IN THE SUPREME COURT OF THE STATE OF FLORIDA

METROPOLITAN LIFE INSURANCE

COMPANY,

Petitioner,

vs. CASE NO: 63,739

ERNEST D. MCCARSON, SR., etc.,

et al,

Respondents.

ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL

PETITIONER'S SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS

STATUTES AND OTHER AUTHORITIES

STATEMENT

This Court has requested supplemental briefs on the issues of breach of contract, and whether bad faith can be a basis for a wrongful death recovery. This supplemental brief is limited to those two issues.

I. RELEVANCE OF BREACH OF CONTRACT OR BAD FAITH TO A WRONGFUL DEATH ACTION

The Wrongful Death Statute, Sec. 768.19 Fla. Stat. permits recovery only if the conduct that caused death "would have entitled the person injured to maintain an action and recover damages if death had not ensued." A wrongful death lawsuit is treated as though "the injured person (had) not died and was suing to recover damages for the wrongful act." Gaboury v Flagler Hospital, Inc., 316 So.2d 642 (Fla. 1st DCA 1975).

Thus, where the injured person would not have had a cause of action had he lived, the wrongful death action must be dismissed, regardless of whether defendant's conduct could be characterized as wrongful. As this Court recently held in Variety Children's Hospital v Perkins, 445 So.2d 1010 (Fla. 1983):

> At the moment of his death the injured minor Anthony Perkins had no right of action against the tortfeasor. ... Since there was no right of action existing at the time of death, under the statute no wrongful death cause of action survived the decedent. Id. at 1012.

In the present case, no wrongful death recovery can be sustained unless Mrs. McCarson would have had a valid cause of action against Metropolitan had she lived. The parties have already briefed and argued the issue of whether she would have had a valid action for intentional infliction of emotional distress. Assuming that she had no such action (either because that cause of action is not recognized or because the facts of this case fall far short of satisfying its unique requirements), the judgment below must be reversed unless she had some other valid cause of action against Metropolitan.

This brief will explain why, had she lived, Mrs. McCarson would not have had a cause of action against Metropolitan either for breach of contract or for bad faith breach of contract.

II. HAD SHE LIVED, MRS. MCCARSON WOULD NOT HAVE HAD A VALID ACTION FOR BREACH OF CONTRACT

A. She Had No Right To Payment Under The Contract

For the Court's convenience, a copy of the insurance contract is attached as an appendix to this brief. This contract, of course, determined whether Mrs. McCarson had any right to recover benefits under it.

Had she lived, Mrs. McCarson would have had no cause of action under the contract for a very simple reason - the contract did not give her any rights. The exclusive right to recover health benefits was given to Mr. McCarson, the employee. The health portion of the policy expressly stated in its "Payment of Claims" provision that "All indemnities payable under the Health Insurance benefits of this policy are payable to the Insured." (App. 5, emphasis added.) Mr. McCarson is the "Insured". (App. 2). Mrs. McCarson was merely a "covered family member", as Mr. McCarson's wife (App. 6, 10).

This is customary where the policy is issued to or for one person, who is provided with dependent coverage for his or her spouse or children. All rights under the policy are provided to that person. Thus, although Metropolitan provided coverage for Mrs. McCarson's medical expenses (subject to other policy provisions, such as the Medicare provisions), any payment by Metropolitan was to be made exclusively to the Insured, Mr. McCarson (App. 5).

Where a group insurance policy specifies that benefits are payable to the insured employee, rather than to the dependent for whom the expenses are incurred, it is the employee who has the right to sue for benefits. Case law is sparse on this elementary proposition of indemnity contract law. It is uniform, however.

Travelers Insurance Co. v Esposito, 171 So.2d 177 (Fla. 3rd DCA 1965) (insured employee allowed recovery for expenses of his covered daughter.) The dependent has no right to benefits, and thus no cause of action against the insurers. New Mexico v Equitable Life Assurance Soc., 447 F. 2d 620 (10th Cir. 1971)(only the employee could claim benefits where the policy required the insurer to "pay to the employee" benefits under the policy. Id. at 622, emphasis added.)

A contrary rule would create chaos. If, despite clear policy provisions to the contrary, this Court held that a covered dependent had a right to sue for policy benefits, the insurer would never know whom to pay. Countless claims would be delayed while the insurer determined whether to pay the insured or the covered dependent for whom the expenses were incurred. If both persons asked for the money, or if the insurer could not safely decide whom to pay, it would have to interplead, an expensive and time-consuming procedure.

