IN THE
SUPREME COURT OF FLORIDA

Case No. 90,869

TIME INSURANCE COMPANY, INC.,

Appellant,

vs.

HARVEY BURGER,

Appellee.

APPEAL ON A QUESTION OF LAW
CERTIFIED BY THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF APPELLEE

Scott E. Perwin
KENNY NACHWALTER SEYMOUR ARNOLD
CRITCHLOW & SPECTOR, P.A.
1100 Miami Center
201 South Biscayne Boulevard
Miami, Florida 33 13 1-2305
Telephone: (305) 373-1000

Brian S. Keif
BRIAN S. KEIF, P.A.
30 West Mashta Drive, Suite 500
Key Biscayne, Florida 33 149
Telephone: (305) 361-0825

Attorneys for Appellee

TABLE OF CONTENTS

TABLE OF CITATIONS

STATUTES AND RULES

OTHER AUTHORITIES

STATEMENT OF THE CASE AND OF THE FACTS

A. *Introduction*

The compensatory damages recoverable in a bad-faith action against an insurer are "those damages which are a reasonably foreseeable result" of the insurer's violation. Fla. Stat. § 624.155(7). After a contested and hard-fought trial, a federal jury in this case found that Appellant Time Insurance Company, Inc. ("Time") had violated section 624.155(1)(b)1.[1] by willfully and unlawfully failing to pay Appellee Harvey Burger's medical claims for a period of 15 months and awarded Burger $50,000 to compensate him for injuries it found to be a "reasonably foreseeable result" of Time's unlawful conduct. Those injuries consisted not only of physical injury Burger suffered from his inability to obtain necessary medical treatment but also the emotional distress he suffered as a direct and reasonably foreseeable result of Time's intransigent denial of medical coverage.

This case concerns a type of bad-faith claim not previously addressed by this Court: a bad-faith claim by an insured against a health insurer for refusal to pay valid medical claims. Time asks this Court to adopt an inflexible, *per* se rule precluding plaintiffs in such cases from recovering compensatory damages for emotional distress in the absence of punitive damages liability even when the evidence shows-and a jury finds-that such damages are a "reasonably foreseeable result" of the insurer's violation. The first point to be made about such a rule is that it would not alter the outcome of this case. Since Burger suffered both physical and emotional injury from Time's conduct, and

---

[1] Section 624.155(1)(b)1, creates a private right of action against an insurer who does not attempt "in good faith to settle claims when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward its insured and with due regard for his interests." The statute authorizes both first-party and third-party bad-faith claims. *See State Farm Mut. Ins. Co. v. Laforet,* 658 So.2d 55, 59, 63 (Fla. 1995).

since punitive damages were properly awarded against Time, the rule urged by Time would not in any event dispose of this case.

Moreover, Time's proposed rule fails on its merits. There is no indication in the language, structure or legislative history of section 624.155 that the Florida legislature intended to impose any limitation on the types of damages recoverable in a bad-faith case other than the requirement of "reasonable foreseeability" expressly set forth in the statute. Courts in this state are free to determine on the specific facts of particular cases that emotional distress was not a "reasonably foreseeable result" of the insurer's conduct and preclude the jury from awarding such damages as a matter of law. The trial court declined to so hold in this case, and there is no contention before this Court that it erred in doing so. What Time seeks instead is a blanket prohibition against recovery of damages for emotional distress in all first-party bad-faith cases unless the plaintiff can prove a claim for intentional infliction of emotional distress or otherwise establish conduct sufficient to support an award of punitive damages. In the words of the Eleventh Circuit, Time seeks a ruling that damages for emotional distress "are not cognizable under Florida law for this claim." *Burger v. Time* Ins. Co., Inc., 115 F.3d 880, 880 (1 1th Cir. 1997). Such a prohibition has neither law nor common sense to commend it.

B. *Statement of Facts*[2]

Burger is a solo practitioner who practices tax and probate law in South Florida. R7-66.[3] In late 1989, Burger purchased a health insurance policy from Time for himself, his wife and his two children, R7-66. The premiums on that policy were always paid on time. R7-67.

---

2 We summarize the facts in the light most favorable to the jury's verdict.

3 Record citations refer to the volume and page number of the federal record.

During the first half of 199 1, Burger submitted a number of medical bills to Time for reimbursement, including a $500 bill for an endoscopy performed by Moskowitz & Cohen, P.A. The copy of the bill sent to Burger contained a stray vertical mark next to one of the "500" figures shown on the bill, making it appear that the price of the procedure was $1,500, although the "total fee" shown at the bottom of the bill was "$500." R2-46, Ex. E.[4] Burger submitted the bill to Time for reimbursement and began making periodic $200 payments to his physician R2-46, Ex. B (June 1, 1991 letter from Harvey Burger to Time), After making three such payments, Burger was told by Moskowitz & Cohen that he had overpaid the bill and promptly notified Time that the amount of the bill was $500 rather than $1500. *Id,* Burger resubmitted the bill, marking it "second request," spoke to a Time representative and followed up the telephone call with another confiig letter. R2-46, Ex. C (June 8, 1991 letter from Harvey Burger to Time). Burger was told that a note had been placed in his file regarding the discrepancy and that he was "not to worry." *Id*

After waiting some period of time for reimbursement of the bills, Burger called Time again and was asked to put copies of all the pending bills in a package and send them by overnight courier to Jeff Simmons, a Time claims processor. R7-69. Burger did so, marking the Moskowitz & Cohen bill "third request" and adding the notation: "Paid $500". R3-73, Ex. 1. Two weeks later, in August 1991, Burger spoke to Simmons again and was told that the matter had been turned over to Time's special investigations unit ("SIU"). R7-71. Burger was informed that Simmons could no longer talk to Burger and that he should speak to a woman named Pam Canada. *Id.*

---

[4] The record citation is to a copy of the bill attached to Burger's response to Time's motion for partial summary judgment. Because of an evidentiary ruling by the trial court, Burger was not permitted to put the bill into evidence or explain the circumstances surrounding it to the jury. The office manager for Drs. Moskowitz & Cohen testified at her deposition that the office uses carbonless paper for bills and that stray marks are commonly found on the copies. R2-46, App. 2.

