Third District Court of Appeal

State of Florida, January Term, A.D. 2011

Opinion filed March 30, 2011.
Not final until disposition of timely filed motion for rehearing.

No. 3D09-3234
Lower Tribunal No. 06-25675

United Automobile Insurance Company,
Appellant,

vs.

The Estate of Stephen D. Levine, assignee of Jose Hernandez, assignor, by and through Tracy Howard, as Personal Representative,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Ellen L. Leesfield, Judge.

White & Case, and Raoul G. Cantero, III, and Rachel Wagner Furst, for appellant.

Ross & Girten, and Lauri Waldman Ross; Freidin Dobrinsky, and Philip Freidin; Slawson, Cunningham, Whalen & Gaspari, and Richard W. Slawson and Fred Cunningham, for appellee.

Before WELLS, SALTER, and EMAS, JJ.

SALTER, J.

United Auto Insurance Company (UAIC) appeals a final judgment and orders denying post-trial motions in a case brought under the bad faith statute.[1] We affirm.

UAIC raises four points on appeal. First, it argues that the trial court abused its discretion in excluding evidence regarding the insurer's prompt action in settling two of four separate policy-related claims arising from a tragic two-car collision. Second, UAIC contends that the trial court abused its discretion by affording the appellee, plaintiff below, an opportunity to re-open her case and offer "surprise testimony" to prove her status as the assignee of UAIC's insured. Third, UAIC argues that a jury instruction regarding "no realistic possibility of settlement within the policy limits" impermissibly shifted the burden of proof from the appellee to UAIC. Fourth, UAIC maintains that the appellee failed to prove a prima facie case of insurer bad faith under the statute and applicable precedent.

We address each of these points in order, although only the first issue merits extended analysis. Before doing so, however, we note one feature of the trial below that distinguishes the record here from many other insurance bad faith cases: no expert witness testified on behalf of UAIC regarding claims-handling policies generally or in this specific case. Two expert witnesses testified for the appellee regarding these issues.

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[1] § 624.155, Fla. Stat. (2002).

I. Background

In December 2001, UAIC's insured under a personal injury protection (PIP) policy, Jose Hernandez, drove his flatbed truck into an automobile driven by Steven D. Levine. Levine and his passenger, Lourdes Maldonado, were killed. Hernandez and his passenger, Ruben Soto, were seriously injured. Hernandez's PIP policy covered $10,000 per person for bodily injury, with an aggregate limit of $20,000, as well as $10,000 of property damage.

Levine's spouse, Tracy Howard, was appointed personal representative of his estate. She retained an attorney to investigate the estate's claims arising from the accident and death. These included potential claims against Hernandez and his insurer, claims for uninsured/underinsured coverage under a non-UAIC policy, a claim against an establishment that served alcoholic beverages to Hernandez in the hours before the accident, and other claims.

UAIC assigned a non-attorney adjuster to the case who determined that there were four prospective claims against Hernandez under the policy: bodily injury claims on behalf of the Levine estate, the Maldonado estate, and Soto, and a property damage claim on behalf of the owner of the automobile driven by Levine and destroyed in the accident. On February 4, 2002, Levine's estate notified Hernandez of its claim against him. Two days later, Hernandez's attorney notified UAIC of the claim (although UAIC had begun its investigation of the claim

immediately after the accident). The same day, UAIC tendered to counsel for the Levine estate a check for the $10,000 bodily injury limit, transmitting it with a "Release of All Claims," a "Hold Harmless and Indemnification Agreement," and a transmittal letter. The letter indicated that the release was provided "for execution," but the letter also requested five additional documents: (1) a subrogation waiver from any uninsured motorist carrier, if applicable, (2) disclosure of all liens and medical/health insurance subrogation claims against the proffered settlement, (3) written confirmation that all such liens and subrogation claims would be satisfied out of the proceeds of this settlement, (4) the "Hold Harmless Agreement," and (5) letters of administration appointing the personal representative of the estate. The transmittal letter was unclear whether the execution and return of the specified documents was a condition to the "prompt and proper disbursement" of the tendered amount.