In briefs below, plaintiffs have argued that Metropolitan breached its contract. Even were this correct (and, as stated below, it is not), this is simply not relevant. Plaintiffs have never been able to explain away the fact that the contract gave rights only to Mr. McCarson, not to Mrs. McCarson. The Wrongful Death Statute requires more than merely wrongful conduct by defendant, it requires that the deceased would have had a cause of action had she lived. Mrs. McCarson would have had no cause of action for contract benefits had she lived. Thus, no wrongful death action may be brought based upon alleged breach of contract.

B. Mrs. McCarson Was Not A Third-Party Beneficiary Of The Insurance Contract.

At oral argument, the Court asked whether Mrs. McCarson had a right to sue under the contract as a third-party beneficiary. The answer is "no" since she was not a third-party beneficiary.

The third-party beneficiary doctrine permits a person who is given rights by a contract to sue to enforce those rights - even if he is not a party to the contract. Of course, if a person has no rights under the contract, this does not allow him to sue under it. It is basic that the contract must promise "some performance to a third person." 2 Willison on Contracts Sec. 347 (1979) (emphasis added). The promise must be to "render performance to the beneficiary." Id. Sec. 356A (emphasis added). This applies to insurance contracts if there is "a beneficiary to whom the insurer has promised the insured that the insurance money shall be paid." Id. Sec. 369. The fact that a promisee's wife may benefit from payment to him under the contract does not make her a third-party beneficary. 4 Corbin on Contracts Sec. 786 (1951). A person is a third-party beneficiary of an insurance contract where "the insurer has promised to pay that beneficiary." Id Sec. 807 (emphasis added).

The contract specifically provided for payment of health benefits to Mr. McCarson. He was the beneficiary, and could sue to collect

benefits. Mrs. McCarson clearly had no right to collect health benefits and, thus, was not a beneficiary of the health insurance benefits.

A few cases are illustrative. Perhaps closest to the present case was Pstragowski v Metropolitan Life Insurance Co. 553 F.2d 1 (1st Cir. 1977). An employment contract with the husband was breached, causing a loss of health insurance coverage on the wife. There, as here, Metropolitan's liability was to the husband under the contract. There, as here, the claim was made that the wife was a third-party beneficiary of the contract, since it related to her medical expenses (among other things). The Court had no trouble rejecting this argument.

The Court noted that giving her third-party beneficiary status, even though he had a specific contractual right to benefits "would create needless, duplicative litigation." It stated that:

> Metropolitan's breach of contract was, above all else, a legal wrong to (him), and a suit by (him) could have attained all the results for which he contracted...Were (she) to be found to have a claim in this case the principle would allow not only two suits for every (breach of contract) but possibly as many more suits as the employee had children or other such dependents. The cost to society would be disproportionate.

In Crown Fabrics Corp. v Northern Assurance Co., 10 A.2d 750 (N.J. E&A 1940), an insurance policy covered property of D & S Processing Co., and

also certain property owned by others. D & S was specified as being "the Assured." The policy provided for benefits to be "payable to the Assured." When a third party's property was damaged, the Court held that the party was not a third-party beneficiary, even though the property was clearly covered under the contract. The reason - that since the contract expressly required payment to "the Assured," others could not assert claims as third-party beneficiaries. The parallel to the McCarson case is obvious.

At oral argument plaintiffs' counsel argued that third-party beneficiary actions are recognized under automobile liability policies. He conceded, however, that the policy before this Court is an indemnity policy not a liability policy (i.e., it pays the insured for his expenses, and does not protect him against any liability he may have to third parties). This is fatal to his argument.

Shingleton v Bussey, 223 So.2d 713 (Fla. 1969), adopted the rule that injured persons may sue the insurer directly to recover benefits under an automobile liability policy. The rationale was that the purpose of the contract was to provide for payment to the injured persons, and public policy favors this purpose. The lower court had emphasized that the policy at issue was "not an indemnity policy, but a liability policy." 211 So.2d 593 (Fla. 1st DCA 1969). Shingleton involved automobile insurance, but its rule has been extended to other liability policies. Beta Eta House Corp. v Gregory, 237 So.2d 163 (Fla. 1970).

This distinction is crucial. Liability policies provide for payment to the third party. Indemnity policies provide for payment to the insured. Shingleton and its progeny gave the right to sue to persons to whom the insurer already was required to pay benefits under the terms of its contract. In the case before this Court, nothing in the contract gives Mrs. McCarson any rights to health insurance benefits.

