IN THE SUPREME COURT OF FLORIDA

BANKERS INSURANCE COMPANY,	]	
Petitioner,	]	
vs.	]	CASE NO. 65,740
CARIDAD MACIAS,	]	
Respondent.	]	

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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INTRODUCTION

The Petitioner is referred as the insurer, insurance company or carrier. The Respondent is referred to as the insured.

Reference to the Record on Appeal will be designated by the letter "R". Reference to the Transcript will be designated by the letter "T". Reference to the Appendix to this Answer Brief will be designated as "App".

STATEMENT OF THE CASE

The insured generally accepts the statement of the case of the brief on the merits with the following area of disagreement:

The insured strongly disputes the assertion in the insurer's Statement of the Case that the Answer "specifically denied" the notice allegations of the Complaint. (Brief of Petitioner at page 2). The insured generally alleged fulfillment of conditions precedent (including notice) in paragraph 11 along with two other allegations concerning the insurer's refusal to pay. The insurance company answered in one statement with a general denial of all of paragraph number 11 as well as 12 of the remaining 14 other paragraphs. (The answer of the insurance company is Attachment 1 to the Appendix).

STATEMENT OF THE FACTS

The insured accepts the Statement of the Facts of the insurance company's brief on the merits with the following areas of disagreement and illumination:

1. The insured speaks almost no English -- both her deposition and trial testimony were in Spanish as presented through interpreters. (R. 26; T. 11). Both the application form and policy containing the written notice provision were in English. The insured stated that she never received a copy of the insurance policy (with its notice provision) in either English or Spanish. (T. 24).

2. At trial, there was only one acknowledged factual issue to be determined by the trial court. As the trial court stated after discussion from both counsel:

> You are saying there is conflict in the testimony [as to the insured's having other hospitalization so as to allow the deductible]. If the Court finds that the agent's testimony is more credible, that ends the case...
>
> * * *
>
> [By] Insurance Company Attorney: Absolutely, Judge (T. 8).

3. Over the insured's objection, the Court allowed inquiry regarding late notice on the cross-examination of the insured (T. 25) and also the direct examination of the insurance company officer (T. 44).

4. The insured testified that she reported the accident to the insurer company by telephone the day after it occurred. (T. 11, 12).

5. The insurer rested its case (T. 51) and neither presented nor proffered any evidence whatsoever regarding its prejudice.

6. The Court presumed prejudice to the insurer (T. 61) but heard no testimony as to prejudice.

ISSUES ON APPEAL

I. WHETHER, WHEN IN AN ACTION TO ESTABLISH COVERAGE, THE INSURANCE COMPANY NEITHER PLED NOR OFFERED ANY PROOF WHATSOEVER OF PREJUDICE FROM THE INSURED'S LATE NOTICE, THE INSURANCE COMPANY IS ENTITLED TO EITHER A PRESUMPTION OF PREJUDICE OR TO AN AVOIDANCE FROM THE DUTY OF EVERY PARTY LITIGANT TO ESTABLISH PREJUDICE; THE POSITION ASSERTED BY THE INSURANCE COMPANY CONSTITUTING AN ABSOLUTE FORFEITURE AND CONTRAVENING THE SIGNIFICANT PUBLIC POLICY CONSIDERATION REQUIRING AUTOMOBILE OWNERS TO PURCHASE AND MAINTAIN PERSONAL INJURY PROTECTION INSURANCE THEREBY AVOIDING THE BURDEN OF INJURED PERSONS BEING PLACED ON SOCIETY AT LARGE.

II. WHETHER, INDEPENDENT OF THE ALLOCATION OF THE BURDEN OF PROVING PREJUDICE, THE DISTRICT COURT OPINION CORRECTLY REVERSED THE TRIAL JUDGE WHERE THE INSURANCE COMPANY ONLY GENERALLY DENIED THE INSURED'S COMPLAINT AND FAILED TO SPECIFICALLY AND WITH PARTICULARITY DENY THE EXISTENCE OF A BREACH OF A CONDITION PRECEDENT [TIMELY WRITTEN NOTICE] AND THE MATTER CAME ON FOR TRIAL ON A SINGLE AND COMPLETELY DIFFERENT ISSUE.

