Supreme Court of Florida

CASE NO. SC05-1021

MICHELLE MACOLA, and
INGE QUIGLEY,

Appellants,

vs

GOVERNMENT EMPLOYEES
INSURANCE COMPANY,

Appellee.

ON CERTIFIED QUESTION FROM THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF MOVANT/ APPELLANT, INGE QUIGLEY

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TABLE OF CONTENTS

TABLE OF CONTENTS..i

TABLE OF CITATIONS.. . .iii

ARGUMENT:

I. THE STATUTORY FIRST PARTY CURE PROVISION DOES NOT APPLY ....TO THIRD PARTY BAD FAITH CASES 1

II. IF THE CURE PROVISION APPLIES TO THIRD PARTY BAD FAITH CASES, DUE PROCESS DOES NOT REQUIRE THAT THE CURE BE ACHIEVED ....BY PAYMENT WITHIN POLICY LIMITS 2

....A. Intr

....B. No

C. No Statutory Impairment of GEICO's Common .... Law

....D. No

E. Insurers May be Required to Undertake Extra-Contractual Duties Where Their Actions .... Prej

III. THIS COURT SHOULD IGNORE GEICO'S ESTOPPEL ARGUMENT AS OUTSIDE THE CERTIFIED QUESTIONS AND OUTSIDE .... THIS COURT'S JURISDICTION 10

IV. QUIGLEY INCORPORATES APPELLANT ....MACOLA'S REPLY BRIEF 11

CONCLUSION 11

CERTIFICATE OF SERVICE 12

CERTIFICATE OF COMPLIANCE 12

TABLE OF CITATIONS

CASES PAGE

Barbe v. Ville Neuve, 505 So. 2d 1331 (Fla. 1987) 10

Dept. of Transp. v. Durden, 471 So. 2d 1271 (Fla. 1985) 6

Doe v. Allstate Ins. Co., 653 So. 2d 371 (Fla. 1995) 9

Florida Municipal Ins. Trust v. Village of Gulf
.... 850 So. 2d 544 (Fla. 4th DCA 2003) 9

Hassen v. State Farm Mut. Auto. Ins. Co., 674 So. 2d 106 (Fla. 1996)................... 4

MaCola v. Government Employees Ins. Co.
....410 F.3d 1359, 1364 (11th Cir. 2005) 11

Manning v. Travelers Ins. Co., 250 So. 2d 872 (Fla. 1971) 4

Rasdale Armored Car Service, Inc. v. Southern Armored Car Service, Inc.
....169 So. 2d 486 (Fla. 1964) 6

Shingleton v. Bussey, 223 So. 2d 713 (Fla. 1969) 6

State Farm Mut. Auto. Ins. Co. v. Hassen
.... 650 So. 2d 128 (Fla. 2d DCA 1995) 4

OTHER AUTHORITIES

Section 624.155(7), Fla. Stat. .... Passim

Article I, §10, United States Constitution 4

Article 5, §3(b)(6), Fla. Const 11

10 Fla. Jur. 2d, *Constitutional Law* §307 (1997)... 4

ARGUMENT

I

THE STATUTORY FIRST PARTY CURE PROVISION DOES NOT APPLY TO THIRD PARTY BAD FAITH CASES

GEICO has failed to present any persuasive argument that the statutory cure provision applies to cases such as this one involving third party bad faith. Although paying lip service to the provision within section 624.155(7) that the statutory remedy "does not preempt any other remedy or cause of action," GEICO inexplicably argues that the statute has done away with common law third party bad faith prosecuted in any way other than pursuant to the statutory formula (with its attendant cure provision). That internally contradictory argument simply does not make sense.

Either the common law or third party bad faith remains intact as a separate remedy—as subsection (7) of the Civil Remedy Statute says in plain language that it does—or the statute has done away with the common law remedy. We know that the latter cannot be the case because the statute says that it does not preempt the common law. Therefore the common law remedy of third party bad faith—without any statutory cure provision—remains viable and unaffected by the

legislature's adoption of the bad faith concept in first party cases. The certified questions should be answered in the negative.

II.

