SUPREME COURT OF FLORIDA

CASE NO. 65,740

BANKERS INSURANCE COMPANY,

Petitioner,

vs.

CARIDAD MACIAS,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

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PETITIONER'S BRIEF ON THE MERITS

INTRODUCTION

The parties will be referred to in the position they occupy in this Court and in their proper name. 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 pleadings, orders, etc., will be by the use of the symbol "R". Reference to the transcript of the trial proceedings will be by the use of the symbol "T". Reference to the respondent's exhibits will be by the use of the symbol "RX". Reference to the appendix will be by the use of the symbol "A".

STATEMENT OF THE CASE

The Court has accepted jurisdiction and dispensed with oral argument. [1]

Respondent, Caridad Macias, sought a declaratory judgment in the trial court (Dade Cir. Ct., Rivkind, J). She alleged, inter alia, that petitioner, Bankers Insurance Company, improperly sold her a policy of automobile insurance containing an $8,000 P.I.P. deductible in that she had no other insurance benefits available (R 1-3). [2]

In addition, respondent (as plaintiff in the trial court) alleged in her complaint the following:

> 11. Plaintiff has furnished the Defendant timely notice of the accident and proof of the claim and has otherwise performed all conditions precedent to entitle her to recover under the policy, but Defendant has refused and continues to refuse to pay Plaintiff for her losses, and/or take a position on the issue of coverage.

(R 2).

Petitioner's answer admitted the issuance of a policy of automobile insurance to the respondent, and admitted that at the time of the accident respondent's policy had a P.I.P. deductible of $8,000 (R 1).

Petitioner specifically denied the allegations contained in paragraph numbered 11, supra, of the complaint (R 2, 9).

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1. The case under review, Macias v. Bankers Insurance Company is reported at 452 So.2d 1020.

2. See Section 627.739 (Fla.Stat. 1977).

A nonjury trial was had. A final judgment was entered in favor of Bankers Insurance Company (hereinafter Bankers).

In the final judgment, the trial court found:

> 1. That the Plaintiff CARIDAD MACIAS failed to give notice of the accident of September 7, 1980, and provide proof of claim to Defendant BANKERS INSURANCE COMPANY or its agents, and
>
> 2. That the Plaintiff has failed to comply with all conditions precedent as contained in her policy of insurance with BANKERS INSURANCE COMPANY, and
>
> 3. The Defendant, BANKERS INSURANCE COMPANY is presumed to be prejudiced by the failure of the Plaintiff to give notice and the Plaintiff has failed to dispel said presumption, and
>
> * * * * *
>
> 5. That as a corollary finding the agent of Defendant, BANKERS INSURANCE COMPANY failed to give an adequate explanation of the deductible under the policy of insurance so as to give effect to the deductible . . . .

(R 15).

Respondent's post-trial motion for a new trial [or rehearing] was denied (R 17-19, 72).

Caridad Macias appealed to the District Court of Appeal of Florida, Third District, to review the order denying the motion for rehearing entered in the nonjury case. [3]

After briefing and oral argument the Third District entered the following opinion:

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3. Although the notice of appeal specified a non-appealable order denying a post-trial motion, said notice is to be treated as correctly directed to the reviewable final judgment. Puga v. Suave Shoes, 417 So.2d 678 (Fla. 3d DCA 1981) (en banc) (R 20).

> 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.

Notice to invoke jurisdiction of this Court was timely filed in the District Court of Appeal, Third District. Briefs on jurisdiction were filed. This Court, as noted above, has accepted jurisdiction.

STATEMENT OF THE FACTS

As noted above, the trial court found that the respondent, Caridad Macias, failed to give notice of her accident of September 7, 1980, and further failed to provide proof of claim to the petitioner, Bankers Insurance Company or its agents (R 15). As to this finding, the record reflects the following: The respondent testified that the automobile accident occurred on September 7, 1980, and that she reported said accident to [her] insurance agent, Atlantic Insurance, by telephone a

day or so after the accident (T 12, 24, 25).

