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SUPREME COURT OF FLORIDA

PATRICK JOSEPH IMHOF, JR.,

Petitioner,

v.

NATIONWIDE MUTUAL INSURANCE COMPANY,

Respondent.

CASE NO. 81,688

District Court of Appeal, 1st District - No. 91-00129

ON APPEAL FROM THE FIRST DISTRICT COURT OF APPEAL

INITIAL BRIEF OF PETITIONER

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INTRODUCTION

Petitioner, Patrick J. Imhof, Jr., has used references and abbreviations as follows:

R - Record on appeal

Appendix - Appendix to Initial Brief of Petitioner (Supreme Court of Florida.)

A-1 - Appendix to Appellant's Initial Brief (1st District Court of Appeal)

Appellant Imhof - Petitioner Patrick J. Imhof, Jr.

Appellee Nationwide - Respondent Nationwide Mutual Insurance Company which was the appellee below.

STATEMENT OF THE CASE

This cause of action arose following an arbitration between the parties on Appellant Imhof's underinsured motorist claim. The arbitration was preceded by the filing of a Civil Remedy Notice of Insurer Violation (Appendix 1/R-1, Exhibit B) which was forwarded to Appellee Nationwide and the Florida Insurance Commissioner on March 10, 1989, pursuant to the provisions of §624.155, Florida Statutes. Following payment of the arbitration award (Appendix 10 and 11, page A-1) and a stipulated amount of taxable costs, Appellant Imhof filed his Complaint (Appendix 1/R-1) seeking damages from Appellee Nationwide for alleged violations of §624.155, Florida Statues. On August 15, 1990, Appellee Nationwide served a Motion to Dismiss (Appendix 2/R-28). On December 11, 1990, Circuit Judge Nickolas P. Geeker entered an Order (Appendix 3/R-30) dismissing with prejudice Appellant Imhof's Complaint for failure to state a cause of action. On December 14, 1993, Appellant Imhof timely filed a Motion for Rehearing (R-31). The Motion for Rehearing was denied by Order dated January 7, 1991 (R-37). On January 8, 1991, Appellant Imhof filed and served his Notice of Appeal from the trial court's Order dated December 11, 1990 (Appendix 3/R-30) wherein this cause of action was dismissed with prejudice for failure to state a cause of action. Briefs (Appendix 4, 5 and 6) were filed and Appellant Imhof filed a Motion for Attorney's Fees (Appendix 7) on March 19, 1991. Oral argument was conducted by the First District Court of Appeal on November 22, 1991. The First District Court of Appeal entered its Opinion

(Appendix 8) affirming the trial court's Order and certifying a question of great public importance on February 19, 1993. Appellant Imhof's Motion for Attorney's Fees was also denied (Appendix 9). Thereafter, Appellant Imhof filed a Motion for Rehearing (Appendix 10) and a Motion for Leave to Amend (Appendix 11) on March 6, 1993. The First District Court of Appeal entered an Order (Appendix 14) denying Appellant Imhof's Motion for Rehearing and Appellant's Motion for Leave to Amend on April 2, 1993. The First District Court of Appeal also denied Appellee Nationwide's Motion to Strike a copy of the arbitration award as a part of the appendix to the Motion for Rehearing on the same day (Appendix 15). On April 20, 1993, the mandate was issued by the First District Court of Appeal. On May 3, 1993 Appellant Imhof filed his Notice of Appeal from the First District Court of Appeal's Opinion and Orders denying Appellant's Motion for Attorney's Fees and Appellant's Motion for Leave to Amend.

STATEMENT OF THE FACTS

The facts are not at issue in this appeal in that the trial court's Order dismissing this cause was based solely on the court's determination that Appellant Imhof failed to state a cause of action in the pleadings.

SUMMARY OF THE ARGUMENT

This court should answer the certified question by the First District Court of Appeal in the negative thereby determining that a statutory bad faith complaint under §624.155(1)(b)(1), Fla. Stat. does not need to include an allegation as to the existence of an arbitration award in favor of the insured in order to state a cause of action. Resolution of the underlying uninsured motorist claim merely establishes that a statutory bad faith claim under §624.155 has accrued but resolution of the claim is not an element of the statutory bad faith cause of action. Furthermore, it is fair and reasonable to infer from the facts alleged by Appellant Imhof that he did receive an arbitration award from Appellee Nationwide. Also, the lack of an arbitration award which is necessary for the bad faith claim to accrue would constitute an affirmative defense. Appellant Imhof is not required to include factual allegations in his complaint in anticipation of possible affirmative defenses. Alternatively, resolution of the underlying uninsured motorist claim could be considered as a condition precedent which was generally pled by Appellant Imhof in his complaint in accordance with the Florida Rules of Civil Procedure. Furthermore, it is improper to dismiss a complaint for failure to include an allegation which has consistently been acknowledged and conceded by Appellant Nationwide throughout the litigation proceedings and which was never addressed by the litigants or any court until the First District Court of Appeal rendered its opinion which is the subject of this appeal.