The release and hold harmless agreements were forms modified to identify the claim and policy numbers as well as the identity of the payee and UAIC's insured. The terms of these agreements were sweeping in their breadth and scope.[2]

[2] For example, the Estate was to indemnify and hold harmless UAIC, "its heirs, assessors [sic] and assigns" from and against an assortment of other claims or liens, including "any and all other Insurer's claims or subrogated liens." The release included a recital that the personal representative of the estate was "of lawful age" and that the release was to bind "any heirs, executors, administrators, successors and assigned [sic]" as against UAIC, "their agents, servants, successors, heirs, executors, administrators and all other persons, firms, corporations,

II. Analysis

A. Exclusion of Evidence Regarding the Maldonado and Soto Settlements

Section 624.155 (1)(b)(1), Florida Statutes, affords "any person," including an insured, a civil remedy against an insurer for "[n]ot 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 her or his interests . . . ." UAIC argues that "claims" and "under all the circumstances" refers to all four claims against its insured, Hernandez, and all the circumstances pertaining to all four of those claims. More specifically, UAIC contends that it was entitled to show the jury that UAIC settled the Soto and Maldonado claims quickly and by tendering more than the aggregate policy limits.

The issue was presented to the trial court via the Levine estate's motion in limine. The Levine estate sought to exclude evidence regarding the settlements by UAIC and (a) the Maldonado estate as against Hernandez, and (b) Soto as against Hernandez, although argument regarding the motion was principally directed to UAIC's settlement of the claim of the Maldonado estate against Hernandez. UAIC argued that the prompt resolution of the Maldonado estate claim—which occurred

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association [sic] or partnerships of and from any and all claims, actions, causes of action, demands, rights damages [sic], costs, loss of service, expenses and compensation whatsoever" including any "known and unknown, foreseen and/or unforeseen" injuries and damage resulting or to result from "the accident, casually [sic] or event" identified by date and location.

because UAIC did not require the Maldonado estate to sign the release as a precondition for negotiating the check in payment of that claim—tended to prove good faith vis-à-vis UAIC's insured, Hernandez.

We review the trial court's exclusion of the evidence under the abuse of discretion standard, a standard testing whether the trial court's conclusion is "arbitrary, fanciful, or unreasonable." H & H Elec., Inc. v. Lopez, 967 So. 2d 345, 347-48 (Fla. 3d DCA 2007) (quoting Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980)). In the case at hand, the trial court recognized that the fact that one independent claimant negotiated separate settlement terms (no release required) with UAIC did not tend to prove whether UAIC acted properly regarding the claim of another independent claimant. To hold otherwise would be to risk distracting the jury—which was to focus on UAIC's efforts or lack of effort in settling the Levine estate's claim against Hernandez—with a "trial within a trial" on the collateral question of why the Maldonado estate and UAIC settled with Hernandez, while the Levine estate did not (one such reason, according to the Levine estate's witnesses, was that the Levine estate wanted to preserve a claim against the bar that served alcoholic beverages to Hernandez). The jury's focus was to be on UAIC's obligation to protect its insured from the anticipated, substantial, and actual claim of the Levine estate. We conclude that the trial court fairly balanced the purported relevance and probative value of the Soto and

Maldonado estate/UAIC settlements against the prejudicial impact, with the result that no abuse of discretion has been shown. H & H Elec., Inc., at 347-48 (citing Trees v. K-Mart Corp., 467 So. 2d 401 (Fla. 4th DCA 1985)).

The trial court's ruling is practical as well. Suppose an insured driver hits six pedestrians. The insurer immediately settles with five, but refuses to act reasonably and in good faith regarding the sixth injured claimant, resulting in an excess (above policy limits) judgment in favor of the sixth claimant against the insured. In the statutory insurance bad faith trial involving the sixth claim, must the trial court allow the insurer to offer evidence of each of the five cases that were settled, and the inevitable cross-examination to explore the different terms of, and reasons, for, each of those settlements by the five other claimants?