IF THE CURE PROVISION APPLIES TO THIRD PARTY BAD FAITH CASES, DUE PROCESS DOES NOT REQUIRE THAT THE CURE BE ACHIEVED BY PAYMENT WITHIN POLICY LIMITS

A. Introduction:

Much of GEICO's Answer Brief (pages 20-32) involves vague due process arguments that an "objective standard" must be applied to the cure provision, because a cure which requires an insurer who committed bad faith to effectuate a settlement with the claimant somehow deprives that insurer of due process of law. Within that argument section, GEICO intermingles two main arguments. First GEICO argues that "[t]o require the insurer to pay sums or to perform acts beyond the contemplation of the parties in the original contract . . . would violate the insurer's rights of due process and would unalterably [sic] impair the insurer's rights under the contract." *Id.* Second, GEICO argues that requiring the insurer to settle the claim (as opposed to simply paying an amount within its policy limits) to effectuate a cure "is violative of due process because it raises a presumption that

the insurer has acted in bad faith." Answer Brief at 22.

There is no such unconstitutional denial of due process or impairment of the contract between Quigley and GEICO. By requiring settlement with the third party claimant for an amount in excess of the policy limits in order to effectuate a cure, the statutory cure provision does not unconstitutionally impair any existing between the parties because that contract was entered into after the effective date of the statutory cure provision. There can be no statutory impairment of GEICO's common law rights to cure bad faith within the policy limits. There are no common law rights regarding cure once bad faith has occurred, much less any rights to cure limited to only the amount which would be due under the policy in the absence of bad faith. Finally, due to Florida's public policy of protecting insureds and regulating the insurance industry, liability insurers may constitutionally be required to undertake extra-contractual duties where their actions prejudice the insured's defense of a liability claim.

B. No Statutory Impairment of Any Existing Contract:

Without citation to a single provision under the Florida or United States Constitutions, GEICO argues that it would amount to an unconstitutional impairment of its contract to apply the statutory cure provision in such a way as to require GEICO to settle the third party's claim, as opposed to simply paying an

amount within its policy limits. Under neither the federal nor the state constitutions is there any prohibition against legislatures enacting laws applicable to contracts which have not yet been entered into at the time of the statutory enactment.

Article I, §10 of the United States Constitution is the Contract Clause. That clause provides in pertinent part as follows: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." That federal provision would not be violated by requiring an insurer to settle with the claimant to cure its bad faith, even if that settlement exceeded the policy limits, because the contract did not pre-exist the enactment of the statutory cure provision. "The contract clause in the Federal Constitution imposes limits on the power of the state to abridge ***existing contracts***." 10 Fla. Jur. 2d, *Constitutional Law* §307 (1997).

Similarly, Article I, §10, Fla. Const. (1968) provides: "No bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed." As with the Contract Clause of the federal constitution, "[i]t has also been the long established law of this state that a statute contravenes the constitutional prohibition against impairment of contracts when it has 'the effect of rewriting antecedent contracts, that is, of changing the substantive rights of the parties ***to existing contracts.***' *Manning v. Travelers Ins. Co.,* 250 So. 2d 872, 874 (Fla. 1971)." *Accord, State Farm Mut. Auto. Ins. Co. v. Hassen,* 650 So. 2d 128, 134 (Fla. 2d

DCA 1995) (emphasis added), *approved on other grounds, Hassen v. State Farm Mut. Auto. Ins. Co.*, 674 So. 2d 106 (Fla. 1996).

Although GEICO does not specifically mention either the Florida or Federal Contract Clauses, if its references to impairment of its contracts were to be construed to implicate those constitutional provisions, no violation of them can be demonstrated because the insurance contract in the presence was entered into ***after*** the effective date of the statutory cure provision of section 624.155, Fla. Stat. As noted by GEICO in its brief, this statute has been in effect since 1982.

This Court has thus made it clear that it is within the legislature's power to enact statutes affecting the rights and responsibilities of parties to automobile insurance contracts and that the Contract Clause does not come into play where the statute in questions preceded the issuance of any given insurance policy. There is no reason why an "objective standard" is required in interpreting the cure provision, so this Court should answer the certified questions by stating that payment of the policy limits was insufficient to constitute a cure.