Thus, in a case that involved the medical expense indemnity portion of an automobile insurance policy rather than involving any liability coverage, Shingleton does not apply, and the injured party cannot sue the insurer. Security Mutual Casualty Co. v Pacura, 402 So.2d 1266 (Fla. 3d DCA 1981). The Court stated that under such an indemnity policy a third party could only sue if the contract provided for payment to him or her, citing Maxwell v Southern American Fire Insurance Co., 235 So.2d 768 (Fla. 3d DCA 1970). In Maxwell, the policy provided that the insurer would pay injured third parties for medical services rendered "to or for" them rather than limiting itself to payments to the insured. The policy Metropolitan issued to Mr. McCarson has no such promise to pay health benefits to third parties while the Insured is alive.

See Southern Fidelity Insurance Co. v Suwannee Lumber Manufacturing Co. 411 So.2d 950 (Fla. 1st DCA 1982). There, the policy was an indemnity policy covering equipment. A third party with an interest in the equipment was not allowed to sue for benefits, since this was an indemnity not a liability policy, and since the policy failed to provide for payment to

persons other than the insured. And in Quinones v Coral Rock, Inc. 258 So.2d 485, (Fla. 3d DCA 1972), the Court pointed out that Shingleton applied only to liability policies, and not to policies for "indemnity against loss actually paid." Id at 486.

See also United States v Metropolitan Life Insurance Co., 683 F. 2d 1250 (9th Cir.1982). This case illustrates the Maxwell-Pacura distinction as to indemnity policies. Dealing with a policy much like that of Mr. McCarson, the Court held that a third party could not sue as a third-party beneficiary. The Court noted that in cases (such as Maxwell which was not cited) where the policy provided for payment to third persons, such third persons could recover as third-party beneficiaries.

The very name "third-party beneficiary" supports Metropolitan's position. The rule has two parts, "third party" and "beneficiary". A person must be both in order to qualify under the rule. Although, Mrs. McCarson was a "third party" she was not a "beneficiary" under the contract and this defeats plaintiffs' claim that she was a third-party beneficiary.

C. Metropolitan Did Not Breach Its Contract

Under the Wrongful Death Statute, a breach of contract could support a wrongful death action (assuming that the breach would have given Mrs. McCarson the right to sue). Plaintiffs in the present case, however, have not established that any such breach of contract occurred.

Even giving due deference to the jury verdict, the undisputed facts negate plaintiffs' claim.

The relevant facts have been discussed in prior briefs, and Metropolitan does not wish to belabor them. It is clear, however, that plaintiffs originally claimed benefits on the basis of an argument that a prior court order required payment. At trial, they conceded that their position was erroneous, and the trial court so ruled. Petitioner's Initial Brief at 5-6 and 32.

Plaintiffs have also argued that Mrs. McCarson's Medicare eligibility was irrelevant, because Metropolitan knew that she was not eligible, and because Medicare did not cover home nursing care. This position also is erroneous, as a matter of law, since it confuses Medicare coverage with Medicare eligibility. Metropolitan knew Mrs. McCarson was not covered, and that coverage would not include home nursing care. Metropolitan did not know she was not eligible. Petitioner's Initial Brief at 6-9, 32-34; Petitioner's Reply Brief at 2-5.

Thus, even resolving all disputed facts in plaintiff's favor, the record establishes that plaintiffs knew that Mrs. McCarson was not eligible, but instead of answering Metropolitan's question by saying so, they refused to respond at all. When they finally responded, after Mrs. McCarson died, Metropolitan tendered payment of amounts due under

the contract, without prejudice to plaintiffs' rights to continue the lawsuit. The trial judge expressly stated that plaintiffs could have avoided the entire problem by simply telling Metropolitan that Mrs. McCarson was not eligible for Medicare. Petitioner's Initial Brief at 9-11; Petitioner's Reply Brief at 5, footnote 5.

Plaintiffs have never even tried to explain why they "stonewalled" the Medicare question, taking the risk that if Metropolitan proved to be correct, and Medicare was relevant (as has proven to be the case) responsibility for delay in payment would be theirs. They have never denied that they did know, and thus could have told Metropolitan, that Mrs. McCarson was not eligible. They have never denied that they took the money Metropolitan paid to them in claims, put it in an attorney's account, and never used it to pay for the nursing services for which Metropolitan made payment.[1] Petitioner's Initial Brief at 15.

