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SID J. WHITE
JUL 15 1993
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

IN THE SUPREME COURT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA

PATRICK JOSEPH IMHOF, JR.,

Petitioner,

v.

NATIONWIDE MUTUAL
INSURANCE COMPANY,

Respondent.

CASE NO. 81,688

RESPONDENT'S ANSWER BRIEF ON MERITS

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[1] Table of Authorities prepared by Lexis.

STATUTES

MISCELLANEOUS

STATEMENT OF THE CASE AND FACTS

The Respondent, NATIONWIDE MUTUAL INSURANCE COMPANY,[2] accepts the Statement of the Case contained in the Plaintiff's Initial Brief. Nationwide provides the following Statement of the Facts, since the Plaintiff has chosen not to discuss them in his Statement of the Facts.

Factually, this case is not complicated. On July 26, 1987, the Plaintiff was involved in an automobile accident with an underinsured motorist.[3] (R. 1-2) At the time of the accident, the Plaintiff was insured under a policy issued by Nationwide to the Plaintiff's father, Patrick Joseph Imhof, Sr., in accordance with Pennsylvania law. (R. 1, 6-21) Although the declarations page of the policy does not appear to be included in the Record, Nationwide does not contest that the policy provided $200,000.00 in uninsured motorists (UM) coverage. The UM coverage of the policy included an arbitration provision requiring arbitration if the insured and Nationwide could not agree on the amount of damages the insured was entitled to recover. (R. 17-18)

The Plaintiff's Complaint alleged that on January 25, 1989, he made a claim against Nationwide's UM coverage. (R. 2) His Complaint further alleged that between January 25, 1989 and March

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[2] For ease of reference herein, the Defendant/Respondent, Nationwide Mutual Insurance Company, will be referred to as Nationwide. The Plaintiff/Petitioner, Patrick Joseph Imhof, Jr., will be referred to by name or as Plaintiff.

[3] All references to the Record on Appeal will be referred to as (R.) followed by citation to the appropriate page number of the Record.

10, 1989, several attempts were made to settle his UM claim, but that Nationwide failed to respond to his attempts to settle the claim. (R. 2) The Complaint further stated that on March 10, 1989, the Plaintiff filed his Civil Remedy Notice of insurer violation pursuant to Fla. Stat. § 624.155. A copy of the notice was attached to the Complaint and incorporated by reference. (R. 2, 22-23)

The Civil Remedy Notice identified Fla. Stat. § 624.155(1)(b)1 as the alleged statute that had been violated. (R. 22) The narrative statement attached to the notice explained that on January 25, 1989, Mr. Imhof's attorney had sent a policy limits demand to Nationwide. (R. 23) The narrative stated that the case presented one of clear liability and damages well in excess of Nationwide's policy limits. The narrative stated that a renewed demand was made on February 21, 1989, but that Nationwide again refused to offer its policy limits to settle the case. (R. 23)

Unlike the statutory notice, the Plaintiff's present Complaint alleged that he was forced to demand arbitration and an appointment of arbitrators because Nationwide refused to settle his claim. (R. 3) The Complaint further stated that during the 60 days which followed receipt of the notice, Nationwide failed to pay the damages or correct the circumstances giving rise to the violation. (R. 3) Paragraph 12 of the Complaint alleged that as a result of Nationwide's conduct, the Plaintiff was forced to demand arbitration of his UM claim which resulted in the payment of additional attorney's fees and that he incurred various

unreimbursed costs as a result of the arbitration. (R. 3-4) The Complaint further alleged that such conduct violated Fla. Stat. § 624.155 and that Plaintiff had complied with all conditions precedent to bringing an action pursuant to the statute. (R. 4) The Complaint did not allege that an arbitration award was entered which exceeded the settlement demand of the Plaintiff, nor did it allege that there was even an arbitration award. (R. 1-5)

On August 15, 1990, Nationwide filed its Motion to Dismiss and stated that it had not violated the statute. (R. 28) Nationwide also maintained that the Plaintiff had not alleged that the arbitration award exceeded the amount of the policy limits (the Plaintiff's demand) which had been the only legal basis upon which a cause of action under Fla. Stat. § 624.155 had been predicated. As an alternative ground, Nationwide maintained that the Plaintiff had failed to allege entitlement to any legally-cognizable damages.