SUMMARY OF ARGUMENT

The district court opinion correctly remands this cause so that the issue of prejudice to the insurance company, if any, may be considered.

Despite the fact that the carrier failed to plead the insured's breach of a condition precedent by not providing timely notice, the trial court (over objection) allowed for the first time at trial the issue of late notice to be injected into the proceeding.

The trial court automatically presumed the insurer prejudiced without requiring any proof whatsoever of prejudice to the insurer.

Aside from precedent of this court requiring consideration of the prejudice issue, the district court opinion, in dicta, states the burden is on the insurer to show it was prejudiced. This allocation of the burden is in conformance with the clear trend of the law throughout the United States. It is more equitable, conforms to the expectations of the parties, avoids a harsh and absolute forfeiture and promotes the strong public policy favoring coverage -- especially in the field of motor vehicle no-fault insurance matters.

Furthermore, the matter came on for trial only on the issue of whether the insurer had provided an adequate explanation of the [$8000] deductible so as to give it effect.

The insurance company did not plead any affirmative defense of breach of condition precedent and did not specify that it was prejudiced by the insured's notice (either by improper telephone notification or by the lateness of threatened and then actual litigation). (App. 1). Consequently, the issue was not properly raised by the pleadings and the insured was prejudiced.

The district court opinion properly remands this civil action so that procedural rule requirements will be used appropriately for fairness to both party litigants.

ARGUMENT

Issue I

WHEN IN AN ACTION TO ESTABLISH COVERAGE, THE INSURANCE COMPANY NEITHER PLED NOR OFFERED ANY PROOF WHATSOEVER OF PREJUDICE FROM THE INSURED'S LATE NOTICE, THE INSURANCE COMPANY IS NOT ENTITLED TO EITHER A PRESUMPTION OF PREJUDICE OR AN AVOIDANCE FROM THE DUTY OF EVERY PARTY LITIGANT TO ESTABLISH PREJUDICE; THE POSITION ASSERTED BY THE INSURANCE COMPANY CONSTITUTING AN ABSOLUTE FORFEITURE AND CONTRAVENING THE SIGNIFICANT PUBLIC POLICY CONSIDERATION REQUIRING AUTOMOBILE OWNERS TO PURCHASE AND MAINTAIN PERSONAL INJURY PROTECTION THEREBY AVOIDING THE BURDEN OF INJURED PERSONS BEING PLACED ON SOCIETY AT LARGE.

In National Gypsum Co. v. Travelers Indemnity Co., 417 So.2d 254, 256 (Fla. 1982) [hereinafter cited as National Gypsum], this Court expressly recognzied the general rule in insurance matters that the carrier must prove prejudice by approving the special concurrence of Judge Schwartz set forth in the lower court opinion.[1] That special concurrence stated:

> ...as to insurance policies in general, the carrier must show that a failure to give required notice has been prejudicial. [citation omitted]. With the narrow exception delineated in this opinion, that doctrine remains entirely intact.

National Gypsum held that recovery against a surety was precluded where a materialman failed to fulfill the condition precedent of giving written notice as required by the bond. This Court found that the rule of the special concurrence -- confirming the holding "to only would-be beneficiaries of performance and payment bonds on building and construction

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[1] Travelers Indemnity Co. v. National Gypsum Co., 394 So.2d 481, 485 (Fla. 3d DCA 1981).

contracts", Id at 255, (because of the circumstances unique to performance bonds) -- best preserved the rights and expectations of the parties.

While the National Gypsum opinion did cite Tiedtke v. Fidelity & Casualty Co., 222 So.2d 206 (Fla. 1969), [hereinafter cited as Tiedtke], it also cited, for favorable comparison, Brakeman v. Potomic Insurance Co., 472 Pa. 66, 371 A.2d 193 (1977).[2] Reasoning that because the materialman was not a primary beneficiary and the construction industry is well aware of the giving of timely written notice, this Court stated that "[Brakeman's] concerns are not present in the instant case." Id at 256.