Alternatively, this court should exercise its inherent authority to allow amendment of the pleadings or take whatever steps are necessary to insure that a serious miscarriage of justice is avoided and the litigants are given a fair opportunity to be heard on the merits of the case. Even if the certified question is answered in the positive, Appellant Imhof should be allowed the opportunity to challenge the dismissal with prejudice since the dismissal by the trial court was made on other grounds which were never addressed by the litigants before the First District Court of Appeal.

Finally, in the event this Court answers the certified question in the negative or otherwise reverses the opinion of the First District Court of Appeal, then the order denying attorney's fees should also be reversed. Appellant Imhof is entitled to an award of attorney's fees if he is ultimately successful in his statutory bad faith claim against Appellee Nationwide.

ARGUMENT

I. The question certified by the First District Court of Appeal should be answered in the negative.

In its Opinion filed on February 19, 1993 (Appendix 8) the First District Court of Appeal essentially determined that Appellant's Complaint (Appendix 1) failed to state any cause of action because the Complaint lacked an allegation that the arbitration proceedings resulted in an arbitration award to Appellant Imhof. Over Judge Barfield's strong dissent, the First District Court of Appeal affirmed the trial court's dismissal with prejudice. The Court certified a question as presenting an issue of great public importance as follows:

> Is an action for bad-faith damages pursuant to section 624.155(1)(B)(1), Florida Statutes, barred by Blanchard v. State Farm Automobile Insurance Company, 575 So.2d 1289 (Fla. 1991), where the complaint fails to allege that there had been a determination of the extent of appellant's damages as a result of the uninsured tortfeasor's negligence?

This certified question should be answered in the negative for the following reasons:

A. This Court's decision in **Blanchard** has no application to the instant case because **Blanchard** determined when a cause of action for first party bad faith accrued and not whether the pleadings stated a cause of action.

Before the Blanchard decision was rendered, litigants and their attorneys were unsure as to whether a first party bad faith claim under §624.155 had to be joined with the underlying claim for uninsured motorist benefits in order to preserve the claim. In Blanchard, this Court disapproved of the Fourth District Court of Appeals' opinion in Schimmel v. Aetna Casualty & Surety Co., 506

So.2d 1162 (Fla. 3d DCA 1987) thereby holding that a first party bad faith claim must be brought after the underlying uninsured motorist claim has been resolved in favor of the insured because the cause of action does not accrue until then. It makes perfect sense that a bad faith claim cannot accrue until the insured receives an arbitration award or judgment. An insurer cannot be guilty of bad faith for "stonewalling" when an arbitration panel or jury confirms that the insured was never entitled to any benefits in the first place. Accordingly, this Court correctly determined that a first party bad faith claim under §624.155 "...does not accrue before the conclusion of the underlying litigation for the contractual uninsured motorist insurance benefits." (emphasis added) Blanchard, at 1291.

In Blanchard this Court did not determine that the existence and amount of an arbitration award or judgment for damages must be specifically pled in order to state a cause of action in bad faith. Therefore, the portion of the Blanchard opinion quoted by the First District Court of Appeal in support of its ruling in the instant case has no application to the certified question because Blanchard does not establish any pleading requirements for bad faith cases.

B. It is not necessary to specifically plead the existence and amount of an arbitration award or judgment because that is not an element of a cause of action for bad faith under §624.155(1)(b)(1), Florida Statutes.

The elements of a cause of action for statutory bad faith under §624.155(1)(b)(1), Florida Statutes are: (1) the transaction of insurance business in Florida; (2) the existence of a statutory duty to act in good faith; and (3) a breach of that duty. There

are no other elements set forth in the statute. In the instant case, Appellant's Complaint clearly sets forth those elements. Appellant Imhof has certainly alleged sufficient facts to put Appellee Nationwide on notice of his bad faith claim.

C. Appellant Imhof's Complaint contains sufficient factual allegations from which fair and reasonable inferences can be drawn that Appellant Imhof received an arbitration award thereby establishing that his bad faith cause of action had accrued.