C. No Statutory Impairment of GEICO's Common Law Rights:

No substantive or procedural due process violation would result from interpreting the cure provision to require settlement with the third party claimant for an amount in excess of the policy limit, based on any alleged impairment of

GEICO's vested common law rights. The liability insurer never enjoyed any such common law right to cure its bad faith by payment of an amount within its policy limits (absent agreement to accept that amount by the third party claimant), so there is absolutely no property right requiring such an interpretation of the statute to satisfy due process principles.

Procedural due process protections are not available where the party's interest affected does not rise to the level of a vested property right. *See, e.g., Dept. of Transp. v. Durden*, 471 So. 2d 1271 (Fla. 1985); *Rasdale Armored Car Service, Inc. v. Southern Armored Car Service, Inc.*, 169 So. 2d 486 (Fla. 1964). GEICO had no vested property right to cure its bad faith by payment of less than its policy limits. Therefore, due process protections do not apply and there is no reason to require an objective standard for curing GEICO's assumed bad faith.

Because GEICO has no vested property interest which could be impaired by applying the cure provision to require complete settlement with the third party claimant—as opposed to mere payment to the insured of the policy limits—the statutory cure provision so interpreted will not offend due process principles because it is the prerogative of the legislature to enact laws regulating the automobile insurance industry, so long as those laws are not arbitrary and capricious. In *Shingleton v. Bussey*, 223 So. 2d 713 (Fla. 1969), this Court noted

as follows:

> It can hardly be disputed that motor vehicle liability insurance is a subject necessarily lending itself to regulation imposed by the State in the exercise of its police power. It is a subject affected with a public interest and its regulation in a multiple of ways for the protection of the general public has become of more and more importance in the passage of years and changing times. This being the case, ***it is not unreasonable to restrict or limit the effect of express contractual provisions where the same collide with those considerations which affect the interest of the public generally.***

Id. at 717 (emphasis added).

D. No Unconstitutional Presumption of Bad Faith:

GEICO's argument that requiring an insurer which has acted in bad faith to settle the third party's claim against the insured in order to cure that bad faith violates due process "because it raises a presumption that the insurer has acted in bad faith" does not make sense. There is no need for an insurer to attempt any sort of cure unless it already had acted in bad faith. An insurer that had not acted in bad faith need not pay the policy limits, settle the third party's claim, or take any other action to cure its prior conduct.

The jury will never be instructed in the bad faith case that there is any sort of

presumption arising from GEICO's duty to settle the claim in response to the cure opportunity. The failure to cure simply permits the bad faith action to go forward without the benefit of any presumption. This due process argument should be rejected and the certified questions be answered in the negative.

GEICO's due process rights would not be violated by applying the cure provision of section 624.155—if it applies at all in third party bad faith cases—in such a way as to require an insurer who has acted in bad faith to resolve the third party's claim rather than simply paying an amount within the policy limits. The certified questions should be answered in the negative.

E. Insurers May be Required to Undertake Extra-Contractual Duties Where Their Actions Prejudice the Insured's Defense of Liability Claims:

Even if GEICO had some vested property right or contract right in existence which was worthy of due process protection, where an insurer by its own actions exposes its insured to a greater risk than would have been present had the insurer acted reasonably in handling the claim, the insurer may constitutionally be required to provide extra-contractual relief in order to remedy prejudice to its insured. In *Doe v. Allstate Ins. Co.*, 653 So. 2d 371, 374 (Fla. 1995), this Court held that, where an insurer undertakes the defense of an insured outside the coverage of the policy and the insured "relies upon the insured to the insured's detriment, then the

insurer should not be able to deny the coverage which it earlier acknowledged." Thus, even where an insurance company has a vested contractual right to provide limited coverage not extending to certain factual situations, where the insurer causes prejudice to the insured by its handling of the claim it will not constitute a due process violation to require the insurance company to respond extra-contractually.