On cross-examination, Mrs. Macias testified that she did not remember receiving any policy of insurance from Bankers or a card from Bankers (T 23, 24). She admitted never sending anything to Bankers in writing (T 25). In addition, she did not know if her attorney sent anything to Bankers (T 25). She neither filled out any application for no-fault benefits nor did she submit any bills to Bankers (T 26-27).

Further, she never received any letter from Bankers informing her that the company would not pay any money for her claim (T 27).

Miriam Perez, an employee of Atlantic Insurance testified that there is no notation in Mrs. Macias' file reflecting any notification of an accident (T 39). She described that her office procedure was to fill out a special form when an accident is reported (T 39-40). She added that a notation would have been made in the file if the agency was contacted concerning the accident and, in turn, a form would have been sent to Bankers (T 40-41).

There was nothing in the file to reflect a telephone call from Mrs. Macias to show any notification to the agency of the accident (T 41). Further, there was nothing from any attorney representing the respondent indicating that the latter was involved in an accident (T 41).

Mrs. Perez first learned about the accident when she was served with a notice to take her deposition (T 41-42).

A Mr. Theroux, the Vice-President of underwriting at Bankers testified that respondent's file revealed no written notification from the insured or her attorney regarding an accident on September 7, 1980 (T 44-45). Mr. Theroux testified further that the file reflected no claim for medical bills arising out of the September 7, 1980 accident (T 45-46).

In addition, no claim was received from Atlantic Insurance, and that Atlantic Insurance was not the agent of Bankers (T 46). [4]

Bankers' Vice-President first learned about the September 7, 1980 accident on June 16, 1982, when Bankers was served with a summons and complaint (T 46-47). On cross-examination, Mr. Theroux testified that no claim was submitted on the policy (T 40-50).

A review of the P.I.P. policy reflects the following:[5]

CONDITIONS

> 1. Notice. In the event of an accident, written notice of the loss must be given to B.I.C. or any of its authorized agents as soon as practicable.
>
> * * * * *
>
> 2. Action Against B.I.C. No action shall lie against B.I.C. unless, as a condition precedent thereto, there shall have been full compliance with all terms of this insurance, nor until 30 days after the required

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4. In the instant case Atlantic Insurance was an independent insurance broker and, accordingly, the agent for Mrs. Macias (T 46). Associated Insurance Brokers was the (general) agent for Bankers in Dade County (T 46).

5. The policy in question was titled a "Personal Injury Protection and Medical Payments" policy (RX No. 2). The following notation appears on the first page of the policy:

> No coverage is afforded under this policy for Automobile Liability or Uninsured Motorist Protection.

(RX No. 2).

> notice of accident and reasonable proof of claim has been filed with B.I.C.
>
> 3. Medical Reports: Proof and Payment of Claim. As soon as practicable the person making the claim shall give to B.I.C. written proof . . . under oath if required, which may include all particulars of the nature and extent of the injuries and treatment received and contemplated, and such other information and may assist B.I.C. in determining the amount due and payable. Whenever the mental or physical condition of an injured person covered by personal injury protection is material to any claim that has been or may be made for past or future personal injury protection insurance benefits, such person shall upon request of B.I.C. submit to mental or physical examination by a physician or physicians . . . .

(RX No. 2).

After the close of all the evidence the trial court made the following observations:

> What about the fact that no claim was filed, depriving them of their opportunity for medical examination if they wanted one?

(T 51).

* * * * *

> What about your allegation that you furnished defendant timely notice of the accident, proof of a claim and otherwise performed all conditions precedent?

(T 52)

* * * * *

> Is there a presumption of prejudice when you don't file a claim and a burden on you to show an absence of prejudice?

(T 52)

As to respondent's position that this suit involved just a declaration of coverage, the Court commented:

> You don't think this is splitting a cause of action . . . .
>
> * * * * *
>
> You want the Court to conclude that you have coverage under the policy, and now you want to file the necessary proof of loss or file your claim and then go through another lawsuit with them? . . .

(T 53-54).

