SUPREME COURT OF FLORIDA

CASE NO. SC06-1259

U.S. SECURITY INSURANCE COMPANY,

Petitioner,

vs.

CARMEN MARIA CONTRERAS, ETC.,

Respondent.

Express & Direct Conflict Jurisdiction
Fourth District Court of Appeal Case Nos. 4D04-1427 & 4D04-4175

PETITIONER'S BRIEF ON JURISDICTION

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I.

STATEMENT OF THE CASE AND FACTS

This petition is from a decision of the Fourth District Court of Appeal that reverses a directed verdict in favor of U.S. Security Insurance Company in a bad faith claim brought by Carmen Maria Contreras. The relevant facts, as set forth in the Fourth District's opinion, are as follows:

On July 17, 1992, a tragic accident occurred resulting in the death of Flor Torres Osterman. A vehicle driven by Arnold Blair Dale struck Ms. Osterman while she was walking along the side of the road. Mr. Dale was charged with DUI manslaughter and leaving the scene of an accident. He was driving the car with the knowledge and permission of its owner, Deanna Dessanti. (A. 1).[1]

Ms. Dessanti's vehicle was insured under an automobile liability insurance policy issued to her by U.S. Security. Mr. Dale was an additional insured by virtue of being a permissive user of Ms. Dessanti's vehicle. (A. 1).

U.S. Security promptly responded to the claim by tendering its $10,000 limits of coverage, along with a general release of both Ms. Dessanti and Mr. Dale. However, the attorney for the estate refused to accept the tender, insisting on a release of only Ms. Dessanti. U.S. Security advised the estate's attorney that it could not enter into a release that exonerated only one of its two insureds. The policy would have terminated the

insurer's contractual obligation to Mr. Dale had it accepted the claimant's demand for a release of only Ms. Dessanti in exchange for the policy limits. Nonetheless, U.S. Security believed that a settlement leaving Mr. Dale without any defense or indemnity would violate its good faith duties to him. (A. 2-3).

The estate refused to release both insureds. After the time limit for the demand expired, the estate filed a wrongful death suit. Ultimately, the estate recovered a judgment against Ms. Dessanti and Mr. Dale for $1,000,000 in compensatory damages. The judgment was affirmed on appeal. Thereafter, Ms. Contreras filed the present bad faith law suit against U.S. Security, as assignee of Ms. Dessanti. (A. 4).

During trial, at the close of the plaintiff's case the trial judge granted a directed verdict in favor of U.S. Security. The judge reasoned that the insurer acted in good faith, as a matter of law, by insisting on a joint release and refusing a settlement demand that would have exalted the interests of one insured over those of another:

> It [the offer to settle with Dessanti but not Dale] immediately places the insurance company in the Hobson's choice. If they don't agree to that, they're sued for bad faith, and if they do agree to it, they're sued for bad faith.
>
> If they agree to it and cut Dale loose, the Plaintiff simply takes an assignment from Dale. If they don't agree to it and leave Dessanti in, the Plaintiff simply takes an assignment from Dessanti. The Plaintiff is protected either way and the insurance company loses either way, and I don't think that's the state of the law. By creating it that way, what, in essence, the Court is permitting is it's letting the Plaintiff dictate whether a

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1 "A" refers to the appendix to this brief.

> bad faith claim arises as opposed to looking at the conduct of the insurance company. It creates automatic bad faith. Either Dessanti should have been protected and wasn't, in which case she has a bad faith claim, or Dale is cut loose and the insurance company had a duty to defend him, in which case he has a bad faith claim, and the insurance company is sitting squarely in the middle with no way to turn.

(A. 4-5) [quote from Fourth DCA opinion].

The Fourth DCA reversed, holding that in view of Ms. Contreras' refusal to release Mr. Dale, a jury question exists concerning whether U.S. Security acted in good faith under all of the circumstances in refusing the offer to settle for a release of Ms. Dessanti only:

> … Clearly, U.S. Security did have an obligation to act in good faith towards both of the insureds. In an effort to fulfill its obligation of good faith, U.S. Security attempted to secure, in exchange for the policy limits, a release for both Dessanti and Dale. Because of the gravity of Dale's misconduct, Contreras was not willing to settle the claim against Dale. Having attempted to secure a release for Dale without success, U.S. Security fulfilled its obligation of good faith towards Dale. Once it became clear that Contreras was unwilling to settle with Dale and give him a complete release, U.S. Security had no further opportunity to give fair consideration to a reasonable settlement offer for Dale. Since U.S. Security could not force Contreras to settle and release Dale, it did all it could do to avoid excess exposure to Dale.
>
> Having fulfilled its obligation to Dale, U.S. Security thereafter was obligated to take the necessary steps before Contreras's offer expired to protect Dessanti from what was certain to be a judgment far in excess of her policy limits. Under the terms of its policy, had U.S. Security paid out its limits, its duty to settle or defend would have ceased….
>
> The trial court's concern of placing U.S. Security in a Hobson's choice is not well-founded. The argument that U.S. Security, as a matter of law, could not settle the claim only against Dessanti because it would expose

> itself to a claim of bad faith by Dale is an illusory one. U.S. Security attempted to settle for both Dessanti and Dale and get a complete release for both of them. A release was unattainable due to Contreras's adamant refusal to settle with Dale. Contreras's refusal is understandable. The horrific nature of the accident and Dale's misconduct of drinking and driving and leaving the scene of the accident could easily account for the animus directed toward Dale. In any event, 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 obligation to the insured…. (A. 7).

It if from that decision that we now seek review.

II.

SUMMARY OF ARGUMENT

The Fourth DCA held that an insurer acts in good faith if it enters into a policy limits settlement for a release of one of two insureds, where the claimant justifiably refuses to release the other insured. The decision allows the claimant to dictate which insured will receive the benefits of the insurance policy, and allows an insurer to play favorites among multiple insureds. The Fourth DCA's decision expressly and directly conflicts with: (1) Boston Old Colony Ins. Co. v. Gutierrez, 386 So. 2d 783 (Fla. 1980), prohibiting an insurer from exalting its own interests above those of an insured; (2) State Farm Fire & Cas. Co. v. Zebrowski, 706 So. 2d 275 (Fla. 1997), holding that the duty of good faith runs only toward the insured, not to a third-party claimant; (3) Berges v. Infinity Ins. Co., 896 So. 2d 665 (Fla. 2004), holding that the focus in a bad faith action is on the actions of the insurer rather than those of the claimant; and (4) Williams v. Infinity Ins. Co., 745 So. 2d 573 (Fla. 5th DCA 1999), holding that an insurer acts in good

faith, as a matter of law, if it rejects a settlement that would leave an insured exposed to additional third-party claims.

III.

ARGUMENT

A. The Fourth DCA's Decision Expressly and Directly Conflicts With This Court's Decision in Boston Old Colony Ins. Co. v. Gutierrez, 386 So. 2d 783 (Fla. 1980).

The claimant in this case placed U.S. Security in the untenable position of choosing between its two insureds. The insurer took the correct position that it was required to protect both insureds by obtaining a joint release in exchange for the policy limits. The Fourth DCA's rejection of the insurer's position allows claimants to inject themselves into the insurer-insured relationship and to dictate which of multiple insureds will receive the benefits of the insurance policy.

In rejecting the trial judge's "Hobson's choice" concern, the Fourth District was required to take the position that an insurer acts in good faith if it enters into a policy limits settlement for a release of one of its insureds, where the claimant adamantly and justifiably refuses to release the other insured. In so holding, the Fourth DCA violated a well-settled principle of insurance law that prohibits an insurer from placing its own interests above those of its insured. Boston Old Colony Ins. Co. v. Gutierrez, 386 So. 2d 783, 785 (Fla. 1980) (""[W]hen 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").

According to the Fourth DCA's decision, U.S. Security would have acted in good faith if it had sold Mr. Dale down the river in order to obtain a release for Ms. Dessanti. In fact, the lower court's decision invites insurers to engage in such conduct with impunity when presented with a demand to settle for one of multiple insureds. The decision encourages insurers to violate a fundamental principle announced by this Court, and therefore it expressly and directly conflicts with Boston Old Colony.

B. The Fourth DCA's Decision Expressly and Directly Conflicts With this Court's Decision in State Farm Fire & Cas. Co. v. Zebrowski, 706 So. 2d 275 (Fla. 1997).

Bad faith law in Florida focuses on the protection of insureds rather than the compensation of third-party claimants; and the insurer's duty of good faith runs only to the insured, not to third-party claimants. State Farm Fire & Cas. Co. v. Zebrowski, 706 So. 2d 275, 277 (Fla. 1997). The Fourth DCA's decision violates this concept, because it allows the claimant to dictate which insured will receive the benefits of the insurance policy. In so doing, it creates a duty to third-party claimants by allowing them to inject their preferences into the insurer-insured relationship.