Neither the statute nor any reported case requires or even permits such detours. In what is perhaps the most recent, comprehensive analysis of statutory bad faith by the Supreme Court of Florida, Berges v. Infinity Insurance Co., 896 So. 2d 665, 677 (Fla. 2005), that Court observed that "the focus in a bad faith case is not on the actions of the claimant but rather on those of the insurer in fulfilling its obligations to the insured." However, in that case (as here), the question was whether the insurer investigated and gave fair consideration to a particular settlement proposal that was not unreasonable under the facts, "where a reasonably prudent person, faced with the prospect of paying the total recovery, would do so."

Id. at 681 (citing Boston Old Colony Ins. Co. v. Gutierrez, 386 So. 2d 783, 785 (Fla. 1980)). In short, the focus is on the insurer's reasonable assessment of "a" claim against its insured.[3] In this case, "the" claim upon which the statutory bad faith claim was based was the Levine estate's claim against Hernandez. For these reasons, we find no error in the trial court's exclusion of evidence regarding UAIC's resolution of the separate Maldonado estate and Soto claims against Hernandez.

B. The Assignment

The Levine estate's amended complaint against UAIC alleged a statutory bad faith claim based on Hernandez's assignment of the claim to the estate. A copy of the assignment was attached to the amended complaint and served on UAIC over two years before the trial of the bad faith case. UAIC's answer denied the allegation that Hernandez had assigned his statutory bad faith claim to the Levine estate, but did not assert any affirmative defense directed to the estate's standing or right to assert the claim. The assignment itself is a bilateral agreement between Hernandez and the estate (and purportedly signed by each) in which the

[3] Boston Old Colony Ins. Co. v. Gutierrez, 386 So. 2d 783, 785 (Fla. 1980), makes this explicit—"For when the insured has surrendered to the insurer all control over the handling of the claim, including all decisions with regard to litigation and settlement, then the insurer must assume a duty to exercise such control and make such decisions in good faith and with due regard for the interests of the insured. . . ." Id. at 785 (emphasis supplied).

estate undertook (among other things) to prosecute and bear the expenses of the bad faith action against UAIC on behalf of Hernandez.

At trial, after the Levine estate closed its case, UAIC moved for a directed verdict on grounds which included an argument that the estate had not proven the validity of the assignment. The trial court permitted the estate to re-open its case to present additional testimony of the personal representative/assignee (Levine's widow) and the insured/assignor's attorney (who had not been listed on the pretrial witness list) regarding the assignment. This testimony was taken while the jury was not present. UAIC presented no evidence challenging the genuineness or authenticity of the signed assignment document.

The assignment is not a required element of the Levine estate's statutory bad faith claim against UAIC. A judgment creditor of the insured "may maintain suit directly against tortfeasor's liability insurer for recovery of the judgment in excess of the policy limits, based upon the alleged fraud or bad faith of the insurer in the conduct or handling of the suit." Thompson v. Commercial Union Ins. Co. of New York, 250 So. 2d 259, 264 (Fla. 1971). Similarly, in section 624.155(1), Florida Statutes (2007), the term "any person" has been held to confer a direct third-party cause of action by claimants such as the estate. Auto-Owners Ins. Co. v. Conquest, 658 So. 2d 928 (Fla. 1995). In the present case, the validity of the assignment is

thus an issue which only affects the entitlement of the Levine estate to attorney's fees under section 627.428, Florida Statutes (2010).

