No. 32048 – *William E. Jones v. Steven L. Sanger and State Farm Mutual Automobile Insurance Company*

Starcher, J., dissenting:

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I dissent because the trial judge should have allowed the plaintiff to amend his complaint.

The majority opinion is correct in stating that the standard of review for a decision on the amendment of a pleading is an abuse of discretion. But that discretion must be guided by fundamental fairness.

One question the trial court must ask is whether it is fair to the defendant to allow the amendment. In the instant case (as the majority opinion notably omits mentioning), the defendant *agreed* to the amendment. From the record:

> [Defense Counsel]: Your Honor, with regard to the Motion to Amend, we certainly don't believe that there is any meritorious bad faith action here, but I'd assume that that's a matter really to be determined down the road.
>
> So, as far as Mr. Young amending his complaint to bring a bad faith action, I suppose, under the rules of liberality for amending the complaint, we really don't have much of a position to object. We certainly will vigorously defend any bad faith claim, we do not believe that claim has any merit. But, as I say, I guess that's a matter to be determine down the road.
>
> So, we didn't file anything in opposition because, under Rule 15, I believe it is, for amendments of complaints, those are to be liberally construed and granted. So I suppose it is a matter of Mr. Young filing his complaint and then we will defend it in the manner we believe necessary.

> The Court: All right. Plaintiff has the Court's approval to amend the complaint. It will be addressed after it is amended and counsel knows what it is.

Clearly, the defendant agreed that amendment would not be unfair.

Another question to be asked is whether allowing the amendment is necessary to be fair to the plaintiff?

In the instant case, the majority suggests that allowing amendment is not necessary to be fair to the plaintiff because the plaintiff's case had been in litigation for ten years – and thus the plaintiff had been dilatory in waiting until after settlement before making an unfair settlement claim.

This argument defies common sense. It was not until "after settlement" that the plaintiff had completed grounds for an unfair settlement practices claim. In this situation it is entirely necessary – to be fair to the plaintiff – to allow amendment.

I would reverse and remand to allow the plaintiff to amend the complaint. Accordingly, I dissent, and I am authorized to state that Chief Justice Albright joins in this separate opinion.