In addition, it will allow clever claimants to maximize their recovery in certain cases by obtaining a release of an impecunious insured for the policy limits, while maintaining an action against the deep pocket insured. For example, if an employer obtains liability

insurance and is sued for the negligence of an employee who qualifies as an additional insured, a claimant will be able to demand a release of the employee for policy limits and proceed against the deep pocket employer for extra-contractual damages. Thus, under the Contreras decision, the claimant can maximize his or her recovery, while the named insured who purchased the insurance policy is left without the protection for which it paid premiums.

By conferring rights under the insurance policy to third-party claimants, the Fourth DCA's decision expressly and directly conflicts with this Court's decision in Zebrowski.

C. The Fourth DCA's Decision Expressly and Directly Conflicts With this Court's Decision in Berges v. Infinity Ins. Co., 896 So. 2d 665 (Fla. 2004).

The Fourth DCA's decision pays lip service to the principle enunciated in this Court's decision in Berges v. Infinity Ins. Co., 896 So. 2d 665, 677 (Fla. 2004), 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, the Fourth DCA violated that very principle by basing its decision on what it considered to be a justifiable refusal on the part of the claimant to release Mr. Dale. The court's decision emphasizes that the claimant's decision not to release Mr. Dale was, in the court's view, "understandable" because of "the gravity of Dale's misconduct." This appears to have been a significant factor in the court's decision.

But what will happen in cases in which the claimant's decision regarding which

insureds should be released is not justified? And who will determine whether, in a particular case, the claimant is justified in refusing a joint settlement? According to this Court's decision in Berges, the motivations and conduct of the claimant are supposed to be irrelevant. However, the Fourth DCA's decision has now made the motivations of the claimant relevant in multiple insured contexts. At the same time, the court has not suggested any mechanism for making that determination.

In this case, the Fourth DCA made its own findings of fact regarding the claimant's motivation. U.S. Security believes that the claimant was motivated by a desire to "set up" the insurer for bad faith, rather than a genuine unwillingness to release the culpable party. However, under Berges, the insurer is generally precluded from introducing evidence and arguments regarding the motivations of the claimant. The Fourth DCA made a fact finding without affording U.S. Security the opportunity to present its evidence and arguments regarding the claimant's motivations.

By making fact findings regarding Ms. Contreras' motivations, the Fourth DCA has opened up a can of worms for future bad faith litigation. Now, the motivations of the claimant may be a significant factor in deciding whether an insurer acted in bad faith by accepting or refusing a demand to settle for one of multiple insureds. Therefore, the Fourth DCA's decision expressly and directly conflicts with this Court's decision in Berges.

D. The Fourth DCA's Decision Expressly and Directly Conflicts With the

Fifth DCA's Decision in Williams v. Infinity Ins. Co., 745 So. 2d 573 (Fla. 5th DCA 1999).

Under Florida bad faith law, a jury question does not arise merely because the insurer passed on a policy limits settlement opportunity. In the analogous context of multiple wrongful death beneficiaries, the Fifth District Court of Appeal held that an insurer acted in good faith, as a matter of law, by rejecting a settlement proposal that would have paid out the policy limits to two beneficiaries, leaving the insured exposed to the claims of additional beneficiaries. Williams v. Infinity Ins. Co., 745 So. 2d 573 (Fla. 5th DCA 1999).

In the present case, the Fourth DCA held that a jury question exists concerning whether the insurer acted in bad faith by rejecting a policy limits settlement demand that would have exposed Mr. Dale to a substantial claim and continuing litigation. The decision of the lower court expressly and directly conflicts with Williams.

IV.

CONCLUSION

It is respectfully submitted that the Court should accept jurisdiction based on express and direct conflict.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. mail on August 11, 2006 to Marjorie Gadarian Graham, Esq., 11211 Prosperity Farms Road, Suite D-129, Palm Beach Gardens, FL 33410; Joseph S. Kashi, Esq., 1776 Pine Island Blvd., Suite 324, Plantation, FL 33322; Diego C. Asencio, Esq., 636 U.S. Highway One, Suite 115, North Palm Beach, FL 33408; and Mark R. Boyd, Esq., 2400 E. Commercial Blvd., Suite 1100, Ft. Lauderdale, FL 33308.

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CERTIFICATE REGARDING FONT

The undersigned certifies that this brief uses 14-point Times New Roman type in compliance with Fla. R. App. P. 9.210(a)(2).

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