As a result, we find no prejudice to UAIC; jurisdiction to determine and award any attorney's fees and costs was separately reserved in the amended final judgment under review. The record before us does not disclose whether the trial court subsequently awarded attorney's fees and costs, but certainly the purportedly "surprise" authentication testimony by the personal representative/assignee and the assignor's attorney at trial was (or will be) no longer a "surprise" at the attorney's fee hearing months later.[4] We find no abuse of discretion in the trial court's decisions to allow the Levine estate to re-open its case briefly to offer testimony responsive to UAIC's supposed concern about the assignment and to admit that document and the related testimony (subject to UAIC's rights to cross-examine the witnesses and offer any evidence tending to prove that the assignment is invalid or something other than it appears to be).

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[4] Also, threshold authentication of a bilateral contract such as the assignment can be accomplished by either party to the document. The personal representative's testimony, as one of two signators, was "evidence sufficient to support a finding that the matter in question is what its proponent claims." § 90.901, Fla. Stat. (2009). "Before a writing with claimed juridical effect may be received, some showing of the authorship, and the authority to execute the instrument will be required. But courts have increasingly adopted a very practical approach, **particularly where there is no indication that the records at issue are not what they purport to be**." Ramirez, Florida Evidence Manual, Second Ed., § 90.901.1[b] at 9-9 (citing Mims v. Old Line Life Ins. Co. of Am., 46 F.Supp.2d 1251, 1260 (M.D. Fla. 1999)) (emphasis provided).

C. Jury Instruction

UAIC maintains that the jury instructions ultimately given impermissibly shifted the burden of proof to UAIC. We disagree. The jury instruction in question was expressly limited to "the defense of the unwillingness of the plaintiff to settle." Regarding the bad faith claims as a whole, the jury was instructed that a defense verdict should be entered if the Levine estate's evidence did not support the estate's claims. Any such objections were raised belatedly, and thus waived, and considering the verdict form and instructions collectively, as required, no error has been shown. Parker v. Graham & James, 834 So. 2d 881, 882 (Fla. 3d DCA 2002) (citing Gallagher v. Fed. Ins. Co., 346 So. 2d 95 (Fla. 3d DCA 1977)).

D. Denial of UAIC's Motion for Directed Verdict

Finally, regarding UAIC's arguments that the Levine estate failed to make a prima facie case and that "the undisputed facts demonstrate that the insurer could not have acted in bad faith," this record amply supports the submission of the estate's case to the jury. UAIC's initial enthusiasm for tendering its policy limits to the Levine estate pales when set against the one-size-fits-all release required by UAIC, UAIC's failure to follow up in more than a superficial way (in a case plainly involving a catastrophic claim), and UAIC's failure to present expert testimony responsive to the estate's experts.

III. Conclusion

The essence of UAIC's claim in this case, though not directly articulated, is that it was set up for a bad faith claim as a strategy, by the Levine estate's failure to tell UAIC why UAIC's tender, release, and other requirements were unacceptable. The "strategy" question was debated in the majority and dissenting opinions in Berges,[5] and it is far from over.[6] Until there is a substantial change in the statutory scheme or the rationale explained in the majority opinion in Berges, however, juries will continue to render verdicts regarding an insurer's alleged bad faith when the pertinent facts are in dispute.

For the reasons detailed above, we find no abuse of discretion or reversible error by the trial court in this case. The amended final judgment and post-trial orders below are affirmed.

EMAS, J., concurs.

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[5] "I cannot join in the majority's approval of what I conclude is a created—rather than a real—bad faith claim." Berges, 896 So. 2d at 685 (Wells, J., dissenting).

[6] The two sides of the debate have been argued in two recent articles. See Gwynne A. Young and Johanna W. Clark, The Good Faith, Bad Faith, and Ugly Set-up of Insurance Claims Settlement, 85 Fla. Bar J. 9 (Feb. 2011), and Rutledge R. Liles, Florida Insurance Bad Faith Law: Protecting Businesses and You, 85 Fla. Bar J. 9 (Mar. 2011).

WELLS, Judge (dissents).

