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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

REPLY BRIEF OF PETITIONER

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ARGUMENT

I.

Appellant Imhof agrees that this is not a complex case but Appellee Nationwide has still missed the central issue. This is a clear case of stonewalling by an uninsured motorist carrier. Appellee Nationwide ignored all of Appellant Imhof's efforts to settle this case both before and after the filing of the bad faith notice under Section 624.155. Section 624.155(2)(d) provides that "No action shall lie if, within 60 days after filing notice, the damages are paid or the circumstances giving rise to the violation are corrected. (emphasis added)" Nationwide could have cured the problem by simply making a good faith effort to settle the claim within 60 days after the bad faith notice. Instead, Nationwide chose to stonewall the claim. Nationwide could not have made a "good faith" effort to settle because Nationwide made absolutely no effort to settle either before or after the 60 day notice which is a violation of the statute regardless of the policy limits. See McLeod v. Continental Ins. Co., 591 So.2d 624 (Fla. 1992). Stonewalling insureds is not an acceptable practice even if the insured has uninsured motorist coverage which exceeds the insured's damages.

In its answer brief, Appellee Nationwide still contends that [Appellant Imhof] "...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..." Appellee's Answer

Brief at 9. Even the certified question by the First District Court of Appeal implicitly recognizes that an arbitration award in excess of policy limits is not an essential element of the cause of action under Section 624.155. Whether Appellee Nationwide should have paid the policy limits demand or made a reasonable counteroffer instead of stonewalling the claim is a matter for the jury to consider when determining whether Nationwide attempted "...in good faith to settle [Appellant Imhof's claim] when, under all of 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." Section 624.155(1)(b)(1), Florida Statutes. Certainly, Appellant Imhof would not be entitled to any damages if a jury ultimately determines that Nationwide did not act in bad faith but that should be a jury issue. The lack of an allegation that Appellant Imhof received an arbitration award in excess of the policy limits is not "fatal" to Appellant Imhof's claim as contended by Nationwide. The only fatal blow to Appellant Imhof's claim should be a jury finding that Nationwide did not act in bad faith.

Clearly, Nationwide misconstrues the purpose of Section 624.155 which is a consumer statute requiring insurance companies to act in good faith when dealing with claims by first-party insureds. Nationwide apparently is of the opinion that it can stonewall its insureds with impunity so long as its policy limits

are adequate to cover the damages. If Nationwide is correct, then Nationwide stands to gain a substantial benefit by stonewalling legitimate claims which would then result in later payment to its insureds and additional profits to Nationwide as a result of the time-value of money. Section 624.155 was intended to make insurance companies liable for damages to its insureds when the insurance carrier fails to act in good faith regardless of the policy limits. The statute was not designed to create an additional source of profits to companies that choose to ignore legitimate claims by their insureds who have damages within their policy limits.

The certified question by the First District Court of Appeal is simple and straight forward. Even though not previously addressed by the litigants, the First District Court of Appeal wants to know whether a claim for bad faith under Section 624.155 is barred by Blanchard v. State Farm Automobile Insurance Company, 575 So.2d 1289 (Fla. 1991) if the complaint does not include an allegation that the claimant received an arbitration award or a judgment against the uninsured motorist carrier. For the reasons set forth in the initial brief of petitioner, Appellant Imhof contends that the certified question should be answered in the negative or it should be concluded that Appellant's allegations were sufficient even if the certified question is answered in the positive. By continuing to claim that an excess verdict is an essential element of a statutory bad faith claim, Appellant

Nationwide is still trying to create confusion by interjecting a false issue which is not even relevant to the issue set forth in the certified question. Nationwide has apparently latched onto the undisputed lack of an excess verdict as its sole defense and refuses to acknowledge or accept that Appellant Imhof need not allege or prove the existence of an excess verdict or arbitration award to state a cause of action under Section 624.155. Furthermore, by ignoring portions of the initial brief of petitioner which were relevant to the issue set forth in the certified question, Nationwide has once again conceded that Appellant Imhof received an arbitration award. If so, Nationwide has implicitly conceded that the allegations of the original complaint are sufficient to state a cause of action even if this Court determines that an allegation of the existence of an arbitration award is necessary.

II.

Nationwide contends that Appellant Imhof's argument that the First District Court of Appeal abused its discretion by not allowing amendment of the pleadings should be denied as untimely since it was raised for the first time on motion for rehearing. Appellee Nationwide fails to recognize that Appellant Imhof also filed a motion for leave to amend seeking to amend its initial brief to the First District Court of Appeal to include the dismissal with prejudice and without leave to amend as an additional issue on appeal. Rule 9.040(d), Florida Rules of Appellate Procedure, does not specify any time frame for filing

such a motion. Appellant Imhof's motion for leave to amend was separate and apart from his motion for rehearing. This Court certainly has the jurisdiction and authority to determine whether an appellate court abused its discretion by failing to grant leave to amend in accordance with the rules of procedure governing the appellate court especially when such failure results in a serious miscarriage of justice by depriving Appellant Imhof of a trial on the merits even when everyone knows the truth of the fact purportedly not alleged in the Complaint.

III.

Appellant Imhof recognizes that his argument on the issue of attorneys' fees is conditional upon this Court's favorable ruling in the instant appeal and final resolution of the underlying bad faith case in favor of Appellant Imhof.

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, Florida 32590 and George A. Vaka, Esquire, Fowler, White, Gillen, Boggs, Villareal and Banker, P.A., Post Office Box 1438, Tampa, Florida 33601 by United States Mail this 27th day of July, 1993.

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