citing* Auto Mut. Indem. Co. v. Shaw, 184 So. 852, 858 (Fla. 1938).

At pages 28 through 32 of its amended answer brief, GEICO argues that the decisions in Clauss v. Fortune Ins. Co., 523 So. 2d 1177 (Fla. 5th DCA 1988), and Hollar v. Int'l Bankers Ins. Co., 572 So. 2d 937 (Fla. 3d DCA 1990), can be reconciled on the ground that in Clauss the civil remedy notice was served prior to the entry of an excess judgment, while in Hollar it was served after the entry of an excess judgment. This argument is unpersuasive, because neither opinion refers to the timing of the civil remedy notice as a basis for its decision. The Fifth District's opinion in Clauss does not base its holding on the fact that the civil remedy notice was filed prior to the entry of the excess judgment. In fact, it does not explain at all why the court determined that the insurer's tender of policy limits was a sufficient cure of the insurer's alleged bad faith.

Likewise, the opinion in Hollar does not rely on the fact that the civil remedy notice in that case was filed after the entry of an excess judgment as a basis for the court's decision. The opinion itself is ambiguous as to whether the civil remedy notice was filed before or after the excess judgment was entered. Counsel for GEICO cites to what it claims to be the briefs from Hollar as proof that the civil remedy notice in that case was filed after the excess judgment had been entered. However, because that fact was not set forth in the Hollar opinion and identified as a material basis for the court's decision, it cannot be regarded as such. Aldeman Steel Corp. v. Winter, 610 So. 2d 494, 502 - 03 (Fla. 1st DCA 1992), *superseded*

by statute on other grounds, as recognized by Reed v. Reed, 643 So. 2d 1180, 1182 n. 4 (Fla. 1st DCA 1994). "It is impermissible . . . to go behind the facts stated in an opinion to find a basis for distinguishing or limiting its intended holding." Aldeman Steel Corp., 610 So. 2d at 503. Therefore, the reasoning of the Hollar opinion applies equally whether the civil remedy notice is filed before or after the excess judgment has been entered.

Nowhere in its entire brief does GEICO attempt to explain how tendering the policy limits to Ms. Quigley protected her from the entry of an excess judgment or paid the damages that were caused by GEICO's bad faith. GEICO's entire argument is based on its own convenience and self-interest, and ignores the interests of insureds. However, the purpose of bad faith law is to protect insureds. Berges v. Infinity Ins. Co., 896 So. 2d 665, 682 (Fla. 2004). Therefore, the proper measure of a cure under section 624.155(3)(d) must provide the insured protection from the consequences of the insurer's bad faith conduct. GEICO's tender of its policy limits to Ms. Quigley provided her no such protection.

SECOND CERTIFIED QUESTION: GEICO'S TENDER OF THE POLICY LIMITS IN RESPONSE TO THE CIVIL REMEDY NOTICE DID NOT CONSTITUTE A FULL SATISFACTION OF THE EXCESS JUDGMENT OR OF THE APPELLANTS' DAMAGES

As to the second question, GEICO argues that because the duty of good faith owed by an insurer to its insured is the same under both section 624.155 and the

common law, therefore a cure that is sufficient to prevent a statutory cause of action from accruing under section 624.155(3)(d) must also be sufficient to satisfy the common-law cause of action. However, the pertinent inquiry is not whether the insurer's duty is the same under the statute and the common law. Instead, it is but whether the measure of damages that an insurer must pay to satisfy the cure provision of section 624.155(3)(d) is the same as the measure of damages recoverable in a common-law action for third-party bad faith. If the Court answers the first certified question in the affirmative, as GEICO urges, then the measure of damages necessary to cure under section 624.155(3)(d) would *not* be the same as the measure of damages recoverable in a common-law bad faith action, and therefore the payment of such a cure would not constitute a full satisfaction of the common-law bad faith claim.

As discussed at pages 33 – 38 of Appellant Macola's initial brief, the pursuit of one remedy cannot act as a bar to a different, consistent remedy that provides a greater measure of damages. See Londono v. Turkey Creek, Inc., 609 So. 2d 14, 16 – 18 (Fla. 1992); Bd. of Public Instruction for Bay County v. Mathis, 181 So. 147, 149 (Fla. 1938). GEICO has argued that the proper measure of a cure under section 624.155(3)(d) should not include the damages that are recoverable in a bad faith action. If the cure does not include those damages, however, then by definition it will not be sufficient to satisfy a common-law claim for bad faith.

None of the arguments that GEICO has advanced in favor of its position that an insurer's tender of its policy limits should be a sufficient cure under section 624.155(3)(d) gives any consideration to what would be necessary to actually remedy the insurer's bad faith conduct or to pay the damages that the insured actually suffers as a result of the bad faith. GEICO's reason for arguing that the standard for a cure under section 624.155(3)(d) should not include the amount of the damages recoverable in a bad faith action, when the civil remedy notice has been served before any excess judgment has been entered, is that the amount of those damages would be too uncertain and difficult to predict at that point. Therefore, GEICO argues that the standard to cure under section 624.155(3)(d) should be only the policy limits, simply because the policy limits are easier to determine. If that standard were adopted, however, then the rationale for setting the cure at the policy limits would not have anything do with the actual satisfaction of the bad faith claim, so the payment of such a cure could not be deemed sufficient to satisfy a common-law claim of bad faith.