I would reverse the $5.2 million dollar judgment against United Automobile Insurance Company for failure to make a prima facie bad faith case. While I fully agree that valid insurance claims must be timely paid and egregious conduct in delaying or denying payment of such a claim is properly sanctioned by an action sounding in bad faith, I find that the instant claim cannot be supported on a mere incantation of the mantra that bad faith is a jury question.

While the facts of this case are tragic, as a matter of law, the insurers' actions did not constitute bad faith. On the evening of December 9, 2001, Jose Hernandez, while purportedly intoxicated, ran a stop sign in the Redlands section of Miami-Dade County and rammed a sports car driven by Circuit Court Judge Steve Levine. Levine died quickly from horrific injuries sustained in the crash; his passenger, Ms. Maldonado also died. Mr. Hernandez and his passenger, Ruben Soto, were injured.

At the time of the accident, Hernandez was insured by United under a policy which provided coverage in the amount of $10,000 per person for bodily injuries, with a $20,000 limit per incident, and in amount of $10,000 for property damage.

A little less than two months after this accident, on February 6, 2002, United received notice of this incident from passenger Maldonado's counsel. Although no notice was received from Levine's estate, United tendered a check the very next day, February 7, 2002, in the amount of $10,000, the bodily injury policy limits, to Levine's estate. It accompanied that tender with what may best be described as a general release, releasing Hernandez and all others from all liability from any and all claims arising from this accident. Acceptance of the check was in no manner conditioned on execution and return of the general release.[7]

Two weeks later, on February 22, 2002, counsel for Levine's estate requested a copy of Hernandez' policy. Five days later, the policy was provided. Two months later, the estate returned United's check ***without explanation***. When United inquired as to the reason for this rejection, United was advised by someone in the office of the counsel for the estate that the tender was insufficient and would preclude the estate from taking other actions. No further communications were forthcoming from counsel for the estate regarding the claim, despite phone calls from a United adjuster in April, May, and June.

Although United exceeded its policy limits for bodily injuries by paying out $30,000, it received no claim for property damages and made no tender for damage

[7] Athough the statement attached to the check indicated that it was for "all claims" the cover letter clearly stated that the check was for "the bodily injury portion of our policy."

to the car Levine was driving. On June 16, 2002, the estate sued Hernandez ultimately securing a $5.2 million judgment against him. In November of 2006, Hernandez assigned all of his rights against United to Levine's estate, which sued United in a single count complaint for bad faith claiming that United failed to timely settle the estate's claim against Hernandez and that "[h]ad Defendant, UNITED, timely tendered the available policy limits, [the estate] would have accepted the available policy limits and released Hernandez." (Emphasis added). Following a jury verdict, a final judgment finding that United had acted in bad faith was entered against United, and the underlying judgment against Hernandez for over $5.2 million was assessed against United.

As a matter of law, these facts do not constitute bad faith and as such, the matter should never have gone to a jury. Although United received ***no notice, claims or demands*** whatsoever from Levine's estate, it issued a check to the estate for its bodily injury policy limits within a day of learning of the incident. As a matter of law, this cannot be bad faith.

The fact that this tender was accompanied by a general release also cannot for a number of reasons constitute bad faith. First, acceptance of the tendered check was not conditioned on execution of the release. Because the tender was not conditioned on the release, the estate was free to accept the tender and ignore the release, leaving Hernandez no worse off than he would have been had a check

alone been sent. However, had the estate executed the release, Hernandez would have been relieved of any further liability, a result obviously to his benefit. In any event, no matter how viewed, providing a general release along with a check for the policy limits inured solely to Hernandez' benefit and could not constitute bad faith. If the estate refused to execute the release, Hernandez was no worse off than he was without the release—his insurance had paid up and he was still on the hook for any excess—and if the estate executed the release he was forever off the hook.