As to the medical expenses the trial court stated that the insurer did not have an opportunity to even investigate said expenses (T 54).

Again, as to notice, the trial judge stated: "There obviously was no notice here until after suit. I think that it was apparent from the evidence in the case . . . . (T 55). The Court stated further: "I find as a matter of fact that she [respondent] never notified them of the accident." (T 56).

In response to respondent's query as to whether the Court was ruling that the suit was premature, the trial judge stated:

> Not necessarily that the suit was premature, that you didn't demonstrate that prior to filing suit there was a bona fide controversy between the parties entitling you to a declaratory action, that there was any claim filed and they made a denial, and then you brought the action. So for those reasons, and the fact that they didn't receive notice of the accident, received no notice of the claim, there is a presumption of prejudice, and you haven't dispelled any prejudice by failing to notify them until the lawsuit that there was a claim for PIP benefits up to the $8,000. Whether it exceeds that or not I wouldn't know from the evidence I heard. But for all of those reasons, I am entering judgment for the defendant. (Emphasis added).

(T 60-61).

SUMMARY OF ARGUMENT

Jurisdiction has been accepted. Review is based on the express, direct conflict of the Third District's decision in accepting cases (cited in its decision) as authority where the principle of law announced in the cited cases is not applicable to the particular facts of this case. The Court will not be burdened with a reargument of the cases and reasoning set forth in the petitioner's brief on jurisdiction.

This is a delayed notice case. In fact, notice of the accident and proof of the alleged claim were never furnished to the insurance company, which issued the policy providing personal injury protection benefits only.

Both, a condition of the insurance policy, as well as Section 627.736(4)(a) (Fla.Stat.) provides that the insurer be given written notice "as soon as practicable" after an accident.

Florida law in delayed notice cases holds 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."

In the instant case, as noted, notice was required both by the contract of insurance and by statute. The purpose of the notice is to give the insurance company (under the terms of its contract and the applicable Florida statutes), the right to prompt discovery of facts, which rights were denied to Bankers by lack of notice. See 627.736(6) (Fla.Stat.) (RX No. 2).

In addition, Bankers had the right under Section 627.736(7) (Fla.Stat.) and also under the policy of insurance to request a mental and/or physical examination of the insured, which statutory and contractual right was frustrated by lack of notice.

Accordingly, the respondent had the burden to dispel the presumption of prejudice by lack of notice. Prejudice was not overcome by any testimony. Further, considering that all of the rights of the insurer to inform itself about the condition of the claimant were defeated by lack of notice and no proof of claim, the trial court was correct in finding respondent failed to dispel the presumption of prejudice.

ARGUMENT

I

A) WHERE NO NOTICE IS GIVEN TO THE INSURER AND NO PROOF OF CLAIM PROVIDED TO THE INSURER (UNDER THE NOTICE PROVISION OF A P.I.P. POLICY) PREJUDICE TO THE INSURER IS PRESUMED.

B) UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE WHERE THE INSURER IS DENIED BOTH CONTRACT AND STATUTORY RIGHTS TO DISCOVER MEDICAL FACTS AND TO REQUEST A MENTAL OR PHYSICAL EXAMINATION OF THE CLAIMANT BECAUSE OF LACK OF NOTICE OR PROOF OF CLAIM, THE INSURED HAS FAILED TO DISPEL THE PRESUMPTION OF PREJUDICE TO THE INSURER.

Presumption of Prejudice

The Third District noted that the trial court found that the respondent failed to give notice of the automobile accident and to provide proof of claim to the petitioner, Bankers Insurance Company (A 1). 452 So.2d at 1020. As a result, the trial court found that Bankers was presumed to have been prejudiced by this failure (A 1). 452 So.2d at 1020.