There are many cases too numerous to cite here from virtually every jurisdiction in this country which hold that pleading requirements are to be liberally construed in favor of a plaintiff faced with a motion to dismiss. In Orlando Sports Stadium, Inc. v. State Ex Rel. Powell, 262 So.2d 881 (Fla. 1972) this court held that,

> For the purposes of the motion to dismiss for failure to state a cause of action, allegations of the complaint are assumed to be true and all reasonable inferences are allowed in favor of the plaintiffs' case. (citations omitted).
>
> Orlando Sports Stadium, Inc., at 883; see also, Abruzzo v. Haller, 603 So.2d 1338, 1340 (Fla. 1st DCA 1992); Shahid v. Campbell, 552 So.2d 321 (Fla. 1st DCA 1989); Gerum v. Bruno, 479 So.2d 860 (Fla. 4th DCA 1985); Bolton v. Smythe, 432 So.2d 129 (Fla. 5th DCA 1983).

Even if a plaintiff were required to allege the existence and extent of a favorable resolution of the underlying uninsured motorist claim, Appellant Imhof's Complaint contains allegations from which fair and reasonable inferences can be drawn that he received an arbitration award. Paragraphs 12 and 13 of Appellant's Complaint state that Appellant was required to pay additional attorney's fees and lost interest on "...the money that should have been paid..." if Appellee Nationwide had made a reasonable attempt

to settle Appellant's claim. It does not require any inference to establish that Appellant Imhof has alleged that Appellee Nationwide owed him money. Based on the other allegations contained within the four corners of the Complaint, it is fair and reasonable to infer that Appellee owed money to Appellant as a result of its contractual uninsured motorist obligations. The only possible basis for such an indebtedness would be an arbitration award or judgment in favor of Appellant Imhof. Even if Appellee Nationwide could conceive some other possible inference as a basis for its alleged indebtedness to Appellant Imhof, any selection from possible inferences must be allowed in favor or Appellant Imhof. Orlando Sports Stadium, Inc., at 883.

D. Appellant Imhof was improperly required to plead facts in anticipation of Appellee Nationwide's affirmative defense that the bad faith cause of action had not accrued.

This Court has also held that, "a complaint need only state facts sufficient to indicate that a cause of action exists and need not anticipate affirmative defenses." Hammonds v. Buckeye Cellulose Corp., 285 So.2d 7, 11 (Fla. 1973); see also, Thompson v. Martin, 530 So.2d 495, 496 (Fla. 2d DCA 1988). In the instant case, the First District Court of Appeal erred by improperly requiring Appellant Imhof to allege specific facts demonstrating that the cause of action had accrued which is an affirmative defense not unlike a statute of limitations defense. Of course, if such an affirmative defense would have been raised by Appellee Nationwide it would have been impossible to prove since an arbitration award had been entered in favor of Appellant Imhof (Appendix 10 and 11,

page A-1). Essentially, the First District Court of Appeal ignored Appellee Nationwide's burden of pleading and proving an affirmative defense by requiring Appellant Imhof to plead facts that are not necessary to state a cause of action then refusing to allow evidence on the issue by affirming dismissal of the case with prejudice.

E. Alternatively, Appellant Imhof was improperly required to plead specific facts establishing that all conditions had been met.

Even if entry of an arbitration award in favor of Appellant Imhof was a condition precedent to bringing the lawsuit against Appellee Nationwide, specific facts establishing that all conditions precedent have been met need not be alleged. See Rule 1.120(c), Fla. R. Civ. P. Accrual of a cause of action can be considered as a condition precedent. If the basis of the lawsuit is statutory, then the complaint must specifically allege performance of all statutory conditions precedent but a general allegation is sufficient as to other conditions precedent. San Marco Contracting Co. v. Dept. of Transportation, 386 So.2d 615 (Fla. 1st DCA 1980). In the instant case, Appellant Imhof specifically alleged compliance with all statutory conditions precedent in paragraphs 10 and 11 of his Complaint (Appendix 1) and generally alleged compliance with all other conditions precedent in paragraph 15.

F. Appellee Nationwide has conceded that Appellant Imhof's statutory bad faith cause of action had accrued by conceding the existence of an arbitration award to every judgment throughout all of the pleadings in this cause.

