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IN THE SUPREME COURT OF FLORIDA

CASE NUMBER 76,243

**DONALD E. BLANCHARD, JR., and
PATRICIA S. BLANCHARD,**

Plaintiffs-Appellants,

vs.

**STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY, an Illinois
corporation,**

Defendant-Appellee.

ON CERTIFICATION FROM THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
TO THE SUPREME COURT OF FLORIDA
PURSUANT TO ARTICLE 5, SECTION 3(b)(6) OF THE FLORIDA CONSTITUTION

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

MARGOL & PENNINGTON, P.A.
Suite 1702
American Heritage Tower
76 South Laura Street
Jacksonville, FL 32202

By: C. Rufus Pennington, III
Florida Bar Number 329029
Rodney S. Margol
Florida Bar Number 225428

Attorneys for Plaintiffs-Appellants

Table of Contents

Reply Brief of Plaintiffs–Appellants 1
Conclusion 5
Certificate of Service 5

Table of Citations

<u>Cases</u>	<u>Page(s)</u>
<i>Butchikas v. Travelers Indemnity Co.</i> , 343 So. 2d 816 (Fla. 1976)	2, 4
<i>Fidelity & Casualty Co. of New York v. Cope</i> , 462 So. 2d 459 (Fla. 1985)	4
<i>Fidelity & Casualty Ins. Co. v. Taylor</i> , No. 84-1884 (11th Fla. Cir. Ct. Nov. 4, 1988)	3
<i>Jones v. Continental Insurance Co.</i> , 670 F. Supp. 937 (S.D. Fla. 1987), <i>after appeal and remand</i> , 716 F. Supp. 1456 (S.D. Fla. 1989)	2, 3
<i>Jones v. Continental Insurance Co.</i> , 716 F. Supp. 1456 (S.D. Fla. 1989)	3
<i>Opperman v. Nationwide Mutual Fire Insurance Co.</i> , 515 So.2d 263 (5th DCA 1987), <i>review denied</i> , 523 So. 2d 578 (Fla. 1988)	1, 2
<i>Rowland v. Safeco Ins. Co. of Am.</i> , 634 F. Supp. 613 (M.D. Fla. 1986)	2
<i>State Farm Mutual Automobile Insurance Co. v. Lenard</i> , 531 So. 2d 180 (Fla. 2d DCA 1988)	1
<i>United Guaranty Residential Insurance Co. of Iowa v. Alliance Mtg. Co.</i> , 644 F. Supp. 339 (M.D. Fla. 1986)	2
<i>Wahl v. Insurance Co. of North America</i> , No. 87-1187-CA-17 (19th Fla. Cir. Ct. June 6, 1989)	3

Statutes, Laws and Rules

Section 624.155, Florida Statutes (1987)	<i>passim</i>
Fla. Laws Ch. 90-119	3
1982 Ins. Code Sunset Revision (HB 4F; as amended HB 10G) (June 3, 1982)	3

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

Lest the Court be inadvertently misled by State Farm's suggestion that Mr. and Mrs. Blanchard only alleged that the insurer "refused to make any good faith offer to settle their claims for those benefits *prior to the time that they instituted* their State Court action," (State Farm's brief at page three, emphasis in original), the complaint below very clearly alleged that the bad faith conduct continued after the suit was initiated, during the trial of the State Court action, and, indeed, after the State Court action was tried.

[T]he defendant [State Farm] continued its course of conduct in refusing to attempt in good faith to settle the claims when it could and should have done so, had it acted fairly and honestly towards the plaintiffs and with due regard for their interests. The defendant continued to engage in its bad faith refusal to make a reasonable offer of settlement *through, and after, the trial* of the aforesaid civil action.

(R1-1-4; emphasis added). Thus, the allegations in the complaint at issue in the present case (which must be accepted as true for purposes of this proceeding) are that the bad faith conduct was occurring while the contractual claim was being litigated and, for that matter, while the jury was deliberating upon the validity of the contractual claim.

We must also respectfully disagree with State Farm's characterization of the rule in *Schimmel* as a settled point under "currently existing Florida intermediate appellate law." (Brief at page four). It is not. To the contrary, *Schimmel* has been directly criticized by the Second District in *State Farm Mut. Automobile Ins. Co. v. Lenard*, 531 So.2d 180 (Fla. 2d DCA 1988); its holding is at odds with the Fifth District's decision in *Opperman v. Nationwide Mut. Fire Ins. Co.*, 515 So.2d 263 (5th DCA 1987), *review denied*, 523 So.2d 578 (Fla. 1988); and the Eleventh

Circuit Court of Appeals has characterized the state of the law as "conflict among the district courts of appeal" (Slip opinion at 3119).

We also disagree with State Farm's suggestion that the measure of damages in a Section 624.155 claim does not include the excess of the damages assessed in the first action over the policy limits. Clearly, the "excess verdict" was one of the sanctions which the Legislature intended would apply in the case of an insurer who was found guilty of a violation of Section 624.155. See *Jones v. Continental Ins. Co.*, 670 F. Supp. 937, 941 (S.D. Fla. 1987), *after appeal and remand*, 716 F. Supp. 1456 (S.D. Fla. 1989); *Opperman v. Nationwide Mut. Fire Ins. Co.*, 515 So.2d 263 (5th DCA 1987), *review denied*, 523 So.2d 578 (Fla. 1988); Staff Report, 1982 Ins. Code Sunset Revision (HB 4F; as amended HB 10G) (June 3, 1982). See also *United Guaranty Residential Ins. Co. of Iowa v. Alliance Mtg. Co.*, 644 F. Supp. 339, 342 n.4 (M.D. Fla. 1986); *Rowland v. Safeco Ins. Co. of Am.*, 634 F. Supp. 613, 615 (M.D. Fla. 1986).

The reasons why an excess verdict should be recoverable in a first-party UM bad faith action were well summarized by the Court in *Jones*:

In a third-party suit damages may include the "excess" judgment over the policy limits. *Butchikas [v. Travelers Indem. Co.]*, 343 So.2d 816, 817-18 (Fla. 1976)]. To ascertain whether the excess award is properly recoverable in first party suits the statute, its legislative history, and current state precedent should be reviewed.

Section 624.155(3) provides:

Upon adverse adjudication at trial or upon appeal, the insurer shall be liable for damages together with court costs and reasonable attorneys fees incurred by plaintiff.

The legislative history states:

[Section 624.155] requires insurers to deal in good faith to settle claims. Current case law requires this standard in liability claims,

but not in uninsured motorist coverage; the sanction is that the company is subject to a judgment in excess of policy limits. This section would apply to all insurance policies.

Staff Report, 1982 Insurance Code Sunset Revision (HB 4F; as amended HB 10G)(June 3, 1982).

The Legislature's comments support the conclusion that it intended the full contours of the statute to be determined by reference to general principles of Florida insurance law including third-party doctrine. *Jones v. Continental*, 670 F.Supp. at 944. As this Court stated previously:

It would be an illogical anomaly to permit an insurance company to proceed to arbitration even though it knew prior to arbitration that it had no reasonable defense to payment, while holding another insurance company liable for bad faith for proceeding to trial when it knew prior to trial that liability was reasonably clear. ***The damages to the insured would be the same in either case and the policy reasons for imposing bad faith liability would be easily thwarted.***

Jones v. Continental, 670 F. Supp. at 945 (emphasis supplied).

Thus, the statute's purpose is to provide the same remedy in both first-party and third-party bad faith claims -- the excess award. In fact, Florida courts which have construed the statute have looked to third-party bad faith law as the basis for their decisions. Moreover, some Florida courts have ruled specifically that an excess arbitration award may be recovered as damages under the statute in a first-party suit. *Wahl v. Insurance Co. of North America*, No. 87-1187-CA-17 (19th Fla. Cir. Ct. June 6, 1989); *Fidelity & Casualty Ins. Co. v. Taylor*, No. 84-1884 (11th Fla. Cir. Ct. Nov. 4, 1988).

Jones v. Continental Ins. Co., 716 F. Supp. 1456, 1459-60 (S.D. Fla. 1989).¹

¹State Farm attempts to avoid liability for an excess verdict by arguing that the case is controlled by Fla. Laws Ch. 90-119. (Brief at 22-23, n.3). However, by its express language, that law does not apply to this case, which accrued years before the effective date of the amendment. Moreover, the 1990 amendment is in no way inconsistent with the legislative history establishing the intent to equate a first-party insurer's liability for bad faith refusal to settle to the exposure of a third-party liability insurance carrier.

Fidelity & Casualty Co. of New York v. Cope, 462 So.2d 459 (Fla. 1985), relied upon by State Farm, is not to the contrary. The issue in *Cope* was whether an injured party who had secured a judgment in excess of the tortfeasor's liability coverage could maintain a common law bad faith action after executing a complete release in favor of the tortfeasor. Clearly, this has nothing to do with the issue of the amount of damages recoverable in the absence of a release. Indeed, it is a completely settled point of law that in a third party bad faith situation, such as in *Cope*, the excess of the damages over the policy limits is a recoverable element of damages in a bad faith action. *Butchikas v. Travelers Indem. Co.*, 343 So.2d 816, 817-18 (Fla. 1976).²

We entirely agree with State Farm, however, on the issue of when a cause of action under Section 624.155 arises. Quite clearly, it arises when the bad faith conduct occurs and results in compensable damages. The Blanchards agree that, particularly in the present case, accrual of the cause of action was not completed until after the trial of the contractual claim. Thus, rather ironically, on the central issue in this proceeding (i.e., the issue of when a Section 624.155 cause of action accrues), the parties are in agreement: it does not accrue until the alleged bad faith conduct occurs.

²It is also rather illogical, and certainly inconsistent, for State Farm to maintain that, if (contrary to State Farm's position) a cause of action under section 624.155 arises concurrently with the contractual cause of action and if (contrary to State Farm's position), the contractual and statutory causes of action may permissively be joined, then the joinder of the two should be *mandated*, but the statutory action should be *mandatorily abated*.

Conclusion

For the foregoing reasons, plaintiffs-appellants submit that the first certified question should be answered in the negative; that, if the Court reaches the second certified question, then it should be answered in the affirmative; and that, if the Court reaches the third certified question, it should be answered in the negative.

MARGOL & PENNINGTON, P.A.

By: 

C. Rufus Pennington, III
Florida Bar No. 329029
Rodney S. Margol
Florida Bar Number 225428
Suite 1702, American Heritage Tower
76 South Laura Street
Jacksonville, Florida 32202
(904) 355-7508
Attorneys for Plaintiffs-Appellants

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I HEREBY CERTIFY that a true copy of the foregoing has been furnished to Stephen E. Day, Esquire, and Ada A. Hammond, Esquire, Taylor, Day & Rio, 10 South Newnan Street, Jacksonville, Florida 32202; Roy D. Wasson, Esquire, 44 West Flagler Street, Suite 402, Miami, Florida 33130; and Sharon L. Stedman, Esquire, Post Office Box 1873, Orlando, Florida 32802, by U.S. Mail this 21st day of August, 1990.



Attorney