SUPREME COURT OF FLORIDA

CASE NO. 90,869

TIME INSURANCE COMPANY, INC., a foreign corporation,

Appellant,

-VS-

HARVEY BURGER and GAIL BURGER,

Appellee.

BRIEF OF APPELLANT TIME INSURANCE COMPANY, INC.

Jurisdiction: Certified Question from United States Court of Appeals Eleventh Circuit

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CERTIFICATE OF INTERESTED PERSONS

AND CORPORATE DISCLOSURE STATEMENT

Appellant, TIME INSURANCE COMPANY, INC., files this Certificate of Interested Persons and Corporate Disclosure Statement, and hereby lists the trial judge, all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in this case.

GAIL BURGER

HARVEY BURGER

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Mark Seiden, Esq.

TIME INSURANCE COMPANY, INC.

TABLE OF CITATION@

Additional Authorities

TABLE OF CITATIONS

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BRIEF OF APPELLANT
TIME INSURANCE COMPANY, INC.

This case is before the Court upon a certified question from the United States Court of Appeals, Eleventh Circuit. The Appellant, TIME INSURANCE COMPANY, INC., was the defendant at the trial level, the Appellant in the Court of Appeals, and will be referred to in this Brief as "TIME." The Appellees, HARVEY BURGER and GAIL BURGER, were plaintiffs in the trial court, appellees in the federal appellate court, and will be referred to herein as "BURGER."

The following symbols will be utilized in this brief:

"R" -- followed by a number shall refer to the record volume, document and pages respectively;

"App." -- Appendix filed simultaneously herewith.

All emphasis is supplied by counsel unless otherwise indicated.

Case and Facts

BUREER initiated this action seeking the recovery of damages based upon allegations of a failure by TIME to timely reimburse first party medical expense benefits under a health insurance policy (R1-1-1-15). Although the complaint was presented in six substantive counts along with a seventh count claiming derivative damages, by the time the parties were prepared to proceed to trial the trial proceedings addressed only Counts I and II of the action. In Count I, BURGER asserted that TIME had violated Florida Statutes Section 624.155 by failing in good faith to settle the claims of BURGER, its refusal to make payment, and that the refusal of payment constituted willful, wanton, and malicious conduct performed with reckless disregard for the rights of BURGER. BURGER asserted entitlement to both compensatory and punitive damages for this failure to settle in Count I of the complaint (RI-1-1-6). Count II of the complaint presented similar allegations but was presented as a claim under Florida Statutes Section 626.9541 and is not part of the question certified to this Court.

Prior to trial, on January 18, 1994, TIME filed its motion for summary final judgment which addressed multiple counts specifically including a challenge to Count I, which sought statutory damages (R3-70). It was consistently the position of TIME that there was no evidence of conduct which would permit or support an award of

damages for only emotional distress or mental anguish, and that the only evidence addressed a mere failure to pay in a timely fashion. A final summary judgment had been entered guainst BURGER and in favor of TIME on BURGER'S claim for infliction of emotional distress asserted in Count V (R4-102, 110).

This litigation flows from a series of events stemming from a questionable altered bill submitted by BURGER to TIME in 1991 for payment (App. A and B)(R6-7)(R6-24, 25, 57-58). In March of 1991 an esophangogastro duodenscopy was performed upon BURGER by Drs. Moskowitz & Cohen, P.A. The procedure generated an actual bill in the amount of $500 (App. A), but a bill submitted by BURGER to TIME contained marks that made the bill appear to be in an amount of $1,500 (App. B)(R3-70-17-25). Was it a coincidence that at that time BURGER had a $1,000 deductible on the insurance policy issued by TIME (R7-84)?

A TIME representative who received the bill checked industry guides published by the Health Insurance Association of America which outlines recommended costs for medical procedures, and found that the bill submitted by BURGER in the amount of $1,500 (App. B) was more than double the normal charges for such procedure (R3-70-17-25). Upon this discovery, BURGER'S claim file, along with the bill allegedly from Moskowitz & Cohen, P.A. were referred to TIME'S Special Investigations Unit for review and analysis (R3-70-17-25).

By August of 1991 BURGER had been informed by TIME'S Special Investigations Unit that an investigation was proceeding to determine whether BURGER had attempted to defraud the company. Although there is some factual dispute with regard to earlier dates, by at least November, 1991, BURGER had been advised that TIME was unable to pay the bills while the investigation was proceeding (R7-71-72, 83). By at least November, 1991 BURGER had legal counsel participating in the dispute with regard to the altered bill controversy (R7-81). In February, 1992, counsel for BURGER submitted a civil remedy written notice to TIME asserting that TIME was in violation of Florida Statutes Section 624.155 and others, and providing a 60 day correction period as is part of the statutory plan.

It is undisputed that within 46 days, in March, 1992, the Special Investigations Unit investigator authorized the payment of all outstanding bills submitted by BURGER for both the husband and the wife, except payment for the altered bill which was under investigation and had been referred to the Florida Department of Insurance as is required by Florida Statutes (R7-42). The Record is uncontradicted that all outstanding bills for Mrs. BURGER were not only authorized for payment but were actually paid on March 27, 1992, within the 60-day correction period of the Florida statutes (R7-43, 50, 83).

Although the TIME computerized record system had been entered in March of 1992 authorizing payment of outstanding bills of Mr. BURGER after satisfaction of a $1,000 deductible (R7-42), bills for Mr. BURGER, other than the altered bill from Drs. Moskowitz & Cohen, P.A. which was under analysis by the Florida Department of Insurance, were paid in or about October of November of 1992 (R7-43). After application of the admitted deductible amount, the total amount due and payable to BURGER was $84.18 (R7-88). Although authorization for the payment had been made within 60 days, the total outstanding claims of Mr. BURGER in the amount of $84.18 were in fact paid outside the 60-day correction period (R7-88). There is absolutely not one shred of evidence of any type of outrageous behavior and the failure of payment was nothing more than confusion within TIME due to Mr. BURGER'S file being with the Special Investigations Unit in connection with the altered bill. The undisputed testimony in this Record was that the $84.18 in benefits due to Mr. BURGER had not been paid by the claims department simply because the claims personnel did not realize that authorization had been granted to release payment on Mr. BURGER'S file because the altered bill and Mr. BURGER'S file was still under activity with the Special Investigations Unit (R7-44).

Although BURGER had absolutely no evidence that demonstrated that he had not received medical treatment because TIME had not

reimbursed $84.18, and BURGER admitted that he did not actually seek treatment from any physician who refused medical care for payment reasons (R7-93, 87), BURGER testified that he did not seek medical care because medical bills had remained unpaid (R7-91). BURGER testified that he was upset because TIME had not paid the bills (R7-78), but there was absolutely no evidence of any medical expenses submitted for any care or treatment for such condition, and no medical person ever testified with regard to any such alleged condition. There were no documents or any type of collection letters or any type of credit problems related to TIME'S failure to reimburse medical bills in the amount of $84.18 before November of 1992 (R7-80). No evidence of any type was submitted by BURGER of any type of economic damage with regard to any alleged damages he sustained in connection with the present dispute, and no claims were made for any type of economic damages.

Prior to trial TIME had requested the entry of a summary final judgment in its favor in connection with the emotional distress claims of BURGER under Florida Statutes Section 624.155 as alleged in Count I, and also requested the entry of a directed verdict in its favor at the conclusion of BURGER'S case (R7-137-151, 163-164), and the motion was renewed at the conclusion of all evidence (R7-184). The trial court reserved ruling at all times during the trial proceedings (R7-162, 184).

A jury returned a verdict finding that TIME had violated Florida Statutes Section 624.155 by not attempting in good faith to settle BURGER'S claim, and proceed to award BURGER $50,000 in compensatory damages and $1 in punitive damages in connection with the emotional distress claims for damages by BURGER. TIME renewed its earlier position in its post-trial motions requesting the entry of a directed verdict upon which the trial court had previously reserved ruling, and requesting the entry of a judgment notwithstanding the verdict. TIME joined a motion for new trial with its other post-trial motions (R. 5-133). The trial court denied post-trial relief and TIME sought review in the United States Court of Appeals, Eleventh Circuit.

On appeal, TIME asserted, in pertinent part, that the law of Florida prohibited the recovery of emotional distress damages when unconnected with any other tort or damage in the absence of intentional infliction of emotional distress and in the absence of outrageous behavior. TIME asserted that Florida Statutes Section 624.155 had not changed substantive Florida law with regard to claims for mental anguish. TIME asserted that numerous Florida decisions, including decisions from the Florida Supreme Court, established Florida law to restrict the award of damages for mental anguish in the absence of malicious behavior and intentional infliction of emotional distress. It was the position of TIME that

the Florida Supreme Court had determined that the damages sought and awarded in this case were not recoverable as a matter of law through decisions such as McLeod v. Continental Insurance Co., 591 So.2d 621 (Fla. 1992), and Butchikas v. Travelers Indemnity Co., 343 So.2d 816 (Fla. 1976). In fact, it was demonstrated without conflict that Count V of the complaint filed by BURGER against TIME had asserted a cause of action alleging an intentional infliction of emotional distress, but a summary final judgment had been entered in favor of TIME and against BURGER as to the claim for intentional infliction of emotional distress on August 18, 1994 (R4-110). Thus, there was no claim for intentional infliction of emotional distress and, therefore, there could be no damages for simply mental anguish unconnected with any other tort.

Although TIME had presented numerous Florida decisions addressing the issue as to the types of damages recoverable pursuant to Florida Statutes Section 624.155 and that the damages claimed in this case could not be recovered, the panel of the federal appellate court included the Honorable Justice Barkett who had, coincidentally, authored the dissenting opinion in McLeod, supra. The federal appellate court came to the conclusion that there was no case law directly addressing whether the emotional distress type of damages alleged by BURGER could be recovered under Florida Statutes Section 624.155 without evidence of conduct of an

outrageous nature. The federal appellate court specifically stated that the phrasing of the question certified was "not intended to limit the Florida Supreme Court's inquiry," and addressed:

> 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?

TIME submits this brief directed to the principle of law that the adoption of Florida Statutes Section 624.155 did not alter or repