IN THE SUPREME COURT OF FLORIDA

CASE NO. 65,740

BANKERS INSURANCE COMPANY,

Petitioner,

vs.

CARIDAD MACIAS,

Respondent.

PETITIONER'S BRIEF ON JURISDICTION

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INTRODUCTION

The parties will be referred to in the position they occupy in this Court. Petitioner, Bankers Insurance Company, was the appellee in the District Court of Appeal, Third District, and the defendant in the Dade Circuit Court. Respondent, Caridad Macias, was the appellant in the Third District and the plaintiff in the trial court.

Reference to the appendix will be by the use of the symbol "A".

STATEMENT OF THE CASE AND FACTS

The decision sought to be reviewed is brief and is set forth as follows: 1/

1/ The decision is not reported as of the writing of this brief.

> Caridad Macias, plaintiff below, appeals from an adverse final judgment after a non-jury trial on the issue of automobile insurance coverage. The trial court found that appellant failed to give notice of the automobile accident and to provide proof of claim to appellee Bankers Insurance Company. As a result, the trial court found that appellee was presumed to have been prejudiced by this failure. We reverse on the basis that it is well settled in Florida that the defense of lack of notice and other breaches of a cooperation clause by an insured require a showing of substantial prejudice to the rights of the insurer. Ramos v. Northwestern Mutual Insurance Co., 336 So.2d 71 (Fla. 1976); Donnell v. Industrial Fire & Casualty Insurance Co., 439 So.2d 974 (Fla. 3d DCA 1983); Travelers Insurance Co. v. Jones, 422 So.2d 1000 (Fla. 4th DCA 1982), rev. denied, 431 So.2d 990 (Fla. 1983); United States Fidelity & Guaranty Co. v. Perez, 384 So.2d 904 (Fla. 3d DCA) rev. denied, 392 So.2d 1381 (Fla. 1980). We remand so that appellee may make this showing, if it is able to do so. All other points are affirmed. (A1-A2).

ARGUMENT

WHETHER THE DECISION SOUGHT TO BE REVIEWED EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER DISTRICT COURTS OF APPEAL.

The Third District relies on this Court's opinion in Ramos v. Northwestern Mutual Insurance Co., 336 So.2d 71 (Fla. 1976), for the principle that the defense of lack of notice and other breaches of a cooperation clause by an insured require a showing of substantial prejudice to the right of the insurer. Through inadvertence, the Third District applied the general principle of law announced in Ramos, although not

applicable to the particular facts of the case, sub judice, creating express, direct conflict. Sacks v. Sacks, 267 So.2d 73 (Fla. 1972).

In the first place the instant case involves insured's failure to give any notice of the automobile accident and to provide proof of her claim. This case is strictly a "delayed notice" case.

In Ramos, the accident occurred November 28, 1969, and notice was received December 29, 1969. (336 So.2d at 73). More importantly, the insured breached the cooperation clauses of his policy by his "total failure to cooperate." Ibid. In Ramos, this failure to cooperate occurred as a result of the insured's "disappearance" and failure to make himself available. The Supreme Court in Ramos held:

> Not every failure to cooperate will release the insurance company. Only that failure which constitutes a material breach and substantially prejudices the rights of the insurer in defense of the cause will release the insurer of its obligation to pay. (Emphasis added).

(336 So.2d at 75).

No breach of the cooperation clause of the policy was involved in the instant case. To the contrary, Ramos involved a breach of the cooperation clause in the policy.

Here, the insured failed to give any notice of the accident, which notice is a condition precedent to coverage under the policy, requiring substantial compliance by the insured.

Thus, the trial judge was eminently correct in finding under the facts and circumstances of this case that the petitioner, Bankers Insurance Company, was presumed to have been prejudiced by the insured's failure to give notice of the accident.

Quite simply, the Third District applied a rule of law involving the legal effect of breaches of a cooperation clause in an automobile policy to a case involving the legal effect of failure to comply with a condition precedent, viz., the giving of notice of accident.

Thus, the Third District created direct conflict by expressly accepting an earlier decision of this Court as controlling precedent in a situation materially at variance with the case relied on. McBurnette v. Playground Equipment Corp., 137 So.2d 563 (Fla. 1962); Spiney v. Battoglia, 258 So.2d 815; Sacks v. Sacks, supra.

Travelers Insurance Co. v. Jones, 422 So.2d 1000 (Fla. 4th DCA 1982), relied upon by the Third District in its decision, is likewise a misapplication of the law to the facts and circumstances of the instant case creating jurisdictional conflict. For Travelers Insurance Co. deals with a breach of notice clause of the automobile policy and other breaches of the cooperation clause of the policy; whereas, the case under

review deals only with a delayed notice. Failure of notice in the instant case goes to a breach of the "notice clause" in the policy and not to breach of any cooperation clause, as was the case in Travelers Insurance Co. v. Jones, supra.

There is also express and direct conflict between the case under review and National Gypsum Co. v. Travelers Indemnity Co., 417 So.2d 254 (Fla. 1982). In the National Gypsum case, the Supreme Court stated what has been the law of Florida, as follows:

> When notice of a possible claim is not given to an insurance company, prejudice is presumed, but recovery is not precluded if the insured can demonstrate lack of actual prejudice....

