SUPREME COURT OF FLORIDA

CASE NO. 65,740

BANKERS INSURANCE COMPANY,

Petitioner,

vs.

CARIDAD MACIAS,

Respondent.

PETITIONER'S REPLY BRIEF ON THE MERITS

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PETITIONER'S REPLY 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".

STATEMENT OF THE CASE AND FACTS

Petitioner readopts its statement of the case and facts set forth in its initial brief on the merits.

ARGUMENT

I

Petitioner's Point I will be restated in lieu of respondent's issue under Point 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.

Quite simply, the respondent relies upon a line of cases from other jurisdictions wherein the carrier is not presumptively prejudiced by late notice and the carrier has the burden of showing that it was prejudiced. E.g., Brakeman v. Potomac Ins. Co., 472 Pa. 66, 371 A.2d 193 (1977). In Brakeman (upon which the respondent places great reliance), the Court held that the insurer must prove not only that the notice provision was breached but also that it suffered prejudice as a consequence. One of several strong dissents in Brakeman rejects the majority holding as contrary to the weight of authority as seen in the following language:

> While some courts have chosen to reject traditional contract principles in interpreting insurance policies, I perceive no reason to do so in wholesale fashion. Indeed, a majority of the jurisdictions in this country still adhere to the traditional approach. See Annot., 18 A.L.R.2d 443 (1961); 8 J. Appleman, Insurance Law and Practice, §4732 (1962), and cases cited therein.
>
> * * * * *
>
> The starting point for analysis of any rule of law lies in an examination of its purpose. The purpose of a requirement that an insurer be given reasonably prompt notice of accident was described in Hachmeister, Inc. v. Employers Mutual Liability Ins. Co., 403 Pa. 430, 433, 269 A.2d 769, 770 (1961): "The reasonable notice clause" is designed to enable an insurer to investigate the circumstances of an accident while the matter is fresh in the minds of all, and to be able to make a timely defense against any claim filed.

Another case relied upon repeatedly by the respondent, Caridad Macias, is Zuckerman v. Transamerican Insurance Company, 133 Ariz. 139, 650 P.2d 441 (1982). Mrs. Macias contends that Zuckerman holds that the consumer (insured) has a reasonable expectation that the coverage will not be defeated by the existence of provisions which were not negotiated and in the ordinary case are not known to the insured. (Respondent's brief at 9; 650 P.2d at 446). This latter language is employed by those jurisdictions, cited by the respondent, which have attempted to avoid the clear, unambiguous late notice provisions of the insurance contract by holding that the court will reject "any strict contractual" approach and place upon the insurer the burden of demonstrating prejudice by late notice. Weaver

Brothers, Inc. v. Chappel, 684 P.2d 123, 125 (Alaska 1984); Zuckerman v. Transamerican Ins. Co., supra; Cooper v. Government Employees Ins. Co., 51 N.J. 86, 237 A.2d 870, 874 (1967); Great American Ins. Co. v. C.G. Tate Construction Co., 279 S.E.2d 759, 775 (N.C. 1981); Plasticrete Corp. v. AM. Policyholders, Inc., 439 A.2d 968, 973 (Conn. 1981); Johnson Controls, Inc. v. Bowes, 409 N.E.2d 185, 187 (Mass. 1980).

As was pointed out in the dissent in Brakeman, while some courts have chosen to reject traditional contract principles in interpreting insurance policies, the majority of the jurisdictions in this country still adhere to the traditional approach. In the traditional approach, where a liability policy makes the insured's failure to give timely notice a ground of forfeiture or compliance a condition precedent to liability, no recovery can be had where timely notice has not been given. See cases cited at 18 A.L.R.2d at 452-53 and 18 A.L.R.2d Latter Case Service at 355.

Florida, initially, was with the majority of jurisdictions. State Farm Mutual Automobile Insurance Co. v. Ranson, 121 So.2d 175 (Fla. 2d DCA 1960), involved an automobile liability policy which required notice of an accident "as soon as practicable" and made compliance with such a provision a condition precedent to an action against the insurer. The insured in Ranson did not give notice of the accident until over a year. The Second District held that the insurer was not obligated to defend the action brought against the plaintiff by the injured party.

To the same effect is Morton v. Indemnity Insurance Co. of North America, 137 So.2d 618 (Fla. 2d DCA 1962), where notice to the liability insurer was given approximately 6 1/2 months after an explosion which injured the insured's tenant. The Second District held that a 6 1/2 month delay was not giving notice "as soon as practicable" as required by the policy as a condition precedent to a right of action against the insurer.

