SUPREME COURT OF FLORIDA

Case No. SC06-1110

WACHOVIA INSURANCE SERVICES, INC.,
JOEL G. WILLIAMS, DAVIS BALDWIN, INC.,
a Division of Wachovia Insurance Services, Inc.

Appellants,

vs.

RICHARD L. TOOMEY, resident of
Montgomery County, as an Individual and
as an assignee of IMC Mortgage Company,
BRIAN D. HOLMAN, resident of
Baltimore County, as an Individual and
as an assignee of IMC Mortgage Company,

Appellees.

INITIAL BRIEF

Appeal from the United States Court of Appeals for the Eleventh Circuit

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PREFACE

This matter is pending on certified questions from the United States Court of Appeals from the Eleventh Circuit.

The Appellants, DAVIS BALDWIN, INC., JOEL G. WILLIAMS, and WACHOVIA INSURANCE SERVICES, INC., collectively, will be referred to herein as "Wachovia."

The Appellees Richard L. Toomey and Brian D. Holman, collectively, will be referred to herein as "Appellees" or by name.

The Record transferred from the Court of Appeals will be referred to as "R[docket entry number]-[page]" as these numbers were assigned by the Middle District.

STATEMENT OF THE CASE

On June 30, 1997, IMC purchased the assets of Central Money Mortgage Co., Inc. R-29-3. As part of this agreement, IMC agreed to cause its subsidiary to enter into employment agreements with Holman and Toomey, shareholder in Central Money Mortgage Co., Inc. R-29-3. These employment agreements provided Holman and Toomey a base annual salary of $300,000 each for a five (5) year term beginning on June 30, 1997, to be paid by IMC or its subsidiary. R-29-3.

On July 1, 1998 Federal Insurance Company ("Federal"), part of the Chubb Group of insurance companies, issued an Executive Protective Binder to IMC for the term of July 1, 1998 to July 1, 1999. R-104-8; R-137-102, ex.16. On July 15, 1998, Federal issued Executive Protection Policy No. 8142-20-44A (the "Policy") to IMC. R-137-102, ex.56; R-140-52, 53. The Policy was issued for a Policy Period of July 1, 1998 through July 1, 1999, and provided coverage under an Employment Practices Liability ("EPL") Coverage Section. *Id.* Until later amended by endorsement, the Policy provided coverage for claims of breach of written employment agreements, such as Holman's and Toomey's. Davis Baldwin, Inc. was the insurance broker, and Joel G. Williams was the vice-president in charge of this account. R-137-102, ex.56. Wachovia Insurance Services, Inc. is

the successor by merger to Davis Baldwin, Inc. R-29-2; R-104-3; R-137-102, ex.39.

On April 15, 1999, Federal wrote to Wachovia "to request renewal information" on the Policy. R-104-2; R-137-102, ex.17. IMC was in severe financial trouble by the time of the renewal. R-76-3. IMC did not wish to renew the Policy for a full year, because it was in the process of trying to sell its assets to a third party and did not want to incur the expense of a full year renewal. R-137-102, ex.56. Accordingly, IMC requested that Wachovia ask whether Federal would issue a two-month extension, extending the Policy term from July 1, 1999 to September 1, 1999. R-76-3, 5, 6.

On June 17, 1999, Holman and Toomey filed a Complaint in the U.S. District Court for the District of Maryland against IMC and its attorney, alleging common-law and securities fraud in connection with IMC's purchase of Holman and Toomey's interest in Central Money Mortgage (the "Maryland Suit"). R-29-4; R-137-102, ex.63. The Complaint in the Maryland Suit alleged that IMC purchased Central Money Mortgage Co., Inc. from Holman and Toomey in exchange for IMC stock by falsely representing that IMC would register $5.4 million of the IMC shares for resale, when IMC had no intention of doing so. *Id.* Because the Complaint alleged only common-law and securities fraud claims, these claims were not covered under the EPL Policy. R-137-102, ex.63.

Between June and September, 1999, IMC and Federal agreed to amend the Policy to extend the Policy pending the sale of IMC, subject to several changes in the terms of the Policy. These changes were documented by endorsements dated between June 18, 1999 and October 13, 1999. R-137-102, ex.56.