SUMMARY OF THE ARGUMENT

This case is not complicated. The Plaintiff attempted to plead a cause of action for statutory insurer bad faith pursuant to Fla. Stat. § 624.155. As a condition precedent to bringing such an action, the Plaintiff was required to specifically notify the Department of Insurance and Nationwide of the alleged violation. The alleged violation, according to the Plaintiff, was that Nationwide failed to pay its policy limits when, under all the circumstances, had it treated the insured honestly and with due regard for his interests, it should have done so. In order to state a cause of action for that alleged violation, it was necessary for the Plaintiff to plead that he received an arbitration award which exceeded the policy limits that Nationwide allegedly refused to pay in bad faith. The Plaintiff did not even allege that an arbitration award was given, much less one that exceeded the policy limits. The Plaintiff has candidly conceded that he could never plead that he received an arbitration award which exceeded the policy limits. That concession is fatal to the Plaintiff's claim because in the absence of such an allegation, the Plaintiff can never demonstrate the statutory violation which was identified in his notice and would form the basis of his cause of action.

Although the Plaintiff has attempted to claim damages such as increased costs associated with the arbitration, those costs are not identified in his statutory notice to Nationwide, nor does he identify any other statutory violation which allegedly

resulted in these damages. The trial court obviously recognized, as did the First District, that the purpose of the notice provisions of the statute are to give the insurance carrier an opportunity to cure the alleged violation. In the absence of the notice, no opportunity to cure can ever be triggered. Here, the Plaintiff simply attempts to create a new claim in retrospect after his underlying claim has not been favorably resolved to him. This Court should not accept such logic because to do so would allow the Plaintiff to obviate the need to give the insurance carrier notice of the alleged violation and thereby would deprive it of its opportunity to cure so as to avoid the statutory penalties.

After reviewing the facts of the claim, Nationwide respectfully suggests that the case really does not present one of great public importance, and this Court should decline to exercise its jurisdiction. However, if this Court does believe that a question of great public importance has been presented, it should answer the certified question in the affirmative and approve the decision of the First District.

Likewise, this Court should reject the Plaintiff's contention that the First District erred when it failed to consider his argument that he had been deprived an opportunity to amend the Complaint and that the amendment privilege had not been abused. The Plaintiff first made this argument in his motion for rehearing filed with the First District. Cases which construe Fla.R.App.P. 9.330 are quite clear that arguments may not be raised for the first time in a motion for rehearing. See, e.g., Delmonico v.

State, 155 So.2d 368 (Fla. 1963). As such, the Plaintiff has waived this point on appeal.

Finally, both the trial court and the First District correctly denied the Plaintiff's motion for attorney's fees. This Court should not disturb those decisions.

ARGUMENT

I.

THE FIRST DISTRICT COURT OF APPEAL CORRECTLY AFFIRMED THE TRIAL COURT'S DISMISSAL OF THE PLAINTIFF'S COMPLAINT FOR FAILURE TO STATE A CAUSE OF ACTION FOR STATUTORY INSURER "BAD FAITH" PURSUANT TO FLA. STAT. § 624.155(1)(b)1 (1988).

This case is not complex. Despite the Plaintiff's best efforts to unnecessarily complicate the matter. This Court can decide this case simply by reviewing the appropriate statute, the Plaintiff's civil remedy notice, the Plaintiff's Complaint and the applicable law. After having done that, this Court should answer the First District's certified question in the affirmative and determine that one may not plead a cause of action for statutory insurer bad faith in the absence of allegations regarding a determination of the extent of the insured's damages as a result of the uninsured tort-feasor's negligence and the "favorable" resolution of the case to the insured.

Florida Statutes § 624.155(1)(b)1 (1988) provides:

> (1) Any person may bring a civil action against an insurer when such person is damaged:
>
> (b) by the commission of any of the following acts by the insurer:
>
> 1. not attempting in good faith to settle claims when, under all the circumstances, it could and should have done so, had it acted fairly and honestly towards its insured and with due regard for his interests.

Florida Statutes § 624.155(2) provides a relatively simple scheme requiring that notice of the alleged violation be given both to the Department of Insurance and the insurer. It likewise provides the insurer a 60-day opportunity to cure the alleged violation. Florida Statutes § 624.155(2)(a) provides:

> As a condition precedent to bringing an action under this section, the Department and the insurer must have been given 60 days' written notice of the violation . . .

Subsection (b) of that section provides that the notice shall be on a form provided by the Department and shall state with specificity certain required information. The notice must state the statutory provisions, including the specific language of the statute, which the insurer allegedly violated and the facts and circumstances giving rise to the alleged violation. Subsection (d) provides that no action shall lie if within 60 days after filing the notice, the damages are paid or the circumstances giving rise to the violation are corrected.