Subsequently, the Second District receded from its language in Ranson and Morton, supra, in the case of American Fire and Casualty Company v. Collura, 163 So.2d 784 (Fla. 2d DCA 1964). In discussing "a notice of accident" clause which requires notice "as soon as practicable" the Court quoting from 8 Appleman, Insurance Law & Practice, §4737, pp. 15-17, stated:

> "Many courts have adopted the rule that it is unnecessary for the company to show that it was prejudiced by the negligence of the insured in order to assert this policy defense [breach of the 'notice' clauses], it being frequently stated that prejudice is presumed under these circumstances. This does not mean that upon a showing of delay, alone, the insurer walks out of court free of potential claims. It means, rather, that prejudice being a difficult matter affirmatively to prove, it 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—for example, that a complete investigation was made by another insurer or by competent persons who turned over the results to the 'late notice' insurer.

Thus, the Second District in Collura with regard to "delayed notice" cases concluded that the insurance company

is not required to show that it was prejudiced by the failure of the insured to give timely notice, in order to avoid liability under its policy; but, as Appleman stated, this does not mean that upon a showing of delay alone, the insurer can avoid liability. It only means that the insurer will not have the burden of proving such prejudice. The outcome of these "delayed notice cases" will ultimately depend upon the facts and circumstances of each case. 163 So.2d at 792-93.

Thereafter, this Court considered the propriety of the principle enunciated in Collura 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 prejudice thereby, then the insurer will not be relieved of liability merely by a showing that notice was not given as soon as practicable. Tiedtke v. Fidelity & Casualty Company of New York, 222 So.2d 206, 209 (Fla. 1969). The Court held "This appears to be the better view and we adopt it." Id. at 209.

Since the Tiedtke case, the foregoing principle that prejudice is presumed when notice is not given to an insurance company but recovery is not precluded if the insured can demonstrate lack of actual prejudice has consistently been followed in this State. E.g., Mr. Vernon Fire Ins. v. Editorial America, 374 So.2d 1072 (Fla. 3d DCA 1979); Bass v. Aetna Casualty & Surety Co., 199 So.2d 790 (Fla. 4th DCA 1967); Klein v. Allstate Insurance Company, 367 So.2d 1085 (Fla. 1st DCA 1979).

Notwithstanding this Court's pronouncement in Tiedtke respondent contends that National Gypsum Co. v. Travelers Indemnity Co., 417 So.2d 254 (Fla. 1982), although citing Tiedtke, indicates that the principle of law announced in Brakeman v. Potomac Insurance Co., supra, a Pennsylvania case, to the effect, that recovery will be allowed against an insurer despite lack of notice is controlling.

This Court's dicta in National Gypsum that the reasons for the decision in Brakeman, that the insurer must show prejudice despite a lack of proper notice are insurance contracts are not truly consensual; they involve forfeitures; and allowing recovery is the more equitable course of action and furthers the reasonable expectations of those who purchase insurance, is not controlling in the instant case. 417 So.2d 256. For Tiedtke and its progeny set forth sounder reasons for adhering to the principle announced in Tiedtke. First, there is no automatic forfeiture under the principle announced in Tiedtke in that Florida is no longer a jurisdiction where late notice alone will enable the insurer to walk out of court free of potential claims. The burden is upon the insured to dispel the presumed prejudice, which is proper considering that the insured is the claimant and the burden of proof should be placed upon the claimant.

In this regard the Fourth District in Bass v. Aetna Casulaty & Surety Co., supra, stated:

> 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).

It cannot be gainsaid that the insurance carrier needs notice of a claim in order to fully investigate the facts. In the instant case, Mrs. Macias "notified" Bankers by service of process twenty-one months after the accident. Obviously, a rule that an insurer must prove that late notice of a potential claim constitutes material prejudice creates a burden or hardship upon Bankers to ascertain all the facts and circumstances relating to the insured's injuries, where the latter precludes any investigation from the inception of the accident up to the time of the service of process.

If the respondent's position is adopted by this Court no insured will have to give notice to the carrier, leaving to the latter the burden of proving prejudice. Further, if the respondent's position is adopted by the Court, the carrier's contractual rights, as well as its statutory rights under §627.736(4)(a), (Fla.Stat.), requiring written notice to be given as soon as practicable after an accident will be frustrated.

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 concerning the medical condition of the insured. These 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 §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 rights were also frustrated by lack of notice. (RX No. 2). *

Finally, respondent contends that this Court in National Gypsum expressly recognized the rule that the carrier must prove prejudice in delay notice cases when it approved the special concurrence written by Judge Schwartz in the lower court opinion. Travelers Indemnity Co. v. National Gypsum Co., 394 So.2d 481 (Fla. 3d DCA 1981). In part, Judge Schwartz' special concurrence contained the following language in a case involving a compensated surety:

> . . . Moreover, it allays the concern expressed by Judge Hendry that reversal jeopardizes the rule that, as to insurance policies in general, the carrier must show that a failure to give required notice has been prejudicial. 18 Fla.Jur. Insurance §789 (1971). With the narrow exception delinated in this opinion, that doctrine remains entirely intact.