Furthermore, under the common law, an insurer's tender of the policy limits after bad faith has already been committed will not insulate the insurer from liability for bad faith. Powell v. Prudential Prop. & Cas. Ins. Co., 584 So. 2d 12, 15 (Fla. 3d DCA 1991), *citing* Knobloch v. Royal Globe Ins. Co., 344 N.E.2d 364 (N.Y. 1976); Howard v. State Farm Mut. Auto. Liab. Ins. Co., 236 N.W.2d 643

(Wis. 1975); and Maguire v. Allstate Ins. Co., 341 F.Supp. 866 (D. Del. 1972). Therefore, even if the insurer's tender of the policy limits is deemed to be a sufficient cure to avoid a statutory bad faith action under section 624.155(3)(d), it cannot insulate the insurer from liability for bad faith under the common law.

At pages 38 and 41 of its amended answer brief, GEICO claims that at some point after its adoption, section 624.155 was expanded to encompass third-party bad faith actions. Then, on page 41 of its brief, GEICO argues that the legislative intent behind this supposed expansion of the statute must have been to curtail third-party bad faith claims. Both the premise and the conclusion of this argument are incorrect.

First, section 624.155 was never expanded to encompass third-party claims, as GEICO maintains. From the time it was first adopted in 1982, section 624.155(1)(b)(1) has always been phrased broadly enough to cover claims of third-party bad faith as well as first-party bad faith. See McLeod v. Continental Ins. Co., 591 So. 2d 621, 624 (Fla. 1992) (holding that, "Section 624.155 does not differentiate between first- and third-party actions . . . ."). The statutory language that supports both first-party and third-party bad faith claims is found in subparagraph 624.155(1)(b)1, which provides that any person who has been damaged may bring a civil action against an insurer for "Not attempting in good faith to settle claims when, under all the circumstances, it could and should have

done so, had it acted fairly and honestly toward its insured and with due regard for his or her interests." The 1982 version of section 624.155(1)(b)1 was worded substantially the same, with only a few inconsequential differences. See §624.155(1)(b)1 Fla. Stat. (Supp. 1982), *quoted in* LaForet, 658 So. 2d at 62. Furthermore, the legislative history of section 624.155 indicates that when the Legislature first adopted the statute in 1982, it was aware of the distinction between first-party and third-party claims and intended for the statute to apply to both. See H. Comm. on Ins., Staff Report, 1982 Insurance Code Sunset Revision (HB 4F; as amended HB 10G), 1982 Sess. (Fla.), *quoted in* Rowland v. Safeco Ins. Co. of America, 634 F. Supp. 613, 615 (M.D. Fla. 1986).

Second, Florida courts have recognized that the purpose of section 624.155 was not to limit any existing common-law remedy, but to extend the remedy for bad faith to the first-party context. See Hollar, 572 So. 2d at 939; Opperman v. Nationwide Mut. Fire Ins. Co., 515 So. 2d 263, 266 (Fla. 1st DCA 1987).

In fact, the amendment history of section 624.155 reflects a clear legislative intent *not* to impair the availability of the common-law remedy for bad faith. After section 624.155 was first adopted, there was some uncertainty as to whether the statute was intended to preempt the common-law remedy for bad faith. See Clauss, 523 So. 2d at 1179 (declining to address whether section 624.155 preempted the common law cause of action for bad faith). To resolve this

uncertainty, in 1990 the Legislature amended section 624.155 by adding subsection (7) (since renumbered as subsection (8)), which explicitly states that the statute does not preempt any remedy available under the common law, and that a party may obtain a judgment under either the common-law remedy of bad faith or the statutory remedy. Ch. 90-119, § 30, Laws of Fla. Therefore, the Legislature has manifested a clear intent that section 624.155 shall *not* limit the availability of the common-law remedy for bad faith, contrary to GEICO's argument.

CONCLUSION

For the reasons argued herein and in Appellant Macola's initial brief, this Court should answer both questions certified by the United States Court of Appeals in the negative. However, a negative answer as to either question will render the other question moot.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by United States Mail on Richard Young, Stephen Gill, Ray Haas, Paul Cardillo, Lefferts Mabie, III, Roy Wasson, Annabel Castle Majewski, Philip Burlington, Janis Keyser, Ronald Kammer, Alyssa Campbell, Paul Nettleton, Bard Rockenbach, Richard Hodyl, Jr., Robert Hurns, and John Yang, on this _____ day of **October**, 2005.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the font used herein is fourteen-point Times New Roman.

Respectfully Submitted,

_____

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