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.

REPLY 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.

ARGUMENT

I. STANDARD OF REVIEW.

Toomey and Holman apparently accepted this court's standard of review as *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.

The reading of the Settlement Agreement urged by Toomey and Holman would require this Court to change the words of the Release. As written, the extremely broad release language releases IMC of all claims. "The Releasors [Holman and Toomey] . . . do hereby release, acquit and forever discharge the Releasees [IMC and others] 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, App.1, p.3.

The exceptions quoted by Toomey and Holman are not exceptions to the release of IMC, but are limitations on any release of Wachovia and other entities

involved in insuring IMC. The limitation to their release provides that "Nothing contained herein shall operate to release or waive any claims [Holman and Toomey] might have or herein acquire against . . . Wachovia . . . ." This is not a limitation on the release that was granted to IMC. While this preserves any claims that Holman and Toomey might have against Wachovia, it does not preserve any claims they might have against IMC.

Holman and Toomey's repeated misstatements notwithstanding, Answer Brief, p.15, 16, 18, 21, 26, 28, Wachovia does not claim to have been released by Holman and Toomey. Rather, Holman and Toomey's release of IMC eliminated an essential predicate of IMC's cause of action against Wachovia that Holman and Toomey, as assignees of IMC, have attempted to pursue.

Holman and Toomey purport to find some reservation of their claims against IMC in connection with language in the Release describing the $1.8 million judgment. Answer Brief, p.14, 15, n.3. However, nothing in this language preserves any obligation of IMC to pay that $1.8 million judgment. Therefore, this is not a limitation of their release of IMC. There is no reason for this Court to disagree with the Eleventh Circuit and its correct interpretation that the Release is a complete release of IMC, which is not diminished by any reservation of claims that Toomey and Holman have against Wachovia.

In their Answer Brief in this Court, Holman and Toomey go even further in their efforts to re-write the Settlement Agreement than they did before the Eleventh Circuit. Now, Holman and Toomey ask this Court to read in a limitation to the release language that would limit the release to the securities claims they had pursued in the Maryland Litigation. Answer Brief, p.12, 16. Holman and Toomey provide no textual basis in the Settlement Agreement for this newly minted argument. Of course, this Court cannot add limitation clauses to the Settlement Agreement in the guise of interpretation. Any arguments made by Holman and Toomey predicated on a characterization of this broad and general release as a "limited release," Answer Brief, p.16, 18, are contradicted by the language of the document.

Holman and Toomey reveal their confusion regarding the claims that they have against IMC, the claims that IMC has against Wachovia, and the claims that Holman and Toomey have against Wachovia, in their discussion at page 18 of their Answer Brief and in their discussion of *Rosen v. Florida Insurance Guaranty Association*, 802 So. 2d 291 (Fla. 2001). Holman and Toomey quote the critical language from *Rosen:* "[T]he underlying claim was not eliminated with the execution of the settlement agreement." *Rosen*, 802 So. 2d at 298, Answer Brief, p.18. In the very next paragraph, Holman and Toomey make the incorrect assumption that the underlying claim is the claim "that IMC might have against

Wachovia." Answer Brief, p.18. This is incorrect. The underlying claim is the claim that Holman and Toomey had against IMC, and which was expressly released without reservation.

Wachovia concedes that Holman and Toomey intended to pursue the claims assigned to them by IMC. However, this intent does not alter the language of the Settlement Agreement. This Court, in *Fidelity & Casualty Co. of New York v. Cope*, 462 So. 2d 459, 460 (Fla. 1985), expressly noted that the plaintiff "did not intend to release [the insurer] from an excess claim suit" by releasing the insured. Notwithstanding this intent, this Court looked to the release as written and held that the derivative claim could not be maintained when the underlying claim was released. This is nothing more than a reiteration of the black letter law that contracts will be enforced in accordance with their unambiguous terms, notwithstanding a contrary subjective intent. *Hamilton Const. Co. v. Board of Public Instruction of Dade County*, 65 So. 2d 729 (Fla. 1953).

Other operative language from *Rosen* is also cited, but misconstrued, by Toomey and Holman in their Answer Brief. *Rosen* is correctly quoted for the proposition that a "A release is an outright cancellation or discharge of the entire obligation as to one or all of the alleged joint wrongdoers. A covenant not to sue recognizes that the obligation or liability continues but the injured party agrees not to assert any rights grounded thereon against a particular covenantee." *Rosen*, 802

So. 2d at 295. Based upon this statement of the law in *Rosen,* Holman and Toomey's release of IMC was clearly a release. Holman and Toomey's conclusion that this was a covenant not to sue, merely because Holman and Toomey reserve their rights against Wachovia (not IMC), Answer Brief, p.19, is not supported by *Rosen.*

Holman and Toomey attempt to rely on parol evidence to alter the plain language of the Settlement Agreement, reciting testimony of one of the Maryland lawyers and their view of how the parties to the Settlement Agreement have treated the Settlement Agreement, along with subsequent acts in the Maryland Court. Answer Brief. p.19, 20. Resort to such parol evidence is not necessary and not even proper because the Settlement Agreement is not ambiguous. *J.M. Montgomery Roofing Co. v. Fred Howland, Inc.*, 98 So. 2d 484 (Fla. 1957). Entering an ineffectual, released judgment against IMC on a released claim does not vitiate or undermine the release contained in the plain language of the Settlement Agreement.