Ms. Canada was at the time a trainee in Time's SIU with less than six months of experience. R7-25. Burger spoke to Canada and her supervisor in late November 1991 and was informed for the first time[5] that none of his pending bills would be paid while the Moskowitz & Cohen bill was being investigated. R7-72. Pam Canada testified that Time's policy is to hold all pending claims long enough to determine whether there are any additional suspect claims and, if none are found, to release any non-suspect claims for payment. R7-29-31. That process takes a week or two. R7-29. Despite that policy, Burger was told in November 1991 (three months after his file was referred to Time's SIU) that none of his claims would be paid until Time solved the mystery of the Moskowitz & Cohen bill. R7-36. In fact, Burger's non-suspect claims were not paid until November 2, 1992. R6-7-8; R7-49-50; R7-52.

Pam Canada testified that, while placing a hold on all pending bills is contrary to Time's policy, she is "sure it's happened before." R7-38-39. The supervisor of Time's special investigations unit confirmed that Time regularly and routinely suspends payment on all pending claims once a file is referred to the SIU. R7-64.

Several months after Burger's file was referred to the SIU, Time turned the file over to the Fraud Division of the Florida Department of Insurance. R2-38-4. The Department of Insurance ultimately contacted the State Attorney's office for Broward County, which placed Burger under arrest and charged him with insurance fraud for altering the $500 Moskowitz & Cohen bill.[6]

---

[5] Although Time produced a computer-generated version of an October 22, 1991 letter to Burger, Burger testified that the letter was never received. R7-71.

[6] When Time's file was produced in discovery, Burger learned of the existence of a third version of the Moskowitz & Cohen bill—one which contains apparent "$1,500" figures for both the price of the procedure (in the center of the bill) *and* for the total amount due (at the bottom of (continued.. .)

R2-38-14. After engaging in discovery and uncovering all of the relevant facts, the prosecutor assigned to the case unilaterally elected to enter a nolle prosequi.[7] R2-38-16.

Burger presented uncontradicted expert testimony that Time's refusal to pay valid and undisputed medical claims was tantamount to a denial of coverage and, under the standards of conduct prevailing in the health insurance industry, constituted insurance bad faith. R7-128-130. Burger's expert also testified that, based on his review of the facts, Time's practice in Burger's case was part of Time's general business practice. R7-132-133.

Between August of 1991, when Time stopped paying Burger's medical claims, and November of 1992, when it resumed, Burger was unable to obtain medical care. R7-75. He failed to get recommended treatment for his failing eyesight because of the effective absence of medical coverage. R7-77-78; R7-105. The lack of treatment worked a hardship on his medical condition. R7-77. He was dunned by doctors and collection agencies. R7-78. He became depressed and was unable to communicate with his wife and children. R7-104. He began to experience what his wife described as "crying spells," R7-105. Evidence was introduced without objection by Time that, "[a]s a direct consequence of Time Insurance Company's failure to timely pay claims, [Burger] is unable to obtain needed medical treatment." Plaintiffs Ex. 2, p.4.[8] The jury was also told without

---

[6](...continued)
the bill). R2-46, Ex. D. Since both of these versions show markings added by Time, the alteration in the total amount due could have only been made after the SIU took possession of the file.

[7] Because of evidentiary rulings by the federal district court, Time's instigation of criminal proceedings against Burger was not disclosed to the jury.

[8] This quotation is from Burger's notice of statutory violation. Time failed to object on hearsay grounds, and the document was received in evidence by the district court and made available to the jury without any limitation on its use. R7-102.

objection that Burger "suffered significant financial injury as well as physical and emotional injury directly related to the conduct of Time Insurance Company." *Id*

C. *Course of Proceedings and Disposition Below*

A federal jury found that Time violated section 624.155 by failing "in good faith to settle [Burger's medical insurance claims] when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward its insured and with due regard for his interests." Fla. Stat. § 624.155(1)(b)1 .[9] The jury awarded Burger $50,000 as compensation for physical and emotional injuries it found to be a "reasonably foreseeable result" of Time's unlawful refusal to pay. The jury also found that Time's conduct occurred "with such frequency as to indicate a general business practice" and was either "willful, wanton and malicious" or "in reckless disregard for the rights of [its] insured." Fla. Stat. § 624.155(4). On the basis of that finding, the jury awarded Burger $1 .OO in punitive damages. The district denied Time's motions for judgment as a matter of law and entered judgment on the jury's verdict.

On appeal to the Eleventh Circuit, Time contended that, under established Florida case law, specifically *McLeod v. Continental Ins.* Co., 591 So.2d 621, 626 n.10 (Fla. 1992), and *Butchikas v. Travelers Indemnity* Co., 343 So.2d 8 16, 8 19 (Fla. 1976), plaintiffs in bad-faith actions against insurers are precluded from recovering damages for emotional distress unless punitive damages are also recoverable. Burger argued that: (1) the compensatory damage award was based on evidence of both emotional and physical injury, and the evidence of physical injury was sufficient

---

[9] The district court granted summary judgment to Time on several of Burger's claims, including a claim for malicious prosecution arising out of Time's instigation of the criminal prosecution against Burger. Burger has cross-appealed from the district court's malicious prosecution ruling, and that cross-appeal remains pending before the Eleventh Circuit.

by itself to support the compensatory damage award; (2) the jury properly awarded punitive damages against Time, thereby establishing a predicate for an award of damages for emotional distress even if *Butchikas* were found to apply; and (3) in any case, this Court's decisions in *Butchikas* and *McLeod* do not apply to statutory bad-faith actions against a health insurer for failure to pay valid medical claims.

Without addressing (1) and (2), the federal court of appeals concluded that there was an absence of Florida case law directly addressing the question of what types of damages "serve as an appropriate basis for compensatory damages" in bad-faith actions of this type, 115 F.3d at 88 1, and certified that question to this Court.