On July 27, 1999, IMC sent Toomey a form letter under the Workers Adjustment and Retraining Act ("WARN") which stated that it was ceasing all operations of Toomey's employer effective July 27, 1999, and that as a result, his employment would be terminated effective July 27, 1999. R-137-102, ex.26. On August 13, 1999, IMC sent Toomey another letter, this time informing him that he was being discharged for cause. R-137-102, ex.27.

On September 15, 1999, Toomey and Holman filed a motion for preliminary injunction in the Maryland Suit, asserting in part that they had been wrongfully terminated. R-137-102, ex.50.

Endorsement No. 2 to the Employment Practices Coverage Section, dated September 23, 1999, deletes coverage for breach of written employment contracts as of July 1, 1999, stating:

> The company shall not be liable for the part of Loss, other than defense costs, which constitutes an actual or alleged breach of any written employment contract. This exclusion shall not apply to the extent the Insured would have been liable for such Loss in the absence of such written employment contract.

> It is further agreed that the effective date of this endorsement will be 07/01/1999.

R-137-102, ex.64. This exclusion for coverage for breach of written employment contract was required by Federal as a condition for extending the term of the EPL Policy. R-137-102, ex.64.

On October 15, 1999, Holman and Toomey filed a motion for leave to file an amended complaint in the Maryland Suit, which motion was eventually granted. This amended complaint added (among other claims) two new counts for breach of employment contract. Those counts alleged that Holman and Toomey had been employed by IMC under written employment agreements, which IMC had breached. The breach of employment contract counts alleged that after terminating Holman and Toomey without cause on August 13, 1999, IMC had failed to pay amounts due under those written contracts totaling approximately $1.8 million. R-29-6. Holman and Toomey sought and obtained an order granting partial summary judgment on their breach of employment contract claim for $1.8 million. R-137-102 ex.69.

On April 2, 2001, Holman, Toomey, IMC, and the other parties entered into a settlement (the "Settlement Agreement") of the Maryland Suit. A $1.8 million final judgment was entered against IMC pursuant to the partial summary judgment for breach of written employment contract. R-137-102, ex.118; R-54-7, 8. The Settlement Agreement also provides that Holman and Toomey give IMC a

complete release. IMC assigned certain rights IMC may have had against Wachovia to Holman and Toomey, and IMC and its attorney paid $1.5 million to settle the securities claims. R-137-102, ex.118; R-54-1-19.

The Settlement Agreement states, in pertinent part:

> 2. Releases.
>
> a. The Releasors, [Holman and Toomey] . . . do hereby release, acquit and forever discharge the Releasees [IMC] from and against any and all claims, demands, proceedings, actions, causes of action, damages, debts, sums of money, costs, attorneys' fees, obligations, contracts, agreements, and liabilities of whatsoever nature, whether known or unknown, suspected or unsuspected, both at law and in equity, and whether based on contract, tort, fraud, intentional act or violation of any securities or other law, having already resulted or to result at any time in the future; provided, however, that nothing contained herein shall operate to release or waive any claims the Releasors might have or herein acquire against the insurance companies specified in Sections 3(d) and (e) below, Wachovia Davis Baldwin, or any partner, shareholder, associate, employee, servant, agent or broker of Chubb/Federal Insurance Company or Wachovia Davis Baldwin for claims which arise out of the claims referenced in Sections 3(d)-(e) below, including, but not limited to, any claims which may be made directly or indirectly to satisfy the $1.8 million judgment awarded by the Court in the Litigation, and further provided that nothing contained herein shall operate to release any obligations of the parties to this Agreement arising under this Agreement.
>
> * * *
>
> 3. Payment to the Plaintiffs
>
> * * *

> c. The parties acknowledge that these cash payments are not related to the wrongful termination of employment claims. Plaintiffs [Holman and Toomey], however, covenant that they will not seek to enforce against Defendant IMC the $1.8 million judgment entered by the Court in the Litigation . . . .
>
> d. The Plaintiffs contend that their claims for improper termination of their employment agreements are or should have been covered under the terms of that certain Executive Protection Policy issued by Federal Insurance Company, Policy No. 8142-20-44A TPA. IMC will promptly execute the necessary documents to assign to Plaintiffs, without recourse and without any representations or warranties whatsoever, all its rights, including its choses in action, which rights IMC may have under or because of the existence of that policy against Chubb/Federal Insurance Company or others to secure indemnification sufficient to satisfy the $1.8 million judgment awarded Plaintiffs by the Court in the Litigation.