Brakeman's concerns, however, are present now in the case at bar. To the extent that National Gypsum did not sub silentio overrule the presumption of prejudice in other non-commercial insurance matters -- especially those matters with a significant public policy favoring coverage -- this Court should do so now and recede from the unduly severe and inequitable forfeiture presumption of Tiedtke where, as here, there is no showing that timely notice would have put the carrier in a more favorable position.

Subsequent to Tiedtke, the Legislature enacted the Florida Motor Vehicle No Fault Law "to provide for medical [and] surgical, ... benefits without regard to fault, and to require

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[2]This Court recognized Brakeman's principle that the "insurer must show prejudice." National Gypsum, at 256.

motor vehicle insurance securing such benefits for motor vehicles..." §627.731, Fla.Stat. (1971). Because of this significant public interest in automobile liability insurance contracts, the application of the Tiedtke presumption to the typical, nonconsenual, no-fault insurance policy does not make sense in today's reality and is contrary to the expressed legislative intent.

A. The Clear Trend

Almost all supreme courts of other jurisdictions during the last decade re-evaluating this presumption -- especially in light of no fault motor vehicles statutes -- have rejected the traditional approach and embraced the view that the carrier is not presumptively prejudiced absent its so showing. Brakeman, supra at 196 ("We are of the opinion, however, that [the strict contractual approach], based on the view that insurance policies are private contracts in the traditional sense, is no longer persuasive"); Weaver Bros., Inc. v. Chappel, 684 P.2d 123, 125 (Alaska 1984) ("The modern trend rejects the [strict contractual] approach and considers the prejudice to the insurer as the material factor."); Zuckerman v. Transamerica Ins. Co., 650 P.2d 441, 448 (Ariz. 1982) ("We thereby grant the consumer his reasonable expectation that coverage will not be defeated by the existence of provisions which were not negotiated and in the ordinary case are unknown to the insurer."); Cooper v. Government Employees Insurance Company, 237 A.2d 870, 874 (N.J. 1967) ("We should therefore be mindful also of the victims of accidental events in deciding whether a forfeiture should be upheld... the burden of persuasion [as to likelihood of appreciable

prejudice] is the carrier's."); Great American Insurance Company v. C. G. Tate Construction Company, 279 S.E.2d 769, 775 (N.C. 1981) ("We believe the sounder rule to be that requiring the insurer to prove that it has been materially prejudiced by the delay."); Plasticrete Corp. v. AM Policyholders, Ins., 439 A.2d 968, 973 (Conn. 1981) ("The trial court correctly placed the burden of persuasion of showing prejudice on the insurance company. This is consistent with the clear trend of the law... [at n. 3] This rationale becomes even more forceful when applied to the field of automobile liability insurance, since the state has an interest in protecting parties injured in motor vehicle accidents."); Johnson Controls, Inc. v. Bowers, 409 N.E.2d 185, 187 (Mass. 1980) ("... there is a recent trend to eschew such technical forfeitures of insurance coverage unless the insurer has been materially prejudiced by virtue of late notification." [placing burden on carrier]); Oregon Automobile Insurance Company v. Salzberg, 535 P.2d 816, 819 (Wash. 1975) ("such relief [to the carrier], absent a showing of prejudice, would be tantamount to a questionable windfall for the insurer at the expense of the public."); cf. Hendrix v. Jones, 580 S.W. 2d 740, 744 (Mo. 1979) (regarding an insured's unexcused failure to attend a trial, "in showing a material breach the insurer will also be required to prove substantial prejudice to avoid liability under the policy."); contra, Marez v. Diary Land Ins. Co., 638 P.2d 286 (Colo. 1981).

B. The Rationale

In National Gypsum, this Court articulated several of the concerns as found in Brakeman.

First, insurance contracts are not truly consensual.

> An insurance contract is not a negotiated agreement; rather its conditions are by and large dictated by the insurance company to the insured. The only aspect of the contract over which the insured can "bargain" is the monetary amounts of the coverage... thus, an insured is not able to choose among a variety of insurance policies materially different with respect to notice requirements, and a proper analysis requires this reality be taken into account. Brakeman at 196.