ISSUE ON APPEAL

> WHETHER THE DAMAGES ALLEGED BY APPELLEE QUALIFY AS COMPENSATORY DAMAGES UNDER FLA. STAT. § 624.155(7)? ALTERNATIVELY, WHETHER THE TYPE OF EMOTIONAL DISTRESS ALLEGED BY APPELLEE QUALIFIES AS DAMAGE THAT IS A "REASONABLY FORESEEABLE RESULT" OF A VIOLATION OF FLA. STAT. § 624.155, AND THUS SERVES AS AN APPROPRIATE BASIS FOR COMPENSATORY DAMAGES UNDER THE STATUTE?

SUMMARY OF THE ARGUMENT

The interpretation of section 624.155(7) urged by Time is inconsistent with the plain meaning of the statute, the underlying purpose of bad-faith doctrine and the weight of authority from other states. The statute permits a plaintiff in a first-party bad-faith case to recover all damages "which are a reasonably foreseeable result of a specified violation of this section by the insurer." Whether certain damages are a "reasonably foreseeable result" of the insurer's conduct is a determination that can and should be made by judges and juries on a case-by-case basis. There is no indication in the statute or anywhere else that the legislature intended to classify whole categories

of potential damages as off-limits in bad-faith cases. Indeed, the broad, unqualified language of the statute is directly to the contrary.

The principal cases cited by Time—*Butchikas* and *McCleod*—do not say otherwise. Both cases involved tort liability and excess judgments. Neither involved health insurance. The reasoning used by the Court in those cases simply does not apply to the far different context of a first-party case against a health insurer based on the insurer's failure to pay medical claims. Moreover, aside from being distinguishable, the holdings of both cases have been superseded by statute. *Butchikas* has been superseded (at least in statutory bad-faith cases) by the adoption of section 624.155(7), and the holding of *McLeod was* specifically overturned by the legislature through the enactment of Fla. Stat, § 627.727(10). Neither case should be considered controlling authority in a bad-faith case arising under section 624.155.

Finally, even if the Court were to extend the rule of *Butchikas* and *McLeod* to bad-faith cases against health insurers, such a ruling would not alter the outcome of ***this case.*** *Butchikas* held that mental anguish is not an element of damages in an excess-judgment bad-faith case unless punitive damages are also available. Burger presented uncontradicted testimony that he suffered physical injury from his inability to obtain needed medical treatment, and, under the "two issue rule," that testimony alone is sufficient to support the jury's compensatory damage award. Moreover, Burger was properly awarded punitive damages against Time under the standards set forth in section 624.155(4). Hence, the rule urged by Time would not alter the outcome of this case even if the Court chose to apply it,

ARGUMENT

I

IN A BAD-FAITH CASE UNDER SECTION 624.155, FLORIDA LAW PERMITS A JURY TO AWARD AS COMPENSATORY DAMAGES WHATEVER SUM IT DEEMS NECESSARY TO COMPENSATE THE VICTIM FOR THE REASONABLY FORESEEABLE CONSEQUENCES OF THE INSURER'S CONDUCT.

A. *Section 624.155(7) should be interpreted according to the plain meaning of its terms.*

Section 624.155(7) allows a plaintiff in a bad-faith case to recover as compensatory damages "those damages which are a reasonably foreseeable result" of the insurer's violation. The legislature's choice of such exceedingly broad terms, grounded in the common law of torts, is inconsistent with any intention to specify in advance the types of damages that might be recoverable in a bad-faith case and plainly indicates a desire to leave that determination to juries subject to normal judicial controls. It is beyond question that emotional distress can be a "reasonably foreseeable" result of a health insurer's failure to pay valid medical claims.[10] Indeed, there may be cases in which such distress is the only "reasonably foreseeable" result. In such a case, it would be perverse if the law allowed an insurer who has admittedly violated the law to escape without paying compensatory damages of any kind.

It is a cardinal rule of statutory construction that an unambiguous statute should be interpreted and enforced according to its terms. "As this Court has stated many times, it is a

---

[10] As Time points out at some length, the availability of damages for emotional distress in a ***negligence*** case arising under ***common law*** is severely limited by the "impact rule." See *generally R.J. v. Humana of Florida, Inc.*, 652 So.2d 360 (Fla. 1995). This is not a negligence case, and it arises under section 624.155 rather than under common law. The impact rule simply does not apply.

fundamental principle of statutory construction that where the language of a statute is plain and unambiguous there is no occasion for judicial interpretation." ***Pardo v. State, 596*** So.2d 665,667 (Fla. 1992). ***AccordAuto-Owners Ins. Co. v. Conquest,*** 658 So.2d 928,929 (Fla. 1995) (construing section ***624.155); Holly v. Auld, 450*** So.2d ***2*** 17, 2 ***19*** (Fla. ***1984); Opperman v. Nationwide Mut. Fire Ins.*** Co., 5 15 So.2d 263,266 n.4 (Fla. 5th DCA 1987) (construing section 624.155), ***rev. denied, 523*** So.2d 578 (Fla. 1988). When the language of a statute is clear on its face, "the statute must be given its plain and obvious meaning." ***Opperman, 5*** 15 So.2d at 266 n.4.

In ***Auto-Owners Ins Co. v. Conquest, supra,*** this Court recently gave "deference" to the "clear and unambiguous wording" of section 624.155 when it held that the legislature's use of the phrase "any person" in subsection (1) indicated its intention to permit claims by both insureds and injured third parties for unfair claims handling practices. 658 So.2d at 929. The Court found itself "compelled by the section's clear wording" and concluded that it was "not free to speculate on the repercussions." ***Id.*** at 930. The same is true here.

Section 624.155(7) permits a plaintiff in a bad-faith case to recover as compensatory damages any damages that the jury deems to be a reasonably foreseeable result of the insurer's violation, The words of the statute are "precise," and their meaning is "unequivocal." ***Conquest, 658*** So.2d at 929. The statute contains no limitation on the types of damages that can be awarded. The federal jury in this case found that Harvey Burger's physical and emotional injuries were a reasonably foreseeable result of Time's 15-month refusal to provide medical coverage, and ample evidence was presented to the jury to support that finding. Based on the clear and unambiguous wording of the statute, this Court should hold that Burger's injuries constitute injuries for which compensatory damages are recoverable under section 624.155.

B. ***Florida law permits recovery of damages for emotional distress resulting from the commission of an intentional tort.***

Time writes that "Florida law has never permitted the recovery of damages for only emotional distress in the absence of an intentional infliction of such distress due to outrageous conduct." Brief of appellant at 10. Time's description of Florida law is flatly and demonstrably false.

In fact, damages for emotional distress or mental anguish are recoverable in cases involving a wide variety of intentional torts. Among other claims, such damages can be recovered as compensatory damages in actions involving claims for defamation;" malicious prosecution;[12] false imprisonment;[13] invasion of privacy;[14] battery;[15] tortious interference with contract;[16] and

---

[11] ***Miami Herald Pub. Co.*** v. ***Ane,*** 423 So.2d 376,390 (Fla. 3d DCA 1982), ***approved,*** 458 So.2d 239 (Fla. 1984); ***Rety v. Green,*** 546 So.2d 410,420 (Fla. 3d DCA 1989) (quoting ***Gertz v. Robert Welch, Inc.,*** 418 U.S. 323, 349-50 (1974)); **FLORIDA STANDARD JURY INSTRUCTION MI 4.5.**

[12] ***Miami National Bankv. Nunez,*** 541 So.2d 1259, 1260 (Fla. 3d DCA 1989); FLORIDA STANDARD JURY INSTRUCTION MI 5.2.

[13] S. *H. Kress &* Co. ***v. Powell,*** 132 Fla. 471, ***180 So. 757,763*** (1938); *Stockett v. Tolin,* 791 F. Supp. 1536, 1556 (S.D. Fla. 1992) (Florida law); **FLORIDA STANDARD JURY INSTRUCTION MI** 6.1.

[14] *Stockett v. Tolin,* 791 F. Supp. at 1555-56 (awarding damages for emotional distress resulting from invasion of privacy); **RESTATEMENT (SECOND) OF TORTS § 652H(b)** (damages for emotional distress are recoverable in an action for invasion of privacy if they are of a kind that normally results from such an invasion).

[15] ***Stockett v. Tolin,*** 791 F. Supp. at 1555-56 (awarding damages for emotional distress resulting from battery).

[16] **FLORIDA STANDARD JURY INSTRUCTION MI** 7.1; **RESTATEMENT (SECOND) OF TORTS § 774A(1)(c)** (damages for emotional distress are recoverable if they are reasonably to be expected to result from the interference):

tortious interference with prospective business relations.[17] Where damages for emotional distress are recoverable, the amount of the award "is left to the discretion of the jury unless it is clearly arbitrary or so great as to be shocking to the judicial conscience or unless it indicates that the jury was influenced by prejudice or passion." ***Albritton v. Gandy***, 531 So.2d 381, 388 (Fla. 1st DCA 1988).

Time's contention that a tort plaintiff is not permitted to recover damages for emotional distress unless he can also allege and prove a claim for intentional infliction of emotional distress is simply wrong. There is no such principle. Allowing plaintiffs who have suffered emotional distress to recover such damages as an element of damages in actions alleging bad faith is consistent with existing doctrine governing intentional torts.

C. *Permitting recovery of damages for emotional distress will further the underlying purposes of bad-faith doctrine.*

Recognition of bad-faith liability on the part of insurance companies arose because existing contract remedies permitted an insurer to disregard the rights of its insureds and ultimately pay no more than its liability under the insurance policy. Under these circumstances, insurers lacked any economic incentive to treat their policy-holders fairly in the first instance. See ***State Farm Mut. Auto. Ins. Co. v. Laforet,*** 658 So.2d 55, 58 (Fla. 1995); S. Ashley, **BAD FAITH ACTIONS: LIABILITY AND DAMAGES** § 1:0 1 (1996). As the author of one leading treatise explains:

> A hundred years ago, insurance companies dwelt in a blessed state. An insurer, faced with the choice whether to settle a claim

---

[17] ***Albritton*** v. ***Gandy,*** 531 So.2d 381, 388 (Fla. 1st DCA 1988) (affirming award of damages for mental and emotional distress in action alleging tortious interference with employment relationship); **FLORIDA STANDARD JURY INSTRUCTION** MI 7.2; **RESTATEMENT (SECOND) OF TORTS** § 774A(1)(c) (damages for emotional distress are recoverable if they are reasonably to be expected to result from the interference).

> against its insured or pay a claim of its insured, knew that if it refused to settle or pay, it would never have to spend more than the limits of its liability as set forth in the insurance policy, even if the insured filed suit against the insurer for breach of contract. . , , This result flowed from the rule of Hadley v. Baxendale that the victim of a contract breach may recover compensation only for harm "arising naturally, i.e., according to the usual course of things, from such breach of contract itself' or harm "in the contemplation of the parties, at the time they made the contract, as the probable result of the breach of it." Applying this rule to insurance cases, the courts held that an insured suing for breach of a policy could recover only the amount of the benefits due under the policy, plus interest.

Ashley, *supra*, § 1 :01 at 1-2. Under these circumstances, "[t]he insurers had nothing to lose, and everything to gain, by refusing payment of even meritorious claims." ***Aetna Life Ins. Co. v. Lavoie,*** 470 So.2d 1060, 1079 (Ala. 1984) (Torbert, C.J., dissenting), ***vacated on other grounds, 475*** US. 813 (1986).

Recognition of bad-faith liability changed the measure of damages recoverable in an action by an insured against his insurer and altered the insurer's economic incentives. "The function of the bad-faith claim is to provide the insured with an extra-contractual remedy." ***Hollar v. International Bankers Ins. Co., 572*** So.2d ***937,939*** (Fla. 3d DCA ***1990). Accord Opperman, 5*** 15 So.2d at 267 (function of first-party bad-faith claim under section 624.155 "is to provide the insured with an extra-contractual remedy"); ***Gruenberg v. Aetna Ins.*** Co., 9 Cal.3d 566, 108 Cal. Rptr. 480, 485, 5 10 P.2d 1032, 1037 (1973) (bad-faith failure to pay valid first-party claim gives rise to a cause of action in tort). In cases involving a failure to pay medical benefits, such as this one, the injuries suffered by the insured will typically consist of (1) the pecuniary and/or physical injury associated with the loss of the benefits themselves, and (2) the mental and emotional distress which result from the insured's inability to obtain needed medical treatment or, having obtained such treatment, to pay for it. If the Court holds that the damages associated with this second category of injury are not

Cognizable as a matter of law, then the insurer's liability in many cases will ultimately extend no farther than the insurance policy itself. Time's rule would return health insurers to the "blessed state" from which bad-faith liability was intended to remove them.