The law in Florida involving late notice to the insurance company by the insured under the terms of a policy was settled by the Supreme Court in Tiedtke v. Fidelity Casualty Company of New York, Fla. 1969, 222 So.2d 206. The Court said that while prejudice to the insurer is presumed in such cases, the insurer will not be relieved automatically of liability simply by showing that notice was not given within the time provided for in the policy if the insured can demonstrate that

the insurer has not been prejudiced. [6] Mount Vernon Fire Ins. v. Editorial America, 374 So.2d 1072 (Fla. 3d DCA 1979); Torres v. Protective Nat. Ins. Co. of Omaha, 358 So.2d 109 (Fla. 3d DCA 1978); Allstate Ins. Co. v. Korschun, 350 So.2d 1081 (Fla. 3d DCA 1977); Laster v. United States Fidelity & Guaranty Co., 293 So.2d 83 (Fla. 3d DCA 1974).

The "purpose of a provision for notice and proofs of loss is to enable the insurer to evaluate its rights and liabilities, to afford it an opportunity to make a timely investigation and to prevent fraud and imposition upon it." Laster v. United States Fidelity & Guaranty Co., supra.

The accident occurred September 8, 1980 (T 24-25). Bankers was notified by a lawsuit of the accident on July 16, 1982, some 21 months after the occurrence of the accident (T 44-45).

In the instant case, the contract of insurance provided notice should be given "as soon as practicable" (RX No. 2). In addition, the policy provided that the person making the claim give all particulars of the nature and extent of the injuries and treatment received and contemplated, etc. (Ibid). [7]

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6. The weight of authority is that prejudice is presumed where the insured breaches the "notice" clause and that the burden is upon the one seeking to impose liability to show that no prejudice did in fact, occur. Bass v. Aetna Casualty & Surety Co., 199 So.2d 790 (Fla. 4th DCA 1967); citing 8 Appleman, Insurance Law and Practice, §4732, pp. 15-17. See also Couch on Insurance 2d §49:58.

7. See page 7, supra.

In this regard Bankers has the right to request a mental or physical examination by a physician or physicians of the insurer where material to any claim that has been or may be made for past or future personal injury protection benefits insurance (RX No. 2). Obviously, the contractual right to examine the insured as provided by the policy was precluded by the late notice of the claim.

Section 627.736 (4)(a), Fla.Stat., provides, under the subsection dealing with when P.I.P. benefits are due, the following:

> An insurer may require written notice to be given as soon as practicable after an accident involving a motor vehicle with respect to which the policy affords the security required by §§627.730-627.745. (Emphasis added).

Here, neither a written notice was given nor any benefits requested.

In addition to the rights given to the insured under §627.736, Fla.Stat., for prompt payment of P.I.P. benefits, there are certain rights given to the insurer under the same statute for prompt discovery of facts about an injured person, which rights were denied to Bankers by lack of notice. For example, §627.736(6), Fla.Stat., gives the right to an insurer providing P.I.P. benefits to discovery of facts from every physician, hospital, clinic, or other medical institution, by requesting complete medical records of the injured person seeking benefits.

Also Bankers was given the right under §627.736(7),

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Fla.Stat. to request a mental and/or physical examination of the insured, which statutory right was frustrated by lack of notice.

The purpose of a provision for notice and proofs of loss (in a P.I.P. policy) is to enable the insurer to evaluate the claim, to discover facts from all medical providers and to request a mental and/or physical examination of the claimant, and to prevent fraud and imposition upon it. Cf., Laster v. United States Fidelity and Guaranty Company, supra.

All of the rights, which could have been exercised if notice was given, were defeated. As far as respondent's attempt to show there was no prejudice, the trial judge found that the respondent failed to dispel the presumption of prejudice (R 15; T 60-61).

Accordingly, the decision of the Third District should be quashed with directions that the judgment of the trial court be affirmed.

CONCLUSION

Based on the foregoing authorities and reasons the petition for review should be granted and the decision of the Third District quashed with directions that the final judgment of the trial court be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy hereof was mailed to Henry H. Harnage, Esq., 1351 N.W. 12th Street, 8th Floor, Miami, Florida 33125, and Stabinski and Funt, P.A. 757 N.W. 27th Avenue, Third Floor, Miami, Florida 33125, Attorneys for Respondent, this 6 day of March, 1985.