Metropolitan did not commit a breach of contract, since the failure to make payment resulted from plaintiff's intransigent refusal to provide relevant information, within their control, which Metropolitan needed

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[1] At oral argument Mr. Klein was asked if insurance benefits paid by Metropolitan were held and not used to pay Redi-Nurse. Mr. Klein said there was no such evidence. In fact, there was uncontroverted evidence from Dennis Winter, the President of Redi-Nurse, a witness called by the McCarsons, that insurance benefits of about $500 for nursing services services were paid to Mr. Thompson, Mrs. McCarson's attorney, and he retained these funds and although asked, refused to pay the funds to Redi-Nurse. Appendix to this brief page 14,15.

to determine the extent of its liability. Even though the claim proved to be payable, the act of deferring payment until plaintiffs provided this information was not a breach of contract.

It is established law that

> When a party stipulates that another shall do a certain thing, he thereby impliedly promises that he will himself do nothing which will hinder or obstruct that other in doing that thing. Blackhawk Heating & Plumbing Co. v Data Lease Financial Corp., 302 So.2d 404, 410 (Fla. 1974).

In Blackhawk, failure to provide information within plaintiff's control was held to excuse defendant's failure to make payments that were otherwise due. Here, too, Metropolitan needed information within the McCarsons' control to determine what, if anything, it owed. The McCarsons refused, without any valid reason, to provide it. See also Melvin v West, 107 So.2d 156, (Fla. 2d DCA 1958); 17 Am. Jur. 2d Contracts Sec. 389 (1964)("a party may not obstruct, hinder or delay (the other party's performance) and then seek damages for the delay thus occasioned").

III. HAD SHE LIVED, MRS. MCCARSON WOULD NOT HAVE HAD A CAUSE OF ACTION FOR BAD FAITH BREACH OF CONTRACT

A. Any Such Cause Of Action Would Not Have Been Hers.

As discussed above, any claim for breach of contract would have been that of Mr. McCarson, not Mrs. McCarson. This is true whether the breach was in good faith or in bad faith. Moreover, as also discussed above, Metropolitan did not breach the contract at all, much less do so in bad faith.

Accordingly, this Court need not even consider the numerous Florida cases holding that no bad faith claim may be asserted for breach of an insurance contract such as this one.

B. Florida Does Not Recognize A Cause Of Action For Bad Faith Breach Of Contract.

This Court has recently held that no separate cause of action exists for bad faith breach of contract, even if "the defendant flagrantly, unjustifiably and oppressively breaches a contract." Lewis v Guthartz, 428 So.2d 222, 223 (Fla. 1982). Deliberate, malicious breach of contract does not create a cause of action above and beyond that for breach of contract. DeMarco v Publix Supermarkets, Inc., 384 So.2d 1253 (Fla. 1980), aff'g ob, 360 So.2d 134 (Fla. 3d DCA 1978).

For insurance cases, the legislature has given plaintiffs additional relief without creating a separate cause of action. Section 627.428 Fla. Stat. (1972) permits recovery for breach of contract, and Mr. McCarson has obtained an award of fees under this section. Section

624.155 (1)(b)(1) Fla. Stat. (1984 Supp.) does create a private action for bad faith failure to pay claims, however, this Court need not consider its effect since this Section was not in effect when Mrs. McCarson died.

An exception to the rule that no "bad faith" recovery is permitted applies in third-party insurance situations. There, a third party sues the insured, who tenders defense of the action to the insurer. Because the insurer controls its insured's defense, it assumes a fiduciary duty to him or her, and is liable for bad faith breach of this fiduciary duty. Butchikas v Travelers Indemnity Co., 343 So.2d 816 (Fla. 1977); Campbell v GEICO, 306 So. 2d 525 (Fla. 1974); Aetna Life Insurance Co. v Little, 384 So.2d 213 (Fla. 4th DCA 1980).

First-party cases such as the present one are quite different. Here, the insured submits a claim (e.g., life, medical expense or disability benefits) and the insurer either pays it or denies it. The parties deal at arm's length, and the insurer does not assume control of any lawsuit by or against the insured. Insurer and insured occupy merely a debtor-creditor relationship, as is true in general under contracts to pay money.