Perhaps the best evidence of the sufficiency of Appellant

Imhof's Complaint whether by explicit averment or by reasonable inference is Appellee Nationwide's specific acknowledgement that Appellant Imhof received an arbitration award. In its Motion to Dismiss (Appendix 2), Appellee Nationwide refers to "the arbitration award." In its Answer Brief (Appendix 5), Appellee Nationwide refers to "the resultant arbitration award" (p.iv); "the resolution of [Appellant Imhof's underinsured motorist] claim resulted in an award..." (p.1); "the arbitration award" (p.1); "the arbitrator's award" (p.12) and "the arbitration award" (p.16). As recognized by Judge Barfield, Appellee Nationwide specifically acknowledged the existence of an arbitration award but sought dismissal of Appellant's Complaint for failure to allege an arbitration award <u>in excess of the policy limits</u>. On the first page of its Answer Brief, Appellee Nationwide states that, "appellant's complaint, however, does not allege a favorable resolution of the underlying claim, and cannot because <u>the arbitration award did not exceed the policy limits</u> which has been demanded in settlement." (emphasis supplied). Furthermore, more than 10 times in its Answer Brief, Appellee Nationwide states that Appellant Imhofs' Complaint is deficient because it does not allege the existence of an arbitration award <u>in excess of the policy limits</u>.

Throughout the pleadings and briefs and during argument before the trial court and the First District Court of Appeal, counsel for Appellee Nationwide has consistently recognized that an arbitration award was entered in favor of Appellant Imhof. Counsel for

Appellee Nationwide has not and could not deny the existence of such an arbitration award in favor of Appellant Imhof. That has never been an issue at the trial court level or before the First District Court of Appeal.

II. The First District Court of Appeal erred when it affirmed the trial court's order dismissing Appellant's Complaint with prejudice and abused its discretion by denying Appellant's Motion for Leave to Amend Appellant's Initial Brief to include the dismissal with prejudice as an issue on appeal.

The trial court dismissed Appellant Imhof's Complaint with prejudice. Dismissal without leave to amend generally constitutes an abuse of discretion requiring reversal unless it can be shown that the party seeking to amend has abused the privilege to amend or the complaint is clearly not amendable. Kennedy v. Santa Rosa Island Authority, 530 So.2d 520 (Fla. 1st DCA 1988) quoting Thompson v. McNeal Co., Inc., 464 So.2d 244 (Fla. 1st DCA 1985). Since Appellant Imhof's Complaint was never amended, there was no abuse of the privilege to amend. Since an arbitration award had been entered in favor of Appellant Imhof, the Complaint was clearly amendable to include the allegation which has been required by the First District Court of Appeal and which is the subject of the certified questions.

At the time of filing Appellant's Initial Brief, there was no reason for Appellant Imhof to appeal the issue of the trial court's dismissal with prejudice without leave to amend. Appellant Imhof could not amend his Complaint to alleviate the problem asserted by Appellee Nationwide by including an allegation that he received an arbitration award in excess of the policy limits because such an

allegation would have been false. The mere existence of any arbitration award was never an issue at any time before the trial court of before the First District Court of Appeal.

Appellant Imhof's Complaint was "clearly amendable" to include an allegation that Appellant Imhof did receive an arbitration award but that was never an issue raised by the litigants before the trial court or the First District Court of Appeal. If the trial court would have dismissed Appellant Imhof's Complaint with leave to amend then counsel for Appellant Imhof would have certainly amended the complaint to include an allegation that Appellant Imhof received an arbitration award if that had been the basis for Appellee Nationwide's Motion to Dismiss. If the trial court would have dismissed Appellant's Complaint with prejudice for failure to include a specific allegation that Appellant Imhof received an arbitration award, then counsel for Appellant Imhof would have certainly made that an issue on appeal. There was no reason for Appellant Imhof to raise the dismissal with prejudice as an issue on appeal since the basis for the dismissal with prejudice was the failure to allege the existence of an arbitration award in excess of the policy limits. Certainly, Appellant Imhof would have no reason to appeal from an order which denied Appellant Imhof to amend his complaint to include a false allegation.[1]

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[1] During a conversation between counsel when counsel for Appellee Nationwide submitted the proposed Order to dismiss the Complaint to the trial court, counsel for Appellee Nationwide agreed with counsel for Appellant Imhof that dismissal with prejudice would be appropriate because Appellant Imhof could not ever amend his Complaint to include an allegation that the arbitration award was in excess of the policy limits which was the

In footnote 3 of its Opinion, the District Court of Appeal impliedly recognized that dismissal with prejudice and without leave to amend was improper. By denying Appellee Nationwide's Motion to Strike a copy of the arbitration award from the Record on Appeal, the court impliedly acknowledged the existence of an arbitration award in favor of Appellant Imhof. Furthermore, a copy of the arbitration award was part of the appendix to the Appellant's Motion for Leave to Amend (Appendix 11) without any objection from Appellee Nationwide. Nevertheless, the First District Court of Appeal denied Appellant Imhof an opportunity to amend his Initial Brief to include the dismissal with prejudice as an issue on appeal. In the interest of justice, the First District Court of Appeal should have allowed Appellant Imhof the opportunity to do so. Failure to address such patent and fundamental error has resulted in a serious miscarriage of justice. 3 Fla. Jur.2d Appellate Review, §199.