R-54-6, 7, 8.

On August 8, 2003, Toomey and Holman, individually and as assignees of IMC, sued IMC's former insurance broker, Wachovia, in the United States District court for the Middle District of Florida. R-1-1. As later amended, Toomey and Holman sought relief on theories of: (1) intentional interference with their alleged rights under their employment contracts and the Policy; (2) breach of fiduciary duties allegedly owed by Wachovia directly to Holman and Toomey; (3) breach of fiduciary duties owed to IMC; and (4) negligence. R-29-1. The claims for breach of fiduciary duties owed to IMC and negligence were filed based on the

assignment of rights in the Settlement Agreement. R-29-8, 12, 13. Generally, these counts alleged that Wachovia breached duties to IMC in connection with the renewal of the Policy that left IMC without insurance coverage for Holman and Toomey's claims that they were wrongfully terminated.

The Defendants filed a motion for summary judgment, arguing *inter alia* that the Settlement Agreement released Holman and Toomey's claims against IMC, that no monies had been paid on the employment claims, and therefore IMC had suffered no damage as a result of any alleged breach of fiduciary duty or negligence. Hence, the Motion for Summary Judgment argued that IMC had no rights against the Defendants that it could assign to Holman and Toomey. The Motion for Summary Judgment also argued that the breach of fiduciary duty claim is not assignable. R-43-1. This motion was denied. R-70-1.

The case proceeded to jury trial.

At the close of Holman and Toomey's case, Wachovia moved for judgment as a matter of law pursuant to Fed. R. Civ. P. 50, which was granted in large part. R-140-1-19. Following the entry of judgment as a matter of law, the only count that went to the jury was the count for breach of fiduciary duties owed by Wachovia to IMC, and then allegedly assigned to Holman and Toomey in the settlement of the Maryland Suit. *Id.* The jury delivered a verdict on that count in the amount of $1,069,200.00, R-113-1, and judgment was entered on the verdict.

Wachovia filed an appeal to the Court of Appeals for the Eleventh Circuit. R-130-1. Holman and Toomey cross-appealed. R-

Following briefing and oral argument, the Eleventh Circuit certified the following questions to this Court:

I. WHAT IS THE EFFECT OF A SETTLEMENT AGREEMENT BETWEEN TWO PARTIES THAT EXPLICITLY CONTAINS BOTH AN ASSIGNMENT OF CAUSES OF ACTION AGAINST A THIRD PARTY INSURER AND AN IMMEDIATE RELEASE OF THE INSURED ON THE SAME CAUSES OF ACTION?

II. CAN A CLAIM FOR BREACH OF FIDUCIARY DUTY AGAINST AN INSURANCE BROKER BE ASSIGNED?

SUMMARY OF ARGUMENT

In order to prosecute any assigned claim that IMC had against Wachovia for breach of fiduciary duty, Holman and Toomey were first required to prove that IMC incurred liability to Holman and Toomey. This would prove the necessary element of damages to IMC. However, the Settlement Agreement granted a broad and complete release of Holman and Toomey's claims against IMC. This release extinguished the very claim that was an essential predicate of the breach of fiduciary duty claim. Therefore, IMC's claim for breach of fiduciary duty was deficient.

Unlike claims based upon mere negligence or contractual duties, claims for breach of fiduciary duty are predicated upon personal and confidential relationships. Therefore, a claim for breach of fiduciary duty cannot be assigned, and Holman and Toomey could not pursue such a claim in the shoes of IMC against Wachovia.