Traditional contract rules concerning "the bargain" evolved when parties genuinely negotiated a contract; their relevance to the present reality of Florida citizens purchasing no fault liability insurance is practically nil. Careful shopping can hardly avoid an oppresive bargain. As the en banc Arizona Supreme Court stated:

> The insured is given no choice regarding terms and conditions of coverage which are contained on forms which the insured seldom sees before purchase of the policy, which often are difficult to understand, and which usually are neither read nor expected to be read either by the person who sells the policy or the person who buys it. Zuckerman, supra at 446.

Significantly in this case, it is undisputed that the carrier never provided the insured with a copy of the policy; the carrier never even suggested it routinely provided policies in Spanish when necessary -- the only document which would have advised the insured of the condition precedent.[3]

[3]The person who sold the policy did not even imply she advised the insured to file written notice in the event of an accident.

Secondly, denial of coverage under the insurance contract may involve a forfeiture. Because the policy provides an important function and effectuates an important public policy, a forfeiture should not be read in lightly. "In the absence of prejudice, such escape hatch provisions [notice] do not serve any legitimate purpose and offend basic notions of equity." Note, A Legal Process Analysis for a Statutory and a Contractual Construction of Notice and Proof of Loss Insurance Disclaimers -- GEICO v. Harvey, 38 Maryland Law Review 299, 316 (1978); Miller v. Marcantel, 221 So.2d 557, 559 (La.Ct. App. 1969).[4] In summary, there is no purpose in allowing the notice clause to completely bar coverage under the policy with no showing of prejudice when to do so will leave the insured with no benefit for the premium paid.

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[4]The Restatement of Contracts, in discussing the significant circumstances in determining whether a failure of performance is to be considered material so as to effectuate the "escape hatch" for the other party, considers the harshness of forfeiture -- [significant determining circumstances]:

> (a) the extent to which the injured party [insured] will be deprived of the benefit which he reasonably expected;
>
> (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
>
> (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;...
>
> (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing."

Restatement (Second) of Contracts, §241 (1981); See generally, Note, The Materiality of Prejudice to the Insurer as a Result of the Insured's Failure to Give Timely Notice, 74 Dick. L. Rev. 260 (1970).

Thirdly, not allowing late notice to be utilized to defeat coverage without any showing of prejudice is more equitable and furthers the expectations of the parties. Zuckerman, supra, at 448; Great American Ins. Co. v. C. G. Tate Const., supra, at 775.

Of great compelling significance is the public policy favoring coverage. §627.731, Fla.Stat. (1971). The presumption of Tiedtke should not be condoned in the present day because of no-fault considerations; in most instances, its rigid application violates the spirit of the Statute. Quite simply, the Legislature has required owners and operators of automobiles to purchase and maintain insurance to protect the public-at-large from the burden of vehicular accidents, as well as to compensate individual insureds and innocent victims for injuries without regard to fault.

C. The Burden of Proving Prejudice.

Certainly in some instances, an insurance company will be prejudiced by late notice. However, it is also certain that, in other instances, late notice will have little or no prejudicial effect. While the clear purpose of the notice provision is to protect the insurer in the preparation of a viable defense or to avoid fraud, it is of equal logic that if delay in the notice has not materially prejudiced an investigation, an insurer's obligation to perform that for which it has been paid ought not be excused.

To presume prejudice and to place this burden on the insured -- at least as was done by the trial court below -- is a presumption affecting the burden of proof. The purpose of such a presumption [§90.304, Fla.Stat. (1983)] is to

implement a cognizable social policy. Ins. Co. of State of PA. v. Estate of Guzman, 421 So.2d 597, 601 (Fla. 4th DCA 1982). If any presumption affecting the burden of proof is to be imposed, the social policy should favor coverage.

It may be argued that the Tiedtke presumption is simply one affecting the burden of producing evidence (an expression of experience) [§90.303, Fla.Stat. (1983)]. However, in reality, it has been applied exactly like those presumptions affecting the burden of producing evidence and breathing long-life into strong policy concerns of society, e.g., legitimacy, validity of marriage, sanity.

While §627.736(7), Fla.Stat. (1983) allows an insurance carrier to insert a provision concerning notice, the statute does not purport to avoid liability because the notice provision is not met. In light of other compelling subsections requiring coverage, the statute should be construed harmoniously to effectuate the legislative intent.

