O/A 1-13-89

IN THE SUPREME COURT OF FLORIDA

CASE NO. 72,388

PENELOPE R. KUJAWA, as
beneficiary of JOHN A.
KUJAWA, Deceased,

Petitioner,

v.

MANHATTAN NATIONAL LIFE
INSURANCE COMPANY,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW
OF A DECISION OF THE DISTRICT COURT
OF APPEAL OF FLORIDA, FOURTH DISTRICT

BRIEF OF AMICUS CURIAE
FLORIDA DEFENSE LAWYERS ASSOCIATION

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______________________________/

INTRODUCTION

This brief is filed on behalf of Amicus Curiae, Florida Defense Lawyers Association, in support of the decision of the Fourth District Court of Appeal. In this brief, the petitioner will be referred to as "Kujawa" and the respondent will be referred to as "Manhattan."

STATEMENT OF THE CASE AND FACTS

The Florida Defense Lawyers Association adopts the Statement of the Case and Facts set forth in Manhattan's brief.

SUMMARY OF THE ARGUMENT

In a third-party insurance situation, the insurer's files (up to the time judgment is entered in the underlying suit) are not privileged as between the insurer and the insured or the injured plaintiff who steps into the shoes of the insured in prosecuting a bad faith action. This is so because of the nature of the relationship between the insurer and the insured during the pendency of the underlying law suit. That relationship is a

fiduciary one, since the insurer controls the litigation and provides a defense on behalf of the insured. The insurer and the insured have a common interest and as between themselves there are no secrets and no privileges, in the absence of any coverage disputes.

The fact that the plaintiff in a third-party bad faith case may obtain the insurer's files results from the nature of the relationship between the parties in the underlying action, <u>not</u> from the nature of the cause of action (bad faith failure to settle within policy limits). Therefore, simply because the causes of action in a third-party and in a first-party context are similar, does not mean that the insurer's files must be produced to the insured in the first-party situation.

This Court should accept the Fourth District's resolution of the issue and reject the Third District's decision in <u>Fidelity and Casualty Insurance Company of New York v. Taylor</u>, 525 So.2d 908 (Fla. 3d DCA 1987). The Third District confused the similarity in the causes of action in the third-party and first-party situations and overlooked the fact that the non-existence of the attorney-client privilege in the third-party context results from the relationship between the parties, not the nature of the cause of action. Moreover, the Third District's determination that the attorney-client privilege is commonly rendered inapplicable in cases such as this should be rejected by this Court. Even if it would be helpful for a plaintiff to have access to the opposing party's privileged

materials, that is not enough to abrogate the attorney-client privilege.

ARGUMENT

THE DISTRICT COURT CORRECTLY DETERMINED THAT THE PRIVILEGES WHICH ATTACH TO ATTORNEY-CLIENT COMMUNICATIONS AND ATTORNEY WORK PRODUCT ARE NOT ABROGATED MERELY BECAUSE THE PARTY INVOKING SUCH PRIVILEGES IS AN INSURER BEING SUED BY ITS INSURED UNDER § 624.155, FLA. STAT.

A. A First-Party Insurance Claim Under § 624.155, Fla. Stat. is Not the Same as a Third-Party Bad Faith Claim and the Determination of Privilege is Different in Each Situation.

In the third-party bad faith context, none of the insurer's files up to the time judgment was entered in the underlying suit are privileged. It is not a matter of requiring the insurer to produce privileged materials; rather, the insurer must produce all of its files because there never was any privilege attached to those documents, as between the insurer and the insured. This lack of privilege has nothing whatsoever to do with the cause of action (bad faith refusal to settle within policy limits) and is not based on the plaintiff's purported need for the materials. The lack of privilege, quite simply, results from the nature of the relationship between the insurer and insured during the defense of the underlying law suit. During the defense of that suit, the insurer acts in a fiduciary capacity with respect to the insured, by controlling the law suit and providing a defense, and the insurer and insured have no privileges as between themselves since they share a common interest and defense.

Black's Law Dictionary defines "Fiduciary Capacity" as follows:

> One is said to act in a "fiduciary capacity" . . . when the business which he transacts . . . is not his own or for his own benefit, but for the benefit of another person, as to whom he stands in a relation implying and necessitating great confidence and trust on the one part and a high degree of good faith on the other part.

Black's Law Dictionary at 753 (4th ed. rev. 1968).