(394 So.2d 485).

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* Also, if the rule proposed by the respondent is adopted by this Court, carriers will be required to maintain increased reserves for undetermined claims since the notice of accident provision in a policy would be ignored by some insured claimants. This maintaining of increased reserves for undetermined claims will ultimately increase the cost of furnishing automobile liability coverage and the resulting increased costs will assuredly be passed on to all consumers.

The above quoted language in Judge Schwartz' special concurrence in Travelers Indemnity Co. v. National Gypsum Co., supra, shows that 18 Fla.Jur. Insurance §789 (1971) is relied upon as authority.

A reading of 31 Fla.Jur.2d Insurance §799 (1981) [renumbered from §789] reflects the following:

> 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.

Finally, the present rule is in the public interest since early investigation reduces the risk of successful fraudulent claims. This is a disadvantage to the specific claimant, who often is also the insured, but it is a disadvantage wholly supportable in the public interest.

Florida has the fairest and most equitable rule as to "late notice." Accordingly, there is no compelling reason to change the law. *

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* In National Gypsum this Court stated what has been the law of Florida, as follows:

> . . . When a 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).

II

Respondent's Issue II should be rephrased to read as follows:

> THE TRIAL COURT DID NOT ERR IN ALLOWING THE ISSUES OF ABSENCE OF NOTICE AND LACK OF PROOF OF CLAIM TO BE TRIED WHERE SAID ISSUES WERE SUFFICIENTLY RAISED IN THE PLEADINGS

Respondent's second issue reads, in part, as follows:

> . . . 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.

The District Court of Appeal of Florida, Third District, did not consider the pleading issue in its decision. Macias v. Bankers Insurance Company, 452 So.2d 1020 (Fla. 3d DCA 1984). The pleading issue raised by respondent in the Third District had no merit. Accordingly, the Third District made no reference to it.

Adverting to respondent's paragraph numbered 11 of her complaint, she stated:

> 11. Plaintiff has furnished Defendant timely notice of the accident and proof of her 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. (Emphasis added).

(R 2).

Bankers' answer stated in part:

> Defendant denies the allegations contained in paragraphs . . . 11 . . . . (R 9).

Respondent contends that Fla.R.Civ.P. 1.120(c) mandates that a denial of performance or occurrence of conditions precedent shall be made specifically and with particularity. Mrs. Macias inadvertently overlooks Fla.R.Civ.P. 1.110(c) which provides in part:

> In his answer a pleader shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments on which the adverse party relies . . . Denial shall fairly meet the substance of the averments denied . . . .

In support of Bankers' position that the issue of notice of the accident and proof of claim were properly raised by the pleadings is the holding in Mariner Village Ltd. v. Am. States Ins. Co., 344 So.2d 1337 (Fla. 2d DCA 1977).

The third-party plaintiff in Mariner Village Ltd. alleged in its third-party complaint, in paragraph numbered four:

> Plaintiff [Largo Plumbing] in this cause is an assigned subcontractor as referred to in Exhibit 'A' attached hereto and the action sued upon accrued after November 3, 1975.

As a prerequisite to the owner's duty to hold the surety harmless from liability, it was necessary that the surety be subjected to some claim by an assigned subcontractor, which claim must have accrued after November 3, 1975.

Thereafter, Mariner Village Ltd., the third-party defendant responded to paragraph 4 by stating that, "Paragraph 4 is denied."

The Second District in Mariner Village Ltd., supra, held:

> Appellant's contention that the allegations of paragraph four constituted the pleading of the performance of conditions precedent under Fla.R.Civ.P. 1.120(c) which required the denial thereof to be pled with particularity cannot be sustained. This rule is applicable only to a general allegation of the performance of conditions precedent as was made in paragraph five of the third-party complaint. Where there are allegations of specific facts, Fla.R.Civ.P. 1.110(c) permits the response by way of a simple denial. (Emphasis added).

344 So.2d 1339.

In the case, sub judice, respondent alleged specific facts that she furnished Bankers timely notice of the accident and proof of her claim. Under Fla.R.Civ.P. 1.110(c), and the Mariner Village Ltd. case, a response by way of a simple denial is permitted where there are allegations of specific facts.

Accordingly, the trial judge was correct in considering the issues of notice of the accident to Bankers and the absence of any proof of the claim.

In the final paragraphs under this issue, respondent raises the jurisdictional question of whether the Third District's decision misapplied the law. This Court accepted jurisdiction [based on the express, direct conflict of the Third District's decision in citing cases as authority, where the principle of law announced in the cited cases was 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.

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 26 day of April, 1985.

Richard M. Gale