Indeed, as has been recognzied in other jurisdictions, both burdens (i.e. burden of proof and burden of producing evidence) should be on the insurer. The California Supreme Court, in Campbell v. Allstate Ins. Co., 384 P.2d 155, 157 (1963), reasoned from the premise that "presumptions should not be created judicially unless there are compelling reasons for doing so," and concluded that a presumption in favor of the insurer on the issue of prejudice would "not be in keeping with public policy... to provide compensation for those negligently

injured in automobile accidents through no fault of their own."

Calling this "the sounder rule," [burden on insurer] the North Carolina Supreme Court found that the carrier's concerns can still be protected. Great American Insurance Company, supra, at 775. The Court cogently analyzed as follows:

> If the insurer has the burden of proving prejudice, then when it receives a delayed notification, the rule will encourage the insurer to make a prompt preliminary investigation of the claim to protect its interests. An investigation may reveal that the delay has materially prejudiced the insurer, and, in that event, the insurer may deny coverage and either wait for suit against it or file suit for declaratory relief. If, on the other hand, the preliminary investigation reveals that the ability of the insurer to investigate and defend has not been materially prejudiced, the insurer, presumably, will proceed with the claim and the question of coverage will never reach the court. Additionally, the insurer, because it is an expert in investigation of accidents, is in a much better position to know what factors are relevant to its [own] ability to investigate and to recognize prejudice.[5] An insured would be in a far less enviable position if he had the burden of showing an absence of prejudice. Indeed, the insured would be forced to prove a negative. Placing the burden of showing prejudice on the insurer encourages an adequate investigation by the qualified party at the earliest possible time.

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[5]See generally, Commerical Molasses Corp. v. New York T. Barge Corp., 314 U.S. 104, 110-11, 62 S.Ct. 156, 160-61, 89 L.Ed. 89 (1941) (holding the burden of [proof] in a bailment starts and remains upon the bailor: "...the law takes into account the relative opportunity of the parties to know the fact in issue"); IX J. Wigmore, Evidence (Chadbourn rev.) §2486 (1981) ([one consideration for allocation of burden] "the burden of proving a fact is said to be put on the party who presumably has peculiar means of knowledge enabling him to prove its falsity if it is false." [emphasis in text]).

The Arizona Supreme Court concluded when placing the burden on the insurance company:

> The clause will be enforced [for the benefit of the insurance company] when the reasons for its existence are thereby served and will not be applied [against the insured] when to do so would be to defeat the basic intent of the parties in entering into the insurance transaction. Zuckerman, supra, at 448.

See also Brakeman, supra at 198.

The carrier may still be protected from undue liability when it is actually prejudiced, but, statutory and policy reasons dictate that the carrier should be required to establish its own prejudice.[6]

[6]This conclusion comports with the general rule that parties are not presumed prejudiced. E.g., contemporaneous objections; effective assistance of counsel.

Petitioner's assertions that all of the insurer's rights to discover the insured's injuries, receive reports, etc. can not be assumed. It is conceivable that, as the insured gave notice by the filing of this action a year and a half after the accident, the insurer would still not be prejudiced; at least as to adequately analyze and offer coverage of some indisputable medical expenses, lost wages, household services. (R.2).

Issue II

INDEPENDENT OF THE ALLOCATION OF THE BURDEN OF PROVING PREJUDICE, THE DISTRICT COURT OPINION CORRECTLY REVERSED THE TRIAL JUDGE WHERE THE INSURANCE COMPANY ONLY GENERALLY DENIED THE INSURED'S COMPLAINT AND FAILED TO SPECIFICALLY AND WITH PARTICULARITY DENY THE EXISTENCE OF A BREACH OF A CONDITION PRECEDENT [TIMELY WRITTEN NOTICE] AND THE MATTER CAME ON FOR TRIAL ON A SINGLE AND COMPLETELY DIFFERENT ISSUE.

Despite the insurer's factual allegation of "specific" denial, the answer reveals otherwise. (App. 1).