In the present case, the Plaintiff's notice was quite specific. The Plaintiff relied upon Fla. Stat. § 624.155(1)(b)1 as the statutory basis of his claim. Nationwide's alleged violation was that it failed to pay its policy limits of $200,000.00 to Mr. Imhof as it should have done, according to the Plaintiff, had it acted fairly and honestly towards Mr. Imhof with due regard for his interests. (R. 23) Under the statutory scheme established by the Legislature, upon receipt of that notice, Nationwide could have "cured" its alleged violation by tendering its $200,000.00 policy limits within 60 days. Obviously, it did not. That fact alone,

however, does not demonstrate the alleged violation. Instead, the Plaintiff, as an essential element of his cause of action, was required to plead an arbitration award exceeding the policy limits to state a cause of action for refusing to pay its policy limits.[4]

As the Plaintiff has candidly conceded in his brief, he did not allege, nor could he ever allege, that he obtained an arbitration award in excess of Nationwide's policy limits of $200,000.00. That admission is fatal to the Plaintiff's case, because he can never plead nor prove the specific violation (bad faith failure to pay policy limits) that he claimed in the statutory notice of violation provided to the Department of Insurance and Nationwide. As such, the underlying action was never favorably resolved in Mr. Imhof's favor, and no cause of action for statutory bad faith ever accrued.

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[4] It is important to note that Nationwide is not contending that Mr. Imhof's damages should be measured by any excess award. This Court correctly concluded in McLeod v. Continental Insurance Co., 591 So.2d 621 (Fla. 1992), that an excess award which was premised upon damages inflicted upon the insured by the uninsured tort-feasor was not the appropriate measure of damages under the statute. Nationwide is maintaining, however, that in order to plead a violation of the statute under the facts of this case, an excess arbitration award was necessary as a prerequisite to pleading a violation of the statute. Given Plaintiff's civil remedy notice, it was Nationwide's alleged failure to pay its policy limits that constituted the violation. In order to plead bad faith under the statute, Plaintiff was required to plead that his claim exceeded that value so as to bring into question whether Nationwide was giving due regard to his interests as required by the statute. Confer, Opperman v. Nationwide Mutual Fire Insurance Co., 515 So.2d 263 (Fla. 5th DCA 1987), rev. den., 523 So.2d 578 (Fla. 1988).

In Blanchard v. State Farm Automobile Insurance Co., 575 So.2d 1289 (Fla. 1991), this Court was asked to answer three certified questions by the United States Court of Appeals for the Eleventh Circuit. It chose to answer the first one which was as follows:

> Does an insured's claim against an uninsured motorist carrier under § 624.155(1)(b)(1.), Fla. Stat., for allegedly failing to settle the uninsured motorist claim in good faith, accrue before the conclusion of the underlying litigation for the contractual uninsured motorist insurance benefits?

This Court answered that question in the negative. In doing so, the court explained that if an uninsured motorist was not liable to the insured for damages arising from an accident, then the UM insurer has not acted in bad faith by refusing to settle the claim. The Court concluded that the insured's underlying first-party action for insurance benefits against the insurer necessarily must be resolved favorably to the insured before a cause of action for bad faith in settlement negotiations could accrue. The court also explained that it followed that an insured's claim against a UM carrier for failure to settle the claim in good faith did not accrue before the conclusion of the underlying litigation for the contractual UM insurance benefits. Absent a determination of the existence of liability on the part of the uninsured tort-feasor and the extent of the Plaintiff's damages, a cause of action could not exist for a bad-faith failure to settle.

Those rules, as applied to this case, demonstrate why the trial court correctly dismissed this case with prejudice, and why

the First District was correct in affirming that decision. Here, the Plaintiff's claim was not merely that Nationwide had failed to settle the case. Instead, the statutory violation notice was more specific and stated that Nationwide's failure to pay its policy limits of $200,000.00 constituted the bad faith failure to settle and the alleged violation. The Plaintiff's notice did not state that he would have been willing to accept even a penny less than the policy limits to settle. Therefore, under the violation he alleged, in order for the underlying litigation to have been favorably resolved in favor of Mr. Imhof, he would have to plead that the underlying litigation resulted in an award which exceeded the $200,000.00 policy limits. As he has conceded in his brief, he could never make such an allegation in good faith because that result was simply not obtained. Therefore, his claim for bad faith never accrued because under the facts of this case, the underlying claim was never favorably resolved in favor of Mr. Imhof. In fact, the present Complaint did not even allege that there was an arbitration award, much less that there was one in excess of the policy limits. As such, there simply was no actionable "violation" of the statute.