(417 So.2d at 258).

The decision under review recites that the insured failed to give notice of the automobile accident and to provide proof of claim to the insurer. In National Gypsum Co., notice of a possible claim was not given to the insurance company and prejudice was presumed. This presumption may be overcome if the insured can demonstrate lack of prejudice.

The Third District held that the defense of lack of notice and other breaches of a cooperation clause by an insured require a showing of substantial prejudice to the rights of the insurer.

As stated, supra, there were no "other breaches" by the insured of the "cooperation clause" in the policy in the instant case.[2/]

In like manner, the case under review is in express, direct conflict with this Court's case of Tiedtke v. Fidelity & Casualty Company of New York, 222 So.2d 206 (Fla. 1969). Tiedtke, involved an automobile accident and delayed notice to the insurance carrier. This Court held:

2/ This Court in the National Gypsum Co. case stated that Judge Schwartz' special concurrence sets out the proper rule which best preserves the rights and expectations of the parties. (417 So.2d at 256). A reference to Judge Schwartz' special concurrence in Travelers Indemnity Co. v. National Gypsum Co., 394 So.2d 481 (Fla. 3d DCA 1981), reveals that 18 Fla. Jur. Insurance, §789 (1971) is relied upon as to the issue of prejudice in "delayed notice" cases. In 31 Fla. Jur. 2d, Insurance §799 (1981) [renumbered from §789] the text reads:

> When the issue of prejudice is injected into a "delayed notice" case, the insurer is not required to show that it was prejudiced by failure of the insured to give timely notice; prejudice under such circumstances is presumed. This does not mean that upon a showing of delay alone the insurer can avoid liability. It means, rather, that, prejudice being a difficult matter to affirmatively prove, the insurance company is not required to make such proof. Prejudice may be presumed, with the burden upon the one seeking to impose liability to show that no prejudice did, in fact, occur.

> "...that the proper interpretation of the effect of prejudice in delayed notice cases was that while prejudice to the insurer is presumed, if the insured can demonstrate that the insurer has not been prejudiced thereby, then the insurer will not be relieved of liability merely by a showing that notice was not given "as soon as practicable. This appears to be a better view and we adopt it.

(222 So.2d 209).

Again, the Third District in this case, which is solely a delayed notice case, announced a principle of law expressly and directly contrary to Tiedtke by eliminating the presumption of prejudice and placing the burden on the insurer to prove that it was not substantially prejudiced.

In like manner, the decision under review expressly and directly conflicts with the holding of the Fourth District in Bass v. Aetna Casualty and Surety Company, 199 So.2d 790 (Fla. 4th DCA 1967). In Bass, the Fourth District held:

> Thus, the Florida position on lack of notice cases is that prejudice to the insurer is presumed, with the burden upon the one seeking to impose liability to show that no prejudice did result. And this would seem to be the better view. The insurance company is not faced with the considerable burden of showing that prejudice did, in fact, occur as a result of the insured's failure to give notice. Yet the insured is not denied recovery when his failure to give notice is demonstrably immaterial. (See 8 Appleman, Insurance Law and Practice, §4773, p.110.)

(199 So.2d 793).

The Third District got off the track and created jurisdictional conflict in the decision under review by treating the defense of lack of notice [breach of a notice provision in an automobile liability policy] as being another breach of the cooperation clause in the policy. In Bass, supra, it is noted that many courts have adopted the rule that it is unnecessary for the company to show that it was prejudiced by the neglect of the insured in order to assert this policy defense [breach of the notice clause] it being frequently stated that prejudice is presumed under these circumstances. (199 So.2d 792).

There is also express and direct conflict between the decision in the instant case and the decision in Klein v. Allstate Insurance Company, 367 So.2d 1085 (Fla. 1st DCA 1979). In Klein, the First District held:

> The rule to be applied to determine the effect of prejudice in delayed notice cases is that while prejudice to the insurer is presumed, if the insured can demonstrate that the insurer has not been prejudiced thereby, then the insurer will not be relieved of liability merely by showing that notice was not given within the provisions of the policy. See Tiedtke v. Fidelity & Casualty Company of New York, 222 So.2d 206 (Fla. 1969).

Here, in a delayed notice case, the Third District placed the burden on the insurer to show it was materially prejudiced. In Klein, as well as in the above cited conflicting cases, the burden is on the insured to demonstrate that the insurer was not prejudiced. Thus, express and direct conflict is patently clear.

CONCLUSION

Based upon the foregoing authorities and reasons, the decision under review expressly and directly conflicts with decisions of this Court and with decisions of other District Courts of Appeal on the same question of law. Accordingly, this Court should exercise its jurisdiction to review the decision of the Third District, direct the parties to file briefs on the merits and order oral argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy hereof was mailed to Henry H. Harnage, Esquire, c/o R.G. Worley, Suite 900, 370 Minorca Avenue, Coral Gables, Florida 33134, this 23rd day of August, 1984.

Richard M. Gale

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