"Florida does not have notice pleading." H.Trawick, Florida Practice and Procedure, §6-5 (1984). Conditions precedent to a contract may be alleged generally (Fla.R.Civ.P. 1.120(c); W. J. Kiely & Co. v. Bituminous Casualty Corporation, 145 So.2d 762 (Fla. 3d DCA 1962)), but, a denial "shall be made specifically and with particularity." Fla.R.Civ.P. 1.120(c); Capital National Bank (Peoples Downtown National Bank) v. Southern Pine Isle Corporation, 353 So.2d 600, 602 (Fla. 3d DCA 1977); Fidelity & Casualty Company of New York v. Tiedtke, 207 So.2d 40, 42 (Fla. 4th DCA 1968), rev'd on other grounds, supra. "If the defending party does not make a specific denial, the party seeking affirmative relief is not required to prove its general allegation." Trawick, supra at §6-20.

W.J. Kiely, supra, is particularly persuasive. In that factual scenario, the insurer (at least) had averred non-cooperation as an affirmative defense. However, it "had not, in

response to the plaintiff's allegation of performance of conditions precedent, denied specifically and with particularity the cooperation condition. The Third District reversed saying the plaintiff "was not required to disprove the affirmative defense averred of the defendant." Id at 763. A fortiorari, when the carrier only generally denied 12 of the 14 paragraphs of the Complaint, the insured ought not be required to disprove the "non-averred" affirmative defense of the insurance company.

Additionally, in Capital National Bank, supra, the Third District further addressed this applicable pleading rule [Fla.R.Civ.P. 1.120(c)], and stated as follows:

> In response to [the] amended complaint, which generally alleged performance of all conditions precedent to the contract, [the defendant] answered by generally denying all pertinent allegations of the complaint and by pleading certain affirmative defenses, not directed to any specific "failures" of condition precedent. ...[such pleadings] did foreclose [defendant] from subsequently raising the issue of failure of specific conditions precedent at trial. [citing, inter alia, Kiely, supra, and Trawick, supra at §6-20.

See also, United Bonding Insurance Company v. Dura-Stress, Inc., 243 So.2d 244, 246 (Fla. 2d DCA 1971) (supplier alleging that all conditions precedent to contract for furnishing materials to subcontractor as well as conditions precedent to bringing of breach of contract action had been performed or had occurred was sufficient to meet issue of performance, and, where denial of performance or occurrence was not made specifically and with particularity as required by rule [Fla.R.Civ.P. 1.120(c)], summary judgment in favor of supplier was warranted); San Marco Contracting

Company v. State Department of Transportation, 386 So.2d 615, 617 (Fla. 1st DCA 1980) ("Conditions precedent to an action may be alleged generally by saying that they have been performed or have occurred. If the responding party denies that they have been performed or have occurred, that denial must specify what conditions precedent were not performed or did not occur.") [emphasis supplied][7]

This requirement of Florida law is precisely to avoid what occurred in the trial court below. Had the insurer pled a specific denial of the failure of the insured to perform the condition precedent [notice provision], the insured would have been on notice as to the condition precedent being a matter in

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[7] In anticipation of the insurer's reliance on Mariner Village Ltd. v. American States Insurance Co., 344 So.2d 1337 (Fla. 2d DCA 1977), the opinion is distinguishable.

In Mariner Village, the matter involved interpretation of a hold harmless agreement in a complex third-party action involving a payment and performance bond. Not only was there a settlement agreement with a negotiated "trigger date", but also there was an addendum for clarification entered into with further explication of the release (and specified) significant date. The third-party complaint affirmatively alleged the claim accrued after that specific date; the agreement and addendum with that date was attached to the complaint. The answer denied the claim accrued after the specified date. The Second District, id. at 1339, stated (in discussing the general denial of the complaint's paragraph maintaining the action accrued after the specified date): "Where there are allegations of specific facts, Fla.R.Civ.P. 1.110(c) permits the response by way of a simple denial."