ARGUMENT

I. STANDARD OF REVIEW.

The question certified by the Eleventh Circuit are questions of law, and therefore the standard of review in this matter is *de novo.*

II. HOLMAN AND TOOMEY RELEASED THEIR CLAIMS AGAINST IMC, AND THEREFORE IMC HAD NO CLAIMS FOR BREACH OF FIDUCIARY DUTY LEFT TO ASSIGN.

For many years, defendants who lack funds have utilized a settlement strategy whereby these cash-strapped defendants assign to the settlement plaintiffs causes of action that the defendants may have against insurers or other third parties arising out of the plaintiff's claim. Also for many years, Florida courts have prescribed the requirements for such settlement agreements, particularly describing what the original plaintiff and the original defendant may and may not agree to, and still have effective assignment of valuable rights.

Florida courts have consistently applied one rule for such settlements. Simply put, if the original plaintiff releases the original defendant, and if the assigned claim is predicated upon the original defendant's liability, then the assignment conveys nothing. Holman and Toomey ignored this admonition when they released IMC in the Settlement Agreement and IMC paid no portion of the $1.8 million judgment. Because IMC was released in the Settlement Agreement, it

paid no portion of the judgment, suffered no damage from any breach of fiduciary duty by Wachovia, and accordingly had no valuable rights left to assign to Holman and Toomey.

In *Rosen v. Florida Insurance Guaranty Ass'n*, 802 So. 2d 291 (Fla. 2001), the Florida Supreme Court catalogued many of the Florida cases on this topic, and reasserted the key fact which determines whether agreements like the Settlement Agreement in this case are effective to assign valuable rights to settling plaintiffs. "[T]he dispositive question . . . is whether the settlement agreement between (the original plaintiff) and (the original defendant) constituted a release . . . ." *Id.* at 295. If the settlement agreement constitutes a release of the original defendant, then there is nothing left to assign. If, instead, the settlement agreement contains only a covenant not to sue or enforce the judgment against the assigning original defendant, then there remains a claim that can be assigned to the original plaintiff.

Numerous Florida cases construing these types of settlement agreements and assignments have turned on this critical fact. For example, in *Rosen; Cunningham v. Standard Guaranty Insurance Company*, 630 So. 2d 179 (Fla. 1994); *Lageman v. Frank H. Furman, Inc.*, 697 So. 2d 981 (Fla. 4th DCA 1997); and *Shook v. Allstate Insurance Co.*, 498 So. 2d 498 (Fla. 4th DCA 1986), these assignments were found to be effective because there was no release of the original defendant, and the claim continued to exist. Conversely, in *Fidelity and Casualty Co. of New*

York v. Cope, 462 So. 2d 459 (Fla. 1985); *Florida Physicians Insurance Reciprocal v. Avila,* 473 So. 2d 756 (Fla. 4th DCA 1985); and *Kelly v. Williams,* 411 So. 2d 902 (Fla. 5th DCA 1982), the settlement agreements and assignments included a release of the original defendant, which released the very claims that were an essential element of the claim being assigned. In each of these cases, the court relied on this fact to conclude that the settlement agreement and assignment conveyed nothing to the original plaintiff. The Eleventh Circuit, too, has recognized this critical factor of a release. *Clement v. Prudential Property & Casualty Insurance Co.,* 790 F. 2d 1545, 1548 (11th Cir. 1986) ("Thus if an injured third party releases the insured from liability, any bad faith claim then retained by the insured arising out of his liability to the injured third party ceases to exist, because the insured is no longer exposed to any excess damages." *See also, Romano v. American Casualty Co of Reading, Pennsylvania,* 834 F. 2d 968, 970 (11th Cir. 1987) (the bad faith claim of the alleged tort feasors against its insurer is extinguished if the insured tort feasor is not liable); and *Camp v. St. Paul Fire and Marine Insurance Co.,* 958 F. 2d 340 (11th Cir. 1992) (questioning whether a discharge in bankruptcy would operate as a release of the claim that had been assigned in the settlement agreement and assignment.)

As the Eleventh Circuit recognized in its opinion, Holman and Toomey clearly and unambiguously released IMC of all claims in the Settlement

Agreement. Slip Opinion, p.11. Using language that could be drawn from any standard form of general release, Holman and Toomey stated that they,

> Do hereby release, acquit and forever discharge [IMC] from and against any and all claims, demands, proceedings, actions, causes of action, damages, debts, sums of money, costs, attorneys' fees, obligations, contracts, agreements, and liabilities of whatsoever nature, whether known or unknown, suspected or unsuspected, both at law and in equity, and whether based on contract, tort, fraud, intentional act or violation of any securities or other law, having already resulted or to result at any time in the future . . . . R-54-6.

Holman and Toomey have argued that the exception in the Settlement Agreement to reserve "any claims [Holman and Toomey] might have or herein acquire against . . . Wachovia [and various insurors]" preserved Holman and Toomey's claims against Wachovia. However, by its phrasing of the certified questions, as well as its express ruling, Slip Opinion, p.11, the Eleventh Circuit has rejected this interpretation of the Settlement Agreement, and has not certified that question. *Id.* Holman and Toomey did not preserve any claims they had against IMC at all.

The very Settlement Agreement by which Holman and Toomey acquired this claim also extinguished it, by releasing IMC from liability. Therefore, under the clear and uncontradicted authority represented by *Rosen* and *Cope,* there is no longer any claim against Wachovia that can be enforced by Holman and Toomey.

The Opinion of the Eleventh Circuit recognized these principles of Florida law, but expressed its question because the release and purported assignment

occurred simultaneously, in the same document. App.11, 13. This Court's recent opinion in *Rosen v. Florida Insurance Guaranty Ass'n, supra,* implies the answer to this question. This Court stated that "the dispositive question in [*Rosen* was] whether the settlement agreement between Rosen and the AB Law Firm constituted a release of the insured and FIGA from all further liability." 802 So. 2d at 295. In the discussion that follows, it is apparent that if this question had been answered in the affirmative, then the release would have controlled over the assignment contained in the same settlement agreement. Because the court concluded that a release was not intended, the assignment was deemed effective. 802 So. 2d at 297, 298.

The Settlement Agreement in this case presents the converse of the settlement agreement in *Rosen.* In the Settlement Agreement, the release of IMC was clear, unequivocal and immediate. Framing the same "dispositive question" as was framed in *Rosen* therefore results in the opposite answer. Because the Settlement Agreement did contain a release of IMC, there was no claim for IMC to assign to Holman and to Toomey.

A similar result follows from *Kelly v. Williams, supra.* In that case, the parties entered into a single stipulation which purported to preserve a third party bad faith claim and at the same time in the same document fully protect the insured against any excess judgment. The Fifth District held that the plaintiff's "attempted

reservation of his rights against the insurer were not effective, since in the body of the stipulation, the baby was thrown out with the bath water." 411 So. 2d at 905. The same can be said of the Settlement Agreement in this case.

Toomey and Holman may argue that it was not their intent to release IMC in the Settlement Agreement, and thus preclude themselves from pursuing any assigned claims. However, there is no ambiguity in the release language of the Settlement Agreement. The release must be given effect according to its plain words. A similar situation was presented to this Court in *Fidelity and Casualty Co. of New York v. Cope, supra.* In that case, this Court expressly noted that there was no intent to release the insurer from an excess claim suit by executing a release in favor of its insured. 462 So. 2d at 461. Nevertheless, this Court enforced the release as written and held that the derivative claim against the insurer could not be maintained.

Holman and Toomey may rely upon language in *Rosen* and *Bodzo Realty, Inc. v. Willits International Corp.,* 428 So. 2d 225 (Fla. 1983), to the effect that releases should be interpreted according to the intent of the parties. However, in neither of these cases was there a clear and explicit release that was ignored merely because the parties later realized they had made a mistake. To be sure, the Settlement Agreement in this case also includes a covenant not to sue in addition to the release, and contemplates that Holman and Toomey would file lawsuits against

Wachovia and others, but the same thing was also true in *Cope, Kelly,* and (at least initially) *Avila.* The parties in the Eleventh Circuit's decision in *Clement* had a similar intent, with the assigned claim actually to be pursued by the released party rather than the assignee. Yet, in none of these cases, despite this intent, did the court vary the clear language of the release which extinguished the underlying claim.

The agreement of the parties may not be re-written nor may words be ignored in the guise of interpretation, *BMW of North America v. Krathen,* 471 So. 2d 585, 587 (Fla. 4th DCA 1985). Apparently, IMC demanded a release as a condition of the Settlement Agreement. In the end, Holman and Toomey simply struck a bad bargain when they agreed to the Settlement Agreement and gave IMC the release it demanded. The courts are powerless to relieve them from the consequences of this bad bargain, *Barakat v. Broward County Housing Auth.*, 771 So. 2d 1193, 1195 (Fla. 4th DCA 2000), regardless of any contrary intent, *BMW of North America v. Krathen, supra.*

Holman and Toomey's multimillion dollar claims against IMC in the Maryland Suit were actively litigated in federal court for years. Presumably, the Settlement Agreement was fully negotiated through skilled and learned counsel. The language of the Settlement Agreement was the best that Holman and Toomey

could negotiate. Unfortunately for them, it is fatal to their efforts to pursue any assigned claims against Wachovia.

III. CAUSES OF ACTION FOR BREACH OF FIDUCIARY DUTY ARE PERSONAL AND NOT ASSIGNABLE.

This Court recently restated the Florida law regarding which claims or causes of action may be assigned, and which may not. *Cowan Liebowitz & Latman, P.C. v. Kaplan,* 902 So. 2d 755 (Fla. 2005). The law may be summarized by saying that claims based on a breach of a duty sounding in mere negligence or contract may be assigned. Claims for breach of duties arising out of a confidential relationship, may not be assigned.

The important part of the Eleventh Circuit's question is not the identification of the parties as an insurance broker and a client. Rather, the important part is the identification of the tort, and the type of duty allegedly breached. Thus, the focus of the inquiry should be how a breach of fiduciary duty claim fits into the *Cowan* framework.

In *Cowan,* this Court was faced with a question of whether a claim for legal malpractice in the preparation of a private placement memorandum could be assigned to creditors who were duped by the inaccurate information in the private placement memorandum. Receding from overbroad dicta in prior cases, this Court noted that the legal services in preparing the private placement memoranda did "not involve personal services or implicate confidentiality concerns." *Id.* at 761. This factor distinguished the claims in *Cowan* from most legal malpractice claims, "because in most cases the lawyer's duty is to the client." *Id.* at 757. This Court

drew a fundamental distinction between the majority of unassignable legal malpractice claims "involving a confidential, fiduciary relationship" from those assignable claims involving a "duty to the public." *Id.* at 761 (internal quotations omitted.)

The verdict and judgment in this case were not based upon a breach of either a duty under negligence or contract. Rather, the only issue that went to the jury was a claim for breach of fiduciary duty, purportedly assigned to Holman and Toomey.

"A fiduciary is a person who stands in a special relationship of trust, confidence or responsibility in his obligation to others." *Alvarez v. State,* 800 So. 2d 237, 238 fn.4 (Fla. 3d DCA 2001). The relationship of a fiduciary is an intensely personal one that exists "whenever one trusts and relies on another." *Earls v. Johnson,* 172 So. 2d 602, 603 (Fla. 2d DCA 1965) (internal quotes omitted). The relationship "exists when confidence is reposed by one party and the trust accepted by the other, when the confidence has been imposed and betrayed, or when influence has been acquired and abused." *Dale v. Jennings,* 90 Fla. 234, 107 So. 175 (Fla. 1926).

Because a fiduciary relationship is a personal one, depending upon a confidential relationship between the parties, proper application of the distinctions in *Cowan* dictates that a breach of fiduciary duty claim may not be assigned. Like

the usual and non-assignable legal malpractice claim, the breach of fiduciary duty claim involves a confidential, personal relationship. 902 So. 2d at 761.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court answer certified question I that no such assignment is effective, and answer certified question II in the negative.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that TIMES NEW ROMAN, 14 pt., is used in this brief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a copy of the foregoing has been mailed this 22nd day of June 2006, to counsel of record as noted below.

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