Although not mentioned by the First District, the trial court's order could have also been affirmed under the principles expressed in Reliance Insurance Co. v. Barile Excavating and Pipeline Co., Inc., 685 F.Supp. 839 (M.D. Fla. 1988). In Reliance, Judge Hodges construed Fla. Stat. § 624.155 and outlined the burden of the insured in demonstrating a claim under the statute. After

reviewing similar statutes from around the country, Judge Hodges ruled that for there to be a finding of liability against an insurance company for statutory "bad faith", the disputed insurance claim would have to be one that could be characterized as not fairly debatable. A claim was not fairly debatable when the facts demonstrated the absence of a reasonable basis upon which to deny the benefits. If, on the other hand, there was some reasonable basis for the denial, no bad faith could be proven as a matter of law.

Application of the Reliance rule also demonstrates that Mr. Imhof could never plead a cause of action under the statute. Under the rule, he would have to plead that his claim for policy limits was not fairly debatable and that there was no reasonable basis for Nationwide's failure to pay the limits. He could never allege such facts here because the arbitrators determined, as he freely concedes, that his claim was not worth the policy limits. Therefore, no bad faith claim can be proven as a matter of law.

Understandably, the Plaintiff tries to avoid this inescapable conclusion by arguing that the broad allegations contained within his Complaint "stated a cause of action." Florida law is quite clear that in order to withstand a motion to dismiss, a Complaint must contain allegations of fact establishing every element of the alleged cause of action. See, e.g., Woodcock v. Wilcox, 98 Fla. 14, 122 So. 789 (1929); Clark v. Boeing Co., 395 So.2d 1226, 1229 (Fla. 3d DCA 1981). Under the facts of this case, with specific reference to the Plaintiff's statutory notice

provided to the Department of Insurance and Nationwide, the Plaintiff had to allege that he received a damage award exceeding the policy limits in order to plead the violation identified in the notice. It was Nationwide's failure to pay the policy limits that constituted the alleged violation. Under the facts of this bad-faith case, that was an essential element of the cause of action which the Plaintiff did not plead, and could never, in good faith, plead.

The Plaintiff ignores these significant points, and instead, attempts to argue that his Complaint alleged that he had been damaged by Nationwide's alleged bad faith because he incurred additional attorney's fees and costs. According to the Plaintiff, Nationwide's "bad faith" refusal to pay its policy limits required him to seek arbitration. Not surprisingly, Plaintiff does not mention how he is entitled to these damages without pleading the statutory violation he claimed. Nowhere in the statutory notice provided to Nationwide are these alleged damages even stated. Instead, it appears that since he could not plead a violation of the statute in accordance with his statutory notice, the Plaintiff is simply attempting to claim some general concept of "bad faith" and that Nationwide should still be punished even when its decision not to pay policy limits was reasonable and justified.

While it is certainly understandable that an insured whose claim has not been "favorably resolved" would thereafter like to change his previous position so as to make it look like he prevailed, Florida law does not afford him that luxury. Florida

Statutes § 624.155(2) has generally been construed as providing an insurer the opportunity to cure the statutory violation alleged by the insured. See generally, Hollar v. International Bankers Insurance Co., 572 So.2d 937 (Fla. 3d DCA 1990), rev. dis., 582 So.2d 624 (Fla. 1991); Clauss v. Fortune Insurance Co., 523 So.2d 1177 (Fla. 5th DCA 1988). Under the statute, notice triggers the opportunity to cure. If the statute's language is to have any meaningful importance, it must be interpreted to require a Plaintiff to specifically identify what conduct of the insurer constitutes the alleged violation so that the insurer can cure the violation. This provision of the statute is meaningless if the insured can make a different claim after the underlying case has been resolved against him.

Under the apparent view of the Plaintiff, there would never be an opportunity to cure the violation because alleged violations would be determined in retrospect at a point in time when the newly recognized violation could never be cured. For instance, the Plaintiff here would now obviously like to suggest that Nationwide should have settled for at least one dollar less than what the arbitrators awarded. Even assuming for sake of argument that a bad faith case could be brought in the absence of an award exceeding policy limits, the Plaintiff could then argue Nationwide's decision was unreasonable and in bad faith. Under that scenario, Nationwide could never "cure" the violation. The arbitration has long since been completed. Nationwide was not notified of the new alleged violation, only that Plaintiff demanded

policy limits. Here, allowing the Plaintiff to now go forward with claims that he incurred additional expenses because of arbitration where there was no violation of the statute, and those claims were not mentioned in his statutory notice, will allow the Plaintiff to accomplish essentially the same result as addressed in the hypothetical. Nationwide would then be precluded from any opportunity to exercise its statutory rights under Fla. Stat. § 624.155. This Court should reject Plaintiff's attempt to create a cause of action through hindsight and retrospect. Instead, he should be held to his notice which claimed a violation that simply did not occur.

Finally, the Plaintiff argues that he was not required to plead in anticipation of Nationwide's affirmative defenses. Nationwide does not take issue with the general principle of law cited by the Plaintiff. Under the circumstances of this case, the Plaintiff did not allege and could not allege that such cause of action ever accrued. Pursuant to Fla.R.Civ.P. 1.110(b), the complaint must state facts sufficient to indicate that a cause of action exists. See, Hammonds v. Buckeye Cellulose Corp., 285 So.2d 7, 11 (Fla. 1973). The Plaintiff here did not and could not ever allege in good faith the existence of his claimed cause of action. This Court should approve the decision below and answer the certified question in the affirmative.

II.

THE FIRST DISTRICT CORRECTLY REFUSED TO CONSIDER AN ARGUMENT WHICH WAS FIRST RAISED ON REHEARING.

The Plaintiff claims that the First District erred when it affirmed an order granting a motion to dismiss with prejudice where the Complaint could have been amended and the amendment privilege had not been abused. The Plaintiff makes this contention despite freely admitting that he never complained about not being given an opportunity to amend the Complaint until his motion for rehearing was filed with the First District. The Plaintiff's effort to create this issue now is simply too little and far too late and should be rejected by this Court.

At the outset, the Plaintiff attempts to provide this Court with a variety of excuses why his failure to timely make this argument should be excused. He thereafter takes the incredible position that the First District erred by not considering an argument he waived, and further, that the First District abused its discretion by not considering the argument when he attempted to make it on a motion for rehearing.

One need only refer to Fla.R.App.P. 9.330 and the cases which construe it to demonstrate that no error has been committed here. A motion for rehearing is intended solely as a means of notifying the court of significant points of fact or law that the court has overlooked or misapprehended. It is not a method by which attorneys or parties can reargue the case to the courts, complain about the decision or otherwise vent their displeasure with what the court has done. See, e.g., Whipple v. State, 431 So.2d 1011 (Fla. 2d DCA 1983). Likewise, a motion for rehearing may not be used to raise arguments for the first time on appeal.

A District Court of Appeal may not consider such an issue. See, Delmonico v. State, 155 So.2d 368 (Fla. 1963). See also, Price Wise Buying Group v. Nuzum, 343 So.2d 115 (Fla. 1st DCA 1977); Florida First National Bank at Key West v. Fryd Construction Corp., 245 So.2d 883 (Fla. 3d DCA 1970). Simply stated, the Plaintiff's failure to timely raise the issue precluded the First District from ever considering it. Thus, the argument has been waived.

Even in the absence of the waiver, however, for the reasons more fully articulated in Argument I, the trial court would not have abused its discretion had it been presented with the request for amendment and such a request been denied. A trial judge is not required to grant leave to file an amended complaint where it appears that under no set of facts alleged, could a cause of action be stated. Here, given the Plaintiff's statutory notice and his conceded inability to allege an arbitration award exceeding the demand for settlement contained within the notice, under no set of facts pled in good faith, could the Plaintiff ever state a cause of action. As such, even if the argument had not been waived and addressed, the trial court would not have erred by denying a request for leave to amend the Complaint. This Court should approve the decision of the First District and answer the certified question in the affirmative.

III.

THE FIRST DISTRICT PROPERLY DENIED PLAINTIFF'S MOTION FOR ATTORNEY'S FEES WHERE HE IS NOT PREVAILING PARTY UNDER THE STATUTE.

The First District correctly denied the Plaintiff's motion for attorney's fees. The Plaintiff has not prevailed at the trial court nor at the First District, a prerequisite under the statute. For the reasons expressed in Arguments I and II, it is respectfully submitted that the Plaintiff should not prevail here either, and as such, the First District's order denying his request for attorney's fees should be approved.

CONCLUSION

Nationwide believes that after this Court reviews the facts of the case, it should determine that there is really nothing of great public importance involved here. The Plaintiff simply could not plead a cause of action. In the event the Court accepts jurisdiction, it should determine that the First District correctly affirmed the trial court's dismissal of Mr. Imhof's Complaint. Simply stated, since he did not plead, and could not plead an arbitration award in excess of the policy limits, he could not state a cause of action for bad faith failure to pay the policy limits in violation of Fla. Stat. § 624.155. The Plaintiff's attempt to raise new issues on rehearing at the First District was properly rejected by that court. This Court should approve the decision and answer the certified question in the affirmative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by U. S. Mail to **Thomas R. Jenkins, Esquire,** 220 W. Garden Street, Suite 801, Pensacola, Florida 32591-3105 on July 13, 1993.

George A. Vaka, Esquire