B. Wachovia's Liability To IMC Is Derivative Of And Dependant On Toomey And Holman's Claims Against IMC.

In this subsection B., Toomey and Holman make unsupported leaps of reasoning in an effort to assert that Wachovia's liability to IMC is unrelated to IMC's liability to Toomey and Holman. They quote the verdict form, and its

listing of nine different articulations of Wachovia's duty to IMC. However, for every single one of these duties, IMC would suffer no damage upon breach unless IMC was also found liable to Holman and Toomey. Therefore, the breach of any or all of these duties would give rise to no liability on the part of Wachovia to IMC unless IMC was also required to pay damages to Holman and Toomey. Following the release in the Settlement Agreement, IMC is not required to pay damages to Holman and Toomey. Therefore, IMC has no damages and no claim against Wachovia based upon any breach of these duties.

In an effort to avoid this inevitable conclusion, Holman and Toomey assert that the mere entry of a paper judgment against IMC constitutes $1.8 million in damages against it. However, such a judgment is no damage at all in light of the unambiguous release language of the Settlement Agreement. Indeed, in *Cope* there was a judgment entered on the underlying claim. However, the release prevented that judgment from supplying the damages element for the derivative claim against the insurer. The same is true here.

Holman and Toomey's citation to *AKS v. Southgate Trust Company,* 844 F. Supp. 650 (D. Kansas 1994) is self-defeating because it actually supports the distinctions Wachovia has been making between releases and covenants not to sue. The *AKS* court emphasized that the settling defendant received only a covenant not to sue and remained "legally obligated to pay the judgment." 844 F. Supp. at 657.

Toomey and Holman's suggestion that the *AKS* "insured was released from its obligation to pay," Answer Brief, p.25 n.7, is a misreading of the case. A judgment that the defendant is not obligated to pay as a result of a release is no damage to the defendants. The cases relied upon by Holman and Toomey at page 25 of the Answer Brief do not involve releases, and assume that there was an obligation to pay the judgment. *See, Berkeley v. Home Ins. Co.,* 68 F. 3d 1409 (D.C. Cir. 1995); *Delancy v. St. Paul Fire & Marine Ins. Co.,* 947 F. 2d 1536 (11th Cir. 1991); *Roden v. Empire Printing Co.,* 135 F. Supp. 665 (D. Alaska 1955).

In a classic bootstrapping argument, Holman and Toomey assert that the jury's verdict in their favor supports a conclusion that IMC was damaged notwithstanding the Release. Answer Brief, p.25, n.8. As a result of the district court's misunderstanding of Florida law, Wachovia was unable to argue that Holman and Toomey had released IMC. The jury never should have been asked this question, and should have been properly instructed if it was asked.

C. Applying The Terms Of The Settlement Agreement As Written Gives Holman And Toomey All Of The Benefits They Were Able To Negotiate.

In this subsection C., Holman and Toomey make a blatant plea to re-write their Settlement Agreement with IMC to comport with their intent, notwithstanding the words that they actually used in the Settlement Agreement. In essence, they argue that they didn't mean what they said. However, while contracts are to be

interpreted in accordance with the parties' intent, that interpretation must be consistent with the words that the parties used. *Moore v.Chodoron,* 925 So. 2d 457, 461 (Fla. 4th DCA 2006). Words cannot be added or subtracted in the guise of interpretation. *Jefferson Ins. Co. v. Fischer,* 166 So. 2d 129, 130 (Fla. 1964); *Discovery Prep. & Cas. Ins. Co. v. Beach Cars of West Palm, Inc.*, 929 So. 2d 729, 732 (Fla. 4th DCA 2006).

IMC and its attorneys in the Maryland Litigation apparently insisted upon receiving a release in addition to the mere covenant not to sue. In order to obtain some recovery on their securities claims and to minimize litigation risk and expense, Toomey and Holman apparently acceded to this demand. Holman and Toomey were unable to negotiate a settlement agreement with IMC that preserved their claims against IMC for the purpose of permitting them to pursue the assigned claims against Wachovia. Now, Toomey and Holman attempt to obtain from this Court what they could not obtain in the settlement negotiations with IMC. The Settlement Agreement should not be re-written merely because Toomey and Holman are disappointed with the result of their negotiation.

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

Toomey and Holman sued on an assigned claim for breach of fiduciary duty. They also sued based on an assigned claim for negligence. However, the assigned claim for negligence is not before this Court, as the district court directed a verdict in favor of Wachovia at trial, and Holman and Toomey have not effectively challenged this ruling. Thus, the question before this Court is not whether a negligence claim against an insurance broker can be assigned. Indeed, that question has been resolved in *Forgione v. Dennis Pirtle Agency,* 701 So. 2d 557 (Fla. 1997). Instead, the question is whether a fiduciary duty owed by an insurance broker may be assigned. Holman and Toomey's unprincipled assumption that the negligence duty and the fiduciary duty are identical or indistinguishable has no support in Florida law, and Holman and Toomey do not purport to find any such support.

Cowan, Liebowitz & Latman, P.C. v. Kaplan, 902 So. 2d 755 (Fla. 2005), itself provide the justification for distinguishing between fiduciary duties and negligence duties, whether they arise between an insurance broker and an insured, an investment advisor and an investor, an attorney and client, or merely between friends. The duty of a fiduciary is a higher duty, precisely because it is based upon the trust and confidence that is personally reposed in the fiduciary. *Earls v. Johnson,* 172 So. 2d 602 (Fla. 2d DCA 1965). For this reason, such a duty is personal, and no cause of action based on the breach of such a duty may be assigned.

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 25th day of August 2006, to counsel of record as noted below.

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