In providing a defense and in controlling the litigation, the insurer is acting not only in its own interests, but in the interests of the insured as well. See, e.g., Stone v. Travelers Insurance Co., 326 So.2d 241, 243 (Fla. 3d DCA 1976). As stated in that case:

> It is clear that in an action for bad faith against an insurance company for failure to settle a claim within policy limits, all materials, including documents, memoranda and letters, contained in the insurance company's file, up to and including the date of judgment in the original litigation, should be produced. We reach this holding because of the very nature of a bad faith action and the posture of the parties involved.
>
> In defending personal injury litigation, an insurance company participates not only on behalf of itself, but also on behalf of its insured.

During the underlying suit the insurer and the insured shared a common defense up to the time judgment was entered, and had no privileges as between themselves.[1] In

[1] Communications to an attorney made by parties who share a common litigation interest are privileged. Western Fuels Association v. Burlington Northern Railroad Co., 102 F.R.D. 201

other words, during the suit brought by the injured plaintiff, the insurer and the insured had no secrets.[2] They had an identity of interests, they shared a common defense and had the same goal (a defense verdict), and there would have been no grounds during that lawsuit for the insurer to refuse the insured access to its records. The parties would not be in an adversarial relationship unless and until there was an excess judgment rendered (assuming there were no issues involving coverage).

Since the insurer and insured have no privileges as between themselves, the insurer cannot later assert a privilege as against the injured plaintiff during the plaintiff's bad faith suit, since the injured plaintiff steps into the shoes of the insured. Thompson v. Commercial Union Insurance Company of New York, 250 So.2d 259 (Fla. 1971).

The foregoing are the considerations relating to the privilege issue in a third-party situation. In a first-party situation, however, there is no fiduciary duty owed by the insurer to the insured and there is no shared defense of a prior law suit. To be sure, the legislature has mandated a duty of good faith by the insurer in all insurance contexts, but a duty of good faith is not the same as a fiduciary duty.

(D. Wyo. 1984); Visual Scene, Inc. v. Pilkington Brothers, plc., 508 So.2d 437 (Fla. 3d DCA 1987) and cases cited therein.

[2] The only exception would be if there was a reservation of rights and in that instance, only those matters bearing on the issue of coverage would be secret.

Merely because Manhattan owed a duty of good faith to Kujawa pursuant to § 624.155, does not mean that Manhattan and Kujawa were in any sort of fiduciary relationship.

Thus lies the fallacy of Kujawa's position. She asserts that because the insurer owes the insured the duty of good faith in both the third-party and first-party insurance contexts (the latter because of § 624.155), then the treatment of materials claimed as privileged is the same. What Kujawa overlooks is that in the third-party context, the plaintiff may have access to the insurer's files because of the identity of interests of the insurer and the insured, <u>not</u> because of the duty of good faith owed by the insurer.

The Florida Defense Lawyers Association would urge this Court to reject Kujawa's position and the Third District's resolution of this issue in <u>Fidelity and Casualty Insurance Company of New York v. Taylor</u>, 525 So.2d 908 (Fla. 3d DCA 1987). The Third District confused the similarity in the <u>causes of action</u> in the third-party and first-party insurance situations with the issue of whether the plaintiff is entitled to access to the insurer's files. While the causes of action may be similar, i.e., the insurer's breach of its duty of good faith to its insured, that is irrelevant to the discoverability of the insurer's files. The right to discover the insurer's files in the third-party context does not flow from the cause of action (the breach of the duty of good faith). It flows instead from the nature of the relationship between the insurer

and the insured in the third-party context. Since the same relationship does not exist in the first-party situation, the Third District incorrectly determined that the insurer's files were discoverable in the first-party situation.

B. The Fourth District's Resolution of the Issue Protects the Sanctity of the Attorney-Client Privilege, Whereas the Third District's Resolution Violates the Privilege.

In the present case, the Fourth District correctly resolved the issue by noting the distinction between a third-party and first-party insurance claim. In the first-party situation, there is no fiduciary relationship since there was no prior lawsuit in which the insurer controlled the defense on behalf of the insured.

The Third District's resolution of the issue in Taylor, however, violates the insurer's attorney-client privilege. Although the Third District correctly noted that the materials sought are relevant, relevancy is not enough to overcome a claim of privilege. Although the court correctly noted that the work product immunity may be overcome with a proper showing of need and inability to obtain the information elsewhere, the court in effect held that the attorney-client privilege can be overcome with the same showing. The court stated: "the attorney-client privilege is likewise commonly rendered inapplicable." 525 So.2d at 910. That is simply not so and the court fails to cite even a single Florida case which so holds.