As far as the estate's claim that it would have executed the "one size fits all release," absolving Hernandez completely from its multimillion dollar claims had United only tendered a check for $10,000 for damage to Levine's car along with the check for $10,000 for bodily injuries, the record is that the estate never made a property damage claim against the United policy and when United inquired as to why the estate rejected its bodily injury tender, it never explained that it was rejecting the tender because United had not also tendered a $10,000 check for property damage.[8] Rather, instead of negotiating a settlement in good faith by making a counter offer to United's settlement tender, the estate brought its suit for bad faith.

[8] In fact, although the car that Levine was driving was titled in his name, it was insured by USAA under a policy held by his wife, Tracy Howard, who made a claim with USAA and was paid $17,500. USAA subsequently sought and received subrogation from United on this claim.

On these facts, I cannot agree to affirm the instant judgment. Had the estate made a counter offer to United's settlement offer or offered to settle its claims within policy limits as had the injured parties in Berges v. Infinity Insurance Co., 896 So. 2d 665 (Fla. 2004), my opinion would be different. But there was no indication whatsoever that Levine's estate was interested in, much less willing to, settle its multimillion dollar claims against Hernandez for policy limits. And, after United initiated "settlement" discussions by issuing a check for the full amount of its bodily injury coverage, the estate remained mute, never objecting to the notation accompanying the check or the release or making a claim or demand for policy limits for property damages. I therefore cannot see how anything that United did or did not do was the cause of any damage to Hernandez. Absent same, no bad faith claim could exist.

In short, United did everything it could to maximize protection for ***its insured***. Without a demand or claim, it promptly paid an amount exceeding policy limits for bodily injuries; it attempted to secure a release from liability for its insured; and it timely attempted to determine who should be paid and in what amount for property damage. In the end, Hernandez suffered no damage that he otherwise would not have incurred but for United's actions. While juries are responsible for determining bad faith claims, it is the responsibility of the courts to treat all litigants which or who come before them on a fair and equal basis. This,

of course, applies to insurance companies. It is therefore incumbent on courts to view the facts objectively and, where appropriate, to preclude obviously collusive or contrived claims from moving forward. This action presents just such a case where counsel for an injured party refuses to communicate or negotiate following a good faith offer by an insurer and after dodging information requests via vague responses by office staff, brings an action for bad faith.

As one knowledgeable author on the subject of bad faith claims has confirmed, no bad faith claim exists as a matter of law where a "claimant [has] failed to respond to [an] insurer's attempts to settle claims within the policy limits. Thus, the courts have properly, effectively, and firmly rejected attempts to justify bad faith claims based on either arbitrary or unrealistic time deadlines, or in response to settlement offers, with which compliance is impossible, or which were not made in a good faith attempt to reach a resolution of the claim." Rutledge R. Liles, Florida Insurance Bad Faith Law: Protecting Businesses and You, 85 Fla. Bar J. 9 (Mar. 2011)[9] (citing Cardenas v. Geico Cas. Co., No. 8:09-cv-2457-T-23TBM, 2011 WL 111588 (M.D. Fla. Jan. 13, 2011); Boateng v. Geico Gen. Ins.

[9] Rutledge R. Liles, Insurance Bad Faith: The "Setup Myth," 77 Fla. B.J. 18, 22 (2003) ("Rutledge R. Liles received his B.A. (1964) from Florida State University and his J.D. (1966) from the University of Florida College of Law. He is a board certified civil trial lawyer with more than 36 years of experience. He has served as president of both the Jacksonville Bar Association and The Florida Bar and is a fellow in the American College of Trial Lawyers and the American Bar Foundation.").

Co., No.10-CIV-60147, 2010 WL 4822601 (S.D. Fla. Nov. 22, 2010); Contreras v. U.S. Sec. Ins. Co., 927 So. 2d 16 (Fla. 4th DCA 2006) (where the claimant would only agree to release one of two insured in return for payment of policy limits, no bad faith as a matter of law in insurer's favor to accept that offer)).

As deeply sympathetic as this case is and as in need of a deep pocket as it is, I simply cannot agree that the facts support a bad faith claim. I would reverse on this ground alone.