The facts of this case illustrate the point. As a result of Time's unlawful refusal to pay, Harvey Burger and his family were effectively without health insurance for a period of 15 months.[18] Because of the absence of health insurance, Burger was forced to forgo necessary treatment for his failing health and suffered serious emotional trauma. Since Time had paid Burger's medical claims by the time the case went to trial, the only injuries for which Burger could seek compensation at trial were the physical and emotional consequences of Time's bad faith. A decision to immunize health insurers from paying damages for emotional distress would in many cases cap an insurer's liability at purely contractual damages and thereby eliminate the very incentives which bad-faith liability was designed to create.

D. *The vast majority of American jurisdictions permit plaintiffs to recover damages for emotional distress in bad-faith cases.*

The great majority of American states permit plaintiffs in bad-faith cases to recover damages for emotional distress. See Ashley, ***supra,*** § 8:04 ("The victim of insurance company bad faith may generally recover damages for emotional distress caused by the insurer's misconduct, whether in a first-party or third-party context") (collecting cases). Perhaps most significantly, such damages are recoverable under the common law of California, on which Florida courts have relied

---

[18] Although Time's liability is not an issue in this appeal, it is worth noting that failure to pay undisputed claims has been repeatedly held to constitute bad faith. 15A **COUCH ON INSURANCE** 2d § 58:7 at 267 (1983) ("Where the [insured's] claim is composed of many elements, some of which are not in dispute, the failure to pay uncontroverted portions of the claim is bad faith"); Ashley, ***supra,*** § 5 : 16.

in interpreting section 624.155.[19] As the Alabama Supreme Court stated in ***Aetna Life Ins. Co. v. Lavoie, 470*** So.2d 1060, 1073-74 (Ala. 1984), ***vacated on other grounds, 475*** U.S. 8 13 (1986): The tort of bad faith had as its genesis the very idea of providing a plaintiff who had been victimized by the intentional, wrongful handling of a claim by the insurer, the right to recover not only contract damages but for the loss occasioned by emotional suffering, humiliation, and embarrassment in addition to punitive damages."

Given the rationale for recognizing bad-faith actions against insurers, it is not surprising to find that courts across the country have allowed plaintiffs to recover damages for emotional distress as an element of damages in first-party bad-faith cases. See, ***e.g., Chavers v. National Sec. Fire & Casualty*** Co,, 405 So.2d 1, 7 (Ala. ***198*** 1); ***Filasky v. Preferred Risk Mut. Ins.*** Co., 152 Ariz. 591, 734 P.2d 76, 82-83 (1987) (affirming award of $100,000 in compensatory damages where insured incurred $4,000 in attorneys' fees and suffered emotional distress resulting from insurer's "callous disregard for her plight"); ***Gruenberg v. Aetna Ins. Co., 9*** Cal.3d 566, 108 Cal. Rptr. 480, 5 10 P.2d 1032 (1973) (recognizing tort of bad faith in first-party context and holding that plaintiffs in such cases can recover damages for emotional distress regardless of whether insurer's conduct is "outrageous"); ***Silberg v. California Life Ins. Co.,*** 11 Cal.3d 452,460, 113 Cal. Rptr. 711, 716, 521 P.2d 1103, 1108 (1974) (affirming award of $75,000 for physical and emotional distress in action alleging bad-faith denial of medical benefits); ***Jarchow v. Transamerica Title Ins.*** Co., 48 Cal. App. 3d 917, 122 Cal. Rptr. 470, 489, 492 (1975) (affnming award of $50,000); ***Universal Life Ins.*** Co. *v. Veasley*, 610 So.2d 290,295 (Miss. 1992) (affirming award for emotional distress while reversing punitive damage award); ***Nichols v. Shelter Life Ins, Co., 694*** F. Supp. 2 18,

---

[19] ***See, e.g., Opperman,*** 5 1 S So.2d at 266-67 (citing and relying on California cases).

220 (N. D. Miss. 1988) (Miss. law) (damages for emotional distress were recoverable in action alleging bad-faith denial of medical claims); ***Braesch v. Union Ins. Co., 237*** Neb. 44,464 N.W.2d 769,778 (1991) (plaintiffs were entitled to recover damages for emotional distress notwithstanding that they had failed to state a claim for intentional infliction of emotional distress); ***Farmers Home Mut. Ins. Co.*** v. *Fiscus*, 102 Nev. 371, 374-75, 725 P.2d 234,236 (1986) (insureds were entitled to recover damages for "anxiety, worry, mental and emotional distress" caused by insurer's bad-faith denial of first-party claim); ***Timmons v. Royal Globe Ins. Co., 653*** P.2d 907, 916 (Okla. 1982) (emotional distress is compensable as an element of damages in a first-party case without proof of either outrageous conduct or "severe" distress); ***Bibeault v. Hanover Ins. Co., 4*** 17 A.2d 3 13, 3 19 (R.I. 1980); ***Universe Life Ins. Co.*** v. *Giles*, 88 1 S.W.2d 44 (Tex. App. 1994) (affirming award of $75,000 for emotional distress in action alleging bad-faith denial of medical benefits), ***aff'd in part and rev'd in part on other grounds, 40*** Tex. Sup. Ct. J. 8 10, 1997 WL 378065 (Tex. July 9, 1997).

These jurisdictions have allowed plaintiffs in first-party cases to recover damages for emotional distress on the basis of evidence and testimony analogous in every respect to the evidence and testimony presented to ***the jury*** here. In ***Jones v. Benefit Trust Life Ins. Co., 800*** F.2d 1397, 1401-02 (5th Cir. 1986), for example, the Fifth Circuit, applying Mississippi law, reinstated an award of $50,000 for emotional distress which had been set aside by the district court because it was based solely on the testimony of the insured and his wife and was unsupported by the testimony of a physician. The trial court summarized the plaintiffs testimony as follows:

> [The plaintiff] testified that he became angry, had nightmares and sought medical attention for high blood pressure at the Veterans Administration Hospital in Gulfport, Mississippi. . . . The plaintiff's wife testified that the plaintiff had nightmares, could not sleep and was worried about his financial problems. She also testified that she took the plaintiff to the Veterans Administration Hospital . . . to get

> the plaintiffs blood pressure down. The plaintiff did not call his doctor or any physician to testify in support of a claim for emotional distress damages.

Jones v. Benefit *Trust Life* Ins. Co., 617 F. Supp. 1542, 1545 (S.D. Miss. 1985). The Fifth Circuit found this testimony sufficient to create a jury question on the existence of emotional distress and hence sufficient to support the jury's award.[20]

Similarly, in *Universe Life Ins. Co.* v. *Giles, supra,* a Texas appellate court affirmed an award of $75,000 for emotional distress in a first-party case on the basis of evidence "consist[ing] in large part of Giles' own testimony about her condition, with some support from other witnesses who had either observed her conduct or who had spoken with her during the relevant time period." 881 S.W.2d at 50. The court "recognize[d] that mental anguish is a question uniquely in the purview of the jury and that such awards are made largely in its discretion" *Id.* It summarized the evidence as showing the plaintiffs "frustration, anger, and fear of devastating financial obligations, and her reaction to multiple threats to turn her accounts over to collection agencies." In addition, the court found, "the jury was entitled to recognize the stress created when an individual is denied coverage for which she has paid." On the basis of this testimony, the jury's award was affirmed. *Id.*[21]

---

[20] The Fifth Circuit noted that the standard for determining the sufficiency of the evidence in a diversity case is a matter of federal law and applied the standard set forth in *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969) (en banc). 800 F.2d at 1400. The Eleventh Circuit uses the same standard.

[21] *See also Universal Life* Ins. Co. v. *Veasley*, 610 So.2d at 292, 295 (plaintiffs testimony that she suffered nervousness, insomnia and depression as a result of insurer's failure to pay claim was sufficient to support award of damages for emotional distress); *State Farm Mut. Auto. Ins. Co. v. Zubiate,* 808 S.W.2d 590,601 (Tex. App. 1991) ("Translating mental anguish into dollars is necessarily an arbitrary process" and therefore within the jury's discretion); *Fletcher v. Western Nat'l Life* Ins. Co,, 10 Cal. App. 3d 376,409, 89 Cal. Rptr. 78, 99 (1970) ("there is no fixed or absolute standard by which to compute the monetary value of emotional distress").

The overwhelming weight of authority in other states permits plaintiffs in first-party bad-faith cases to recover damages for emotional distress without proving either outrageous conduct or conduct otherwise sufficient to support an award of punitive damages. Appellees respectfully contend that the same rule should be followed in Florida.

E. *This Court's rulings in* Butchikas *and* McLeod *are limited to "excess judgment" cases.*

Time's fundamental contention is that this Court's decisions in ***Butchikas*** *v. Travelers Indemnity Co.,* 343 So.2d 8 16, 8 19 (Fla. 1976), and ***McLeod*** *v. Continental Ins. Co.,* 591 So.2d 621, 626 n. 10 (Fla. 1992), collectively stand for the proposition that damages for emotional distress are not cognizable in either common-law or statutory bad-faith cases unless the evidence also supports an award of punitive damages.[22] However, both the language and the reasoning of those decisions are limited to cases involving excess judgments and do not apply to the quite different context present here.

In ***Butchikas***, a case involving liability rather than health insurance, this Court ruled that mental anguish is not an element of recoverable damages in an "excess judgment" case unless punitive damages can also be recovered. The Court began its discussion of the point by noting the absence of "Florida precedent for awarding compensation for mental anguish in an 'excess' case."

---

[22] In fact, Time's statement of the rule it is asking the Court to apply is not entirely consistent. In some places, Time contends that damages for emotional distress should not be available unless the insured can prove "outrageous conduct" sufficient to support a claim for intentional infliction of emotional distress; in others, it contends that such damages require only a basis for awarding punitive damages. *Compare* Brief of Appellant at 10 (outrageous conduct required) *with id.* at 13 (willful or malicious conduct required). ***Butchikas*** holds quite clearly that an award of damages for emotional distress is permissible so long as punitive damages are recoverable. In statutory bad-faith cases, the standard for recovery of punitive damages has been codified in Fla. Stat. § 624.155(4). As we show below, punitive damages were properly awarded against Time under that standard.

343 So.2d at 8 18. It found no reason to treat liability insurers differently from other defendants with respect to the foreseeability of emotional distress and deemed it "axiomatic" that "in 'excess' cases the fact and degree of financial exposure are brought about by the insured's decision to risk the financial and emotional consequences which naturally flow from the insufficiency of coverage." *Id* at 8 19. The Court's discussion is focused on cases involving a potential "excess judgment," and the import of that discussion is that the risk of emotional distress results from the insured's decision to purchase limited liability coverage rather than the insurer's conduct in refusing to settle.

In *McLeod,* the Court held in response to a question certified by an intermediate appellate court that the appropriate measure of damages in a case alleging a bad-faith failure to settle an uninsured motorist claim consists of those damages "which are the natural, proximate, probable, or direct consequences of the insurer's bad faith actions." 591 So.2d at 626. It rejected the argument that such damages should be fixed automatically at the amount of the excess judgment, finding that the amount of the excess judgment is recoverable only when "the actual damages resulting from the insurer's bad faith are found to exceed the policy limits."[23] *Id.* After observing that such actual "damages may include, but are not limited to, interest, court costs, and reasonable attorney's fees incurred by the plaintiffs," the Court dropped a footnote stating that its decision did not affect the holding in *Butchikas*. *Id.* at 626 n. 10.

This case, unlike *Butchikas* and *McLeod,* has nothing to do with tort liability or an excess judgment. The reasoning which underlies *Butchikas*—that in excess judgment cases "the fact and degree of financial exposure are brought about by the insured's decision to risk the financial and

---

[23] This holding was legislatively overturned when Fla. Stat. § 627.727(10) was enacted in 1992. See *State Farm Mut. Auto. Ins. Co. v. Laforet,* 658 So.2d 55 (Fla. 1995). The consequences of that event are discussed in the next section.

emotional consequences which naturally flow from the insufficiency of coverage"-does not apply to cases involving health insurance. Health insurance policies like the one issued to Harvey Burger by Time typically do not have policy limits. The policy involved in this case had no such limits. Burger certainly made no decision to "risk" the "fmancial and emotional consequences" of Time's refusal to pay valid and undisputed medical claims. Burger purchased and paid for health insurance coverage to ensure that he and his family could afford adequate medical care. The financial and emotional consequences of Time's unlawful failure to provide the coverage Burger purchased were unilaterally imposed on him by Time.

Moreover, the purpose of buying health insurance is quite different from the purpose of buying either liability insurance or uninsured motorist coverage. Adequate health care is both enormously expensive and critical to the well-being of American families. The purpose of health insurance is to enable the insured to shoulder the potentially crushing burden of health care and thereby maintain the health and well-being of the insured and his or her family. It is not only "reasonably foreseeable" but inevitable that depriving the insured of health insurance coverage for which he has paid may result in anxiety, depression and other manifestations of emotional distress, either because the insured is forced to forgo necessary medical care (as Burger was) or because he is forced to bear the financial burden of that care without the means to bear it.[24]

The purpose of liability and uninsured motorist coverage is quite different. Both products cover losses associated with injuries that are at least potentially compensable under tort law

---

[24] *See Silberg v. California Life Ins. Co.,* 521 P.2d at 1109 (express purpose of health insurance policy issued by defendant insurer was "to protect the insured against medical bills which could result in financial ruin" and insurer's "failure to afford relief to its insured against the very eventuality insured against by the policy" amounted to violation of duty of good faith and fair dealing as a matter of law).

and for which it makes sense to speak of an "excess judgment"-a judgment beyond the limits of the relevant insurance policy. Both raise the possibility that the insured will have to suffer the consequences of an uninsured loss, and both are subject to this Court's observation in ***Butchikus*** that the "fact and degree of financial exposure" are the result of the insured's decision to risk the consequences attendant to the purchase of limited coverage. None of these observations applies to cases involving a health insurer's failure to pay valid medical claims.

Different situations call for different legal rules. This Court's opinions in ***Butchikas*** and ***McLeod*** did not purport to address the availability of damages for emotional distress on the facts present here. Both decisions dealt solely with "excess judgment" cases. Neither offers any guidance on whether emotional distress is a "reasonably foreseeable result" of bad faith by a health insurer. We respectfully contend that the Court should limit its decisions in ***Butchikas*** and ***McLeod*** to the factual situations which gave rise to them and adopt a different rule in first-party cases not involving an excess judgment.

F. ***The holdings of*** Butchikas ***and*** McLeod ***have been superseded by statute.***

Aside from being distinguishable, both ***Butchikas*** and ***McLeod*** have been superseded by statute and should no longer be considered controlling authority in bad-faith cases arising under Florida statutory law.

Butchikas was decided at a time when the only bad-faith cases recognized by Florida courts were third-party cases arising under common law. The enactment of section 624.155 in 1982, and the subsequent adoption of subsection (7) of that statute in 1990, created an entirely new statutory cause of action with its own statutory standards for recovery of compensatory and punitive damages. As we have noted above, the "reasonably foreseeable" standard set forth in section

624.155(7) is not only clear and unambiguous but also plainly inconsistent with any legislative intent to preclude compensation for emotional distress in cases where such distress is a "reasonably foreseeable result" of the insurer's conduct.[25]

To the extent that ***McLeod*** was intended to adopt ***Butchikas*** in all first-party cases arising under section 624.155, its holding has also been superseded by statute. Shortly after ***McLeod*** was decided, the legislature enacted Fla. Stat. § 627.727(10) specifically to overturn the holding of ***McLeod. See Laforet,*** 658 So.2d at 60-61. Plaintiffs in first-party cases against uninsured motorist carriers are now permitted by statute to recover "the total amount of the claimant's damages, including the amount in excess of the policy limits, any interest on unpaid benefits, reasonable attorney's fees and costs, and ***any damages caused by a violation*** *of* ***a law of this state. The*** total amount of the claimant's damages are recoverable whether caused by an insurer or by a third-party tortfeasor." Fla. Stat. § 627.727(10) (emphasis added).

Like the language of section 624.155(7), the language of section 627.727(10) is clear, unambiguous and inconsistent with any blanket prohibition against recovery of damages for emotional distress where such distress is "caused by" the insurer's bad faith. While section 627.727(10) is limited in scope to actions against uninsured motorist carriers, that scope is sufficient to ***overturn the holding*** of ***McLeod.*** Having been abrogated by the legislature, ***McLeod*** should not be considered an obstacle to a common-sense interpretation of section 624.155(7). Any other result would place the courts of this state in the anomalous situation of applying ***McLeod*** in actions

---

[25] ***See Dunn v. National Security Fire and Cas. Co., 63*** 1 So.2d 1103, 1107 (Fla. 5th DCA 1993) (recognizing that section 624.155 creates a statutory duty to the insured and that, when that duty is breached, "damages for pain and suffering ***caused to the insured*** should be recoverable in an appropriate case") (emphasis in original),

involving a *different* fact pattern than the fact pattern present in *McLeod* (such as a bad-faith claim against a health or disability insurer) despite the fact that it no longer applies in actions involving the precise fact pattern present in *McLeod*.

Thus, neither *Butchikas* nor *McLeod* should be considered controlling authority in this statutory bad-faith case. For the reasons stated above, we respectfully contend that the Court should interpret section 624.155(7) based on the plain meaning of its terms and without regard to those prior decisions.

II

THE COMPENSATORY DAMAGES AWARDED IN THIS CASE WERE BASED IN PART ON UNCONTRADICTED EVIDENCE OF PHYSICAL INJURY

A central premise of Time's argument is that the jury award of $50,000 in compensatory damages was based solely on evidence of emotional distress. That premise is incorrect. In fact, the jury heard uncontradicted evidence that Time's refusal to provide medical coverage caused Burger tangible physical injury by forcing him to forgo needed medical treatment. Because the evidence of physical injury is sufficient standing alone to support the jury verdict, the "two issue rule" requires that the judgment against Time be affirmed.

The jury heard testimony that between August 1991, when Time stopped paying Burger's medical claims, and November 1992, when it resumed, Burger was financially unable to obtain needed medical care. R7-75. Burger testified specifically that he failed to obtain medical care recommended by a group of ophthalmologists in Boston as a result of Time's denial of coverage and that the absence of such care worked a hardship on his medical condition. R7-77-78. Mrs. Burger confirmed that her husband "could not go" for medical treatment between mid- 199 1 and November

1992 because of the effective lack of insurance coverage and because her family "did not have the finances" to pay for treatment itself. R7-105. Finally, Burger's amended notice of insurer violation—introduced without objection by Time and without limitation by the district court-told the jury that Burger had suffered "significant financial injury as well as physical and emotional injury directly related to the conduct of' Time. Plaintiffs Ex. 2, p.4.[26]

No contrary evidence was introduced by Time. Under the "two issue rule," an undifferentiated damage award which includes two different elements of damages must be affirmed so long as one of the two elements of damages is not subject to a claim of error on appeal. *Odom* v. *Carney*, 625 So.2d 850 (Fla. 4th DCA 1993); ***Barhoush v. Louis***, 452 So.2d 1075 (Fla. 4th DCA 1984). In this case, the jury's award of $50,000 in compensatory damages is supportable based solely on the uncontradicted evidence that Time's refusal to provide medical coverage had an adverse effect on Burger's physical health. The jury was free to conclude that Time's unlawful refusal to pay Burger's medical claims caused Burger physical injury by forcing him to forgo necessary medical treatment, and to compensate him for that injury.

III

THE JURY PROPERLY AWARDED PUNITIVE DAMAGES AGAINST TIME

Even if this Court chose to apply the rule adopted in ***Butchikas*** and referred to in *McLeod*, the judgment in favor of Burger should be affirmed because punitive damages were

---

[26] In the absence of either an objection or a request for a limiting instruction under Federal Rule of Evidence 105, the jury was entitled to treat the notice as evidence of the matters asserted in it. See *Sherman v. Burke Contracting, Inc.*, 891 F.2d 1527, 1533 (11th Cir. 1990); *United States v. Yamin*, *868* F.2d 130, 135 (5th Cir. 1989); *United States v. Johnson*, *577* F.2d 1304, 1312 (5th Cir. 1978). See *generally* 1 MCCORMICK ON EVIDENCE § 54 (1992) (hearsay evidence admitted without objection is available to support the jury's verdict).

properly awarded against Time. The undisputed facts of this case are sufficient to support the jury's finding that Time's failure to pay undisputed medical claims was part of a "general business practice" and amounted either to "willful, wanton and malicious" conduct or to a "reckless disregard for the rights of [its] insured."

Time was put on notice as of February 10, 1992 that it had violated Florida's bad-faith statute by failing to pay Burger's medical claims and that Burger was unable to obtain necessary medical treatment as a result of Time's failure to pay. Plaintiffs Ex. 2. Notwithstanding that notice, and notwithstanding its conscious awareness of the harm being caused by its failure to pay, Time failed to take any steps to ensure that Burger's bills were paid for approximately nine additional months. Pam Canada acknowledged that Time makes no effort to ensure that an insured's outstanding claims are paid after the bills are released for payment. R7-128. The only expert to testify during the trial testified that Time's denial of payment to the Burgers was tantamount to an intentional denial of coverage and constituted bad faith. R7-128- 130.

The jury also heard uncontroverted evidence that Time's refusal to pay Burger's claims was part of a general business practice. Pam Canada denied that failing to pay an insured's non-suspect bills could be properly characterized as "unusual":

> Q: If that [failure to pay non-suspect bills after reviewing the file and finding nothing suspicious] did happen that would be unusual because it's not your standard policy, correct?
>
> A: I'm sure it's happened before.

R7-38-39.

Dan Rose, the supervisor of Time's SIU, confirmed that Time's practice is to suspend *all* claims once a file is referred to the SIU:

Q: Is there a policy at Time Insurance Company that says if a file or insured is referred to the SIU, that there [are] no further payments made [on] future claims regarding that insured?

A: Until the investigation is completed, yes, sir.

R7-61.

Based on these and other uncontradicted admissions by Time employees, Burger's expert concluded that the practices and procedures followed by Time in processing Burger's medical claims constituted a general business practice. R7-132. The district court properly ruled that Burger presented sufficient evidence to support an award of punitive damages against Time under Florida law. Since punitive damages were available, both the punitive and the compensatory damage awards were proper even under the restrictive rule urged by Time.

CONCLUSION

Appellee Harvey Burger respectfully contends that this Court should answer the certified question in the affirmative. The damages awarded by the jury in this case qualify as compensatory damages recoverable under section 624.155(7). Alternatively, the Court should answer the alternative certified question in the affirmative and hold that emotional distress is among the "reasonably foreseeable result[s]" of an insurer's bad faith and thus an appropriate basis for compensatory damages under the same statute.

Respectfully submitted,

Scott E. Perwin (Fla. Bar No. 710083)
KENNY NACHWALTER SEYMOUR ARNOLD
CRITCHLOW & SPECTOR, P.A.
1100 Miami Center
20 1 South Biscayne Boulevard
Miami, Florida 33 13 1-2305
Telephone: (305) 373-1000

Brian S. Keif
BRIAN S. KEIF, P.A.
30 West Mashta Drive, Suite 500
Key Biscayne, FL 33 149
Telephone: (305) 361-0825

Attorneys for Appellee

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief of Appellee was served by United States mail this 29th day of August, 1997 upon the following:

R. Fred Lewis, Esq.
Kuvin Lewis Restani & Stettin, P.A.
7325 S.W. 63 Avenue
Suite 201
Miami, FL 33 143

Kevin P. O'Connor, Esq.
O'Connor & Myers, P.A.
2801 Ponce de Leon Boulevard
Ninth Floor
Coral Gables, FL 33 134

Scott E. Per-win (Fla. Bar No. 710083)

88258