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P.2d 28 (Alaska 1974) involved the crime-fraud exception to the attorney-client privilege. That exception to the privilege applies in Florida. Kneale v. Williams, 158 Fla. 811, 30 So.2d 284 (1947). The crime-fraud exception, however, has never been extended in Florida beyond situations in which communications between attorney and client involve contemplation of a crime or perpetration of a fraud. There is no assertion in the present case that Manhattan communicated with its attorneys with respect to the commission of a crime or perpetration of a fraud. Moreover, it is clear from the Werley case that in order to invoke the crime-fraud exception, the party seeking to dispense with the attorney-client privilege must make a prima facie showing of crime or fraud. In Werley, the court held that a facial insufficiency in the insurer's coverage defenses would satisfy the plaintiff's burden of making a prima facie showing of fraud. In the present case, at this stage, Kujawa has not alleged fraud or made any showing at all, let alone a prima facie case. Moreover, this Court should reject the Werley court's holding that merely showing legally insufficient defenses constitutes a prima facie showing of fraud so as to dispense with the attorney-client privilege.

Gibson v. Western Fire Insurance Co., 682 P.2d 725 (Mont. 1984), also cited by the Third District in Taylor, does not support the statement that "the attorney-client privilege is likewise commonly rendered inapplicable." There is no discussion of the issue in that case; apparently, the insurance

company produced its files without challenge. In re Bergeson, 112 F.R.D. 692 (D. Mont. 1986) is the only case cited which does render the attorney-client privilege inapplicable. The existence of that single district court opinion from Montana can hardly support the contention that the privilege is commonly rendered inapplicable.

This amicus was able to find only one non-Florida state case which squarely addresses the issue involved here. In Maryland American General Insurance Co. v. Blackmon, 639 S.W.2d 455 (Tex. 1982), the Supreme Court of Texas held that in a first-party insurance situation, the plaintiff may not have access to the insurer's privileged materials.

Kujawa argues that the materials sought are vitally important to her if she is to prove her case. Kujawa's amicus goes even further in asserting that the "only possible avenues for any insured to prove breach of duty is discovery of the entire claim file." (Academy of Florida Trial Lawyers' Brief at p. 3). As will be discussed later in this brief, such an argument cannot overcome the attorney-client privilege. However, in addition to that crucial point, Kujawa's argument must fail from a practical standpoint. Clearly there are other means whereby Kujawa can prove her case. She can depose witnesses; she can use non-privileged written materials; she can produce her own witnesses to testify concerning the nature of Mr. Kujawa's death and the responses she received in her contacts with Manhattan; and she can attempt to demonstrate

that Manhattan's procedure in conducting a contestability investigation was unreasonable, frivolous or the like. Merely because Kujawa would like to see what Manhattan's legal department records show does not mean she needs such records to prove her case.

There are any number of situations in which a plaintiff would like to obtain privileged material in the opposing party's possession. In virtually every case, there could conceivably be privileged material in the defendant's possession (or in his counsel's possession) which might aid the plaintiff. Similarly, in every case involving punitive damages, the plaintiff would be aided by knowing what was in the defendant's privileged materials. Even in the criminal context, the state would surely like to know what the defendant told his attorney.

If Kujawa's argument were accepted, the attorney-client privilege would be abrogated just by arguing that the plaintiff's case might be stronger if he could find something helpful in the defendant's privileged files.

Moreover, although need is a relevant criteria in considering whether an attorney's work product should be produced, it is irrelevant in considering a discovery request for attorney-client privileged material. Once material is shown to be protected by the attorney-client privilege, absent a waiver or the existence of facts to support the crime-fraud exception, the privilege is inviolate. The law is very strict

in its prohibition against the disclosure by attorneys of communications made to them in confidence by their clients. Lee v. Patten, 34 Fla. 149, 15 So. 775 (1894). The confidential relationship of attorney and client is indispensable to the administration of justice and should not be lightly brushed aside by removing the privilege accorded communications between attorney and client. Seaboard Air Line R. Co. v. Timmons, 61 So.2d 426 (Fla. 1952).

This Court has recently reaffirmed the importance of the attorney-client privilege in Mills v. State, 476 So.2d 172 (Fla. 1985) in stating: "The attorney-client privilege arises in the context of a relationship having great significance for the protection of fundamental personal rights." 476 So.2d at 176.

CONCLUSION

This Court should once again reaffirm the sanctity of the attorney-client privilege by approving the decision of the district court below. Any other result would erode the viability of the attorney-client privilege and could have grave consequences to the judicial system in this State.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Amicus Curiae Florida Defense Lawyers Association was served by mail this 18th day of November, 1988 on: STEVEN A. EDELSTEIN, ESQUIRE, Law Offices of Roland Gomez, 8100 Oak Lane, Miami Lakes, Florida 33016; RICHARD A. BARNETT,

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