Both the First District Court of Appeal and this Court have the inherent authority to allow amendment of any part of the appellate proceedings at any time when such an amendment is in the interest of justice and results in disposing of the case on the merits. See Rule 9.040, Fla. R. of App. P. Based on the same rule, the First District Court of Appeal and this Court have the authority to disregard any failure to raise an issue on appeal even

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only issue raised by Appellee Nationwide before the trial court. An order dismissing the case with prejudice would not have been submitted to the trial court if the basis for the dismissal was a simple failure to allege the existence of an arbitration award in favor of Appellant Imhof.

without an amendment of the initial brief because such action by this Court would not affect any substantial right of Appellee Nationwide. The First District Court of Appeal's failure to disregard such an error or defect under the circumstances of this case has substantially prejudiced the rights of Appellant Imhof and has resulted in a serious miscarriage of justice. This Court's failure to correct the problem would result in a further miscarriage of justice. This Court should agree that it is unfair to require a litigant to appeal an issue which was never raised by the litigants and which was raised for the first time by the First District Court of Appeal in its Opinion, then deny the litigant an opportunity to raise the issue on appeal. This is especially true when the First District Court of Appeal knew that the dismissal with prejudice was improper and knew that Appellant Imhof did receive a substantial arbitration award from Appellee Nationwide. If this Court determines that a specific allegation of the existence of an arbitration award was necessary, then Appellant Imhof should be allowed an opportunity to amend his original Complaint to include the allegation of a fact which every litigant, attorney and judge in this case has always known. Alternatively, this Court should allow Appellant Imhof the opportunity to amend his Initial Brief to the First District Court of Appeal to include the dismissal with prejudice as an issue on appeal. Either alternative would be appropriate to avoid a serious miscarriage of justice and allow the litigants to reach the merits of the case.

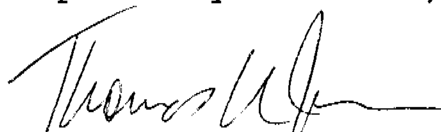
III. The First District Court of Appeal erred by denying Appellant's Motion for Attorney's Fees.

The First District Court of Appeal presumably denied Appellant's Motion for Attorney's Fees because it affirmed the trial court's Order dismissing appellant's Complaint with prejudice. If this Court answers the certified question in the negative or otherwise reverses the opinion of the First District Court of Appeal, then the order denying Appellant's Motion for Attorney's Fees should also be reversed. If Appellant Imhof ultimately prevails on his claim against Appellee Nationwide, then Appellant Imhof would be entitled to an award of attorney's fees pursuant to the provisions of §624.155(3) which provides that the insurer shall be liable to the insured for attorney's fees upon adverse adjudication at trial or upon appeal in bad faith actions brought pursuant to the statute.

CONCLUSION

This Court should answer the certified question in the negative and remand this cause to the First District Court of Appeal with instructions to remand to the trial court for trial on the merits of Appellant Imhof's statutory bad faith claim. If the certified question is answered in the positive, however, this Court should reverse the First District Court of Appeal and remand with instructions and findings that Appellant Imhof's complaint sufficiently states a cause of action based on fair and reasonable inferences from the alleged facts or based on appellant Imhof's specific and general allegations that all conditions precedent have been met. Alternatively, this Court should reverse the First District Court of Appeal and remand with instructions to allow Appellant Imhof an opportunity to amend his initial brief to include dismissal with prejudice as an issue on appeal or remand to the trial court with instructions to allow amendment of Appellant Imhof's Complaint. This Court should also reverse the First District Court of Appeal on the issue of attorney's fees and remand to the trial court with instructions to award attorney's fees for all time spent at the trial court level and on appeal if judgment is ultimately entered in favor of Appellant Imhof on his bad faith claim.

Respectfully submitted,



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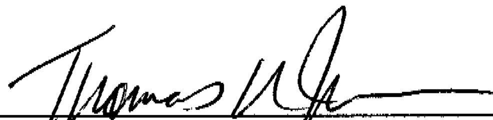
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was furnished to Jeffrey A. Cramer, Esquire, Post Office Box 12108, Pensacola, FL 32590 by U.S. Mail this 1st day of June, 1993.



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