In the third party bad faith setting such as that present in this case, there is even less reason to find a due process problem with the imposition of an extra-contractual cure requirement (settlement of the claim) than in the situation of recognizing coverage by estoppel such as in *Doe*. For one thing, bad faith on the part of GEICO is more culpable conduct than an insurance company's simple mistake in undertaking defense of a non-covered claim without a reservation of rights. Second, the relief imposed of requiring settlement of a ***covered*** claim in an amount more than the policy limits is less drastic than the relief recognized in *Doe* of imposing coverage for conduct totally ***outside the coverage*** of the policy in the first place. In both situations, the actions of the insurance company created the predicament for the insured and the insurer is in a better position to remedy its mistake than is the insured. There is no due process violation in requiring an insurer to indemnify its insured against a non-covered claim based upon the

insurer's claims handling practices which cause prejudice to its insured. *See also Florida Municipal Ins. Trust v. Village of Gulf*, 850 So. 2d 544 (Fla. 4th DCA 2003), *review dismissed* 873, So. 2d 316 (Fla. 2004) (pre-suit claims handling). Therefore, there can be no due process violation in requiring GEICO to cure its bad faith by paying more than the policy limits in order to avoid liability for still more in subsequent bad faith litigation.

III.

THIS COURT SHOULD IGNORE GEICO'S ESTOPPEL ARGUMENT AS OUTSIDE THE CERTIFIED QUESTIONS AND OUTSIDE THIS COURT'S JURISDICTION

GEICO's final argument (Answer Brief pages 46-49) is that the Appellants are estopped from pursuing their third party bad faith claims by reason of Quigley's service of the Civil Remedy Notice ("CRN"). This Court should ignore that argument and disregard it in responding to the certified questions. The issue of whether the Appellants are estopped from pursuing their third party bad faith claim was determined adverse to GEICO by the Eleventh Circuit and was not a subject of the certified questions which led to this proceeding.

In its opinion containing the certified questions now under consideration the Eleventh Circuit expressed no doubt whatsoever in holding that Macola and

Quigley were ***not*** estopped from pursuing their third party bad faith claim by virtue of the CRN. Citing this Court's decision in *Barbe v. Villeneuve,* 505 So. 2d 1331, 1332 (Fla. 1987), the Eleventh Circuit reversed the district court's erroneous determination that the CRN estopped the Plaintiffs from prosecuting their third party bad faith claim: "Therefore, under *Barbe*, the district court erred in holding that Quigley's CRN constituted an election of remedy that estopped her from pursuing the common law bad faith claim." *Macola v. Government Employees Ins. Co.*, 410 F.3d 1359, 1364 (11th Cir. 2005); App. A at 12. The Eleventh Circuit further stated that it was "***confident*** that Quigley's decision to file a CRN did not estop her common law bad faith claim . . . ." *Id.*

Article 5, §3(b)(6), Fla. Const. limits this Court's jurisdiction in cases such as this one to "review[ing] a question of law certified by the Supreme Court of the United States or a United States Court of Appeals which is determinative of the cause and for which there is no controlling precedent of the Supreme Court of Florida." The Eleventh Circuit certified no question concerning the estoppel issue to this Court, so it would be outside this Court's jurisdiction to address that issue in this proceeding. GEICO's argument about estoppel should be ignored.

IV.

QUIGLEY INCORPORATES APPELLANT

MACOLA'S REPLY BRIEF

Rather than occupy this Court's time and attention in re-reading arguments identical to those made in Macola's Reply Brief, the Appellant Quigley simply adopts and incorporates those arguments by reference.

CONCLUSION

WHEREFORE, GEICO's payment of the policy limits being insufficient to constitute a cure to the unripe third-party bad faith claim that thereafter ripened into an excess judgment of more than $1.5 million, this Court should answer the certified questions in the negative.

CERTIFICATE OF SERVICE

I hereby certify that copies of this brief were served by U.S. Mail upon counsel for Appellee, B. Richard Young and Stephen D. Gill, Young Bill Rombous & Fugett, P.A., 226 Palafox Place, Suite 700, Pensacola, Florida 32501; Ray Haas and Rebecca Townsend, Haas Dutton Blackburn Lewis & Longley, P.A., 1901 North 13th Street, Tampa, Florida 33606; Paul T. Cardillo, Law Offices of Paul T. Cardillo, P.A., Co- Counsel for Appellant Quigley, 209 West Verne Street, Tampa, Florida 33606; and Counsel for Appellant Macola, Dale Swope, Angela Rodante, and Shea Moxon, Swope Rodante, P.A., 1234 East Fifth Avenue, Tampa, Florida 33605; Counsel for Appellant Quigley, Lefferts Mabie III, P.O. Box 499, Tampa,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief has been computer generated in 14 point Times New Roman and complies with the requirements of Rule 9.210.

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