Numerous cases have held that in first-party cases, as with contracts in general, no cause of action for bad faith breach of contract exists. Kent Insurance Co., v Hassan, 447 So.2d 323, 324 (Fla. 4th DCA 1984) ("Florida law does not permit first party claims of bad faith by an

insured against an insurer"); Smith v Standard Guaranty Insurance Co., 435 So.2d 848, 849 (Fla. 2d DCA 1983)("our Florida courts have consistently held that a suit for punitive damages will not lie against an insurance company for bad faith in failing to pay first party claim"); Safeco Insurance Co. v Campbell, 433 So.2d 25 (Fla. 2d DCA 1983)(no bad faith allowed for bad faith breach of first-party insurance policy); Industrial Fire & Casualty Insurance Co. v Romer, 432 So.2d 66, 67 (Fla. 4th DCA 1983)("Florida law has not recognized a separate tort which would give rise to a claim for compensatory or punitive damages predicated on a mere bad faith refusal by the insurance company to pay a claim") United States Fire Insurance Co. v Clearwater Oaks Bank, 421 So.2d 783 (Fla. 2d DCA 1982) (bad faith action allowed only in third-party cases); Stetz v American Casualty Co., 368 So.2d 912 (Fla. 4th DCA 1979); Shupack v Allstate Insurance Co., 367 So.2d 1103 (Fla. 3d DCA 1979); Lumilite Industries, Inc. v Southeast Life Insurance Co., 365 So.2d 1083 (Fla. 3d DCA 1979); Aetna Life Insurance Co. v Smith, 345 So.2d 784 (Fla. 4th DCA 1977); Saltmarsh v Detroit Automobile Inter-Insurance Exchange, 344 So.2d 862 (Fla. 3d DCA 1977); Allstate Insurance Co. v Gibbs, 340 So.2d 1202 (Fla. 4th DCA 1976); Baxter v Royal Indemnity Co., 285 SO.2d 652 (Fla. 1st DCA 1973); MacDonald v Penn Mutual Life Insurance Co., 276 So.2d 232 (Fla. 2d DCA 1973).

In prior briefs plaintiffs have attempted to rely on three first-party cases. These are Life Investors Insurance Co. v Johnson, 422 So.2d 32

(Fla. 4th DCA 1982); World Insurance Co. v Wright, 308 So.2d 612 (Fla. 1st DCA 1975); Escambia Treating Co. v Aetna Life Insurance Co., 421 F. Supp. 1367 (N.D. Ala. 1976).

Johnson did not involve bad faith at all. Instead it involved the question of what damages were foreseeable for breach of a credit insurance policy. Under the facts before it, the Court held that damages for loss of a car (the purchase of which gave rise to the credit insurance policy) were actually contemplated when the credit policy was purchased, and were thus recoverable. That Johnson is not inconsistent with the numerous cases cited above is shown not only by that Court's not even mentioning them, but by the same district's later decision in Romer, stating that no cause of action exists for bad faith breach of a first-party insurance contract.

Wright, unlike Johnson, is on point. As indicated above, however, numerous other courts have reached the opposite result (including the Baxter case, supra, by a different panel of the First District). Most significantly, this Court has expressly disapproved Wright ("we do not find this case persuasive", Butchikas, supra, 343 So.2d at 818).

Escambia was an early federal case in which the judge, as required by federal law, attempted to determine what result the Florida state courts would reach. He guessed wrong. Were Escambia decided today the result

would surely be different, in view of the overwhelming weight of Florida cases to the contrary. The Court below has expressly rejected Escambia in its recent Hassan and Romer decisions.

IV. CONCLUSION

Had she lived, Mrs. McCarson would not have had a cause of action against Metropolitan for breach of contract. Not only was she not the proper party to bring such action (since only her husband had the right to claim benefits under the insurance policy), but Metropolitan did not breach its contract at all (the delay in paying claims being due to the McCarsons' wholly unexplained refusal to answer Metropolitan's question concerning Medicare).

Likewise, had she lived, she would have had no cause of action for bad faith. Numerous cases have held that no such cause of action exists. Again, even if it existed, it would have permitted an action by her husband, who was the insured under the insurance policy, and not by herself.

Since Mrs. McCarson would have had no cause of action against Metropolitan had she lived, this wrongful death action is barred by statute regardless of any other issues.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Larry Klein, Esquire 501 South Flagler Drive, West Palm Beach, Fl. 33401, Samuel D. Phillips, Esquire, Flagler Court Building, West Palm Beach, Fl. 33401 and Mr. Lee Thompson, Esquire, 2642 Forest Hill Boulevard, West Palm Beach, Fl. 33406 by mail this 13th day of June, 1984.

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