Certainly, Mariner's extensive settlement negotiations and agreement to a "hammered-out" control date for release from liability, is vastly different from this insured's purchasing no-fault insurance and, upon seeking coverage, generally stating conditions precedent have been met.

dispute at trial. Moreover, if considered necessary, the insured could have sought to avoid, by way of reply, and set forth new facts in an effort to overcome the legal effect of facts specifically contained in the affirmative defense. In Re: The Estate of Grant v. Irick, 433 So.2d 681, 682 (Fla. 5th DCA 1983); Protection Casualty Insurance Company v. Killane, 459 So.2d 1037, 1038 (Fla. 1984) ("...evidence of failure to wear an available and fully operational seal belt may be considered by the jury in assessing a plaintiff's damages where the "seat belt defense" is specifically pled..." [italics in opinion].[8]

The irony of the insurer's answer is that it denied paragraph 11 en toto which contains even a statement that the insurance carrier "refuses to pay." (R.2).

"A judgment based on matter outside the issues made by the pleadings is invalid, except when tried by the consent of the parties." Trawick, supra, at §6-5. As the insured's counsel immediately objected when the insured's late notice was elicited during her examination (R.25), the notice provision, unarguably,

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[8]Even assuming the insurance company did not receive the insured's telephone notice as she so testified, the insurer was certainly on notice by the time of the filing of the lawsuit.

From the very beginning, the company's position was that there was not coverage for the insured's medical expenses, lost wages and household services (R.2) because of the $8,000 deductible. (T.50). The insurer, by unconditionally denying any liability upon its policy, waives proof of loss required by the policy. A general "denial at any time before the suit is time-barred waives the requirement of filing a proof of loss." Balogh v. Jewelers Mutual Insurance Co., 167 F.Supp. 763, 773 (D.Fla., S.D. 1958); Hartford Accident and Indemnity Company v. Phelps, 294 So.2d 362, 356 (Fla. 3d DCA 1974).

was not tried by consent. The trial court found for the insured on the single issue as framed by the pleadings [deductible amount].

Despite this acknowledged single issue, the court's permitting the [non-framed] late notice to dictate the the trial result essentially violated the insured's due process right to be heard in court. See, Balboa Insurance Company v. St. John's Engineering Company, Inc., 416 So.2d 1268 (Fla. 5th DCA 1982) (after a stipulated statement of facts and legal memoranda [upon motion to amend answer to raise for first time affirmative defenses of estoppel and waiver], the court's granting of motion and entering judgment was basically unfair and a violation of due process).

The cases cited in the district court opinion at bar are all appropriate for remanding this cause to the trial court for further proceedings. In the four cases, defenses of lack of notice and other breaches of cooperation by the insured required a showing of substantial prejudice to the insurer. In fact, this court stated in Ramos v. Northwestern Mutual Insurance Co., 336 So.2d 71, 75 (Fla. 1976):

> ...to constitute the breach of a policy, the lack of cooperation must be material and the insurance company must show that it was substantially prejudiced in the particular case by failure to cooperate.

The district court opinion has simply followed this dictate.

However, even if the opinion misapplied what this Court considers to be the proper burden, that application is merely

dicta and does not affect the outcome of the decision remanding the cause to the trial court.

Remand is essential so that the affirmative defense of late notice and the issue of prejudice, if any, may be properly pled and evidence received.

CONCLUSION

Because the District Court opinion is correct in its assessment that an insured's lack of notice requires a showing of substantial prejudice to the insurance company before allowing forefeiture of the policy, the decision should be affirmed.

For the reasons set forth in this Respondent's Answer Brief, the burden to show its own prejudice should be placed upon the insurance company.

In any event, the insurer, at the very least, should be required to plead specifically and with particularity the affirmative defense of failure of a condition precedent [timely written notice] before being allowed to avoid performance of that for which it has been paid.

Because fairness requires a different result from that obtained originally in the trial court, the district court decision should be affirmed.

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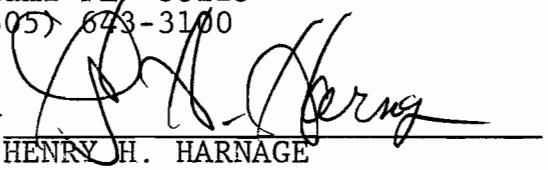
By 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Answer Brief on the Merits was mailed to Richard M. Gale, Esq., Attorney for Petitioner, Suite 2608, New World Tower, 100 N. Biscayne Blvd., Miami FL 33132 on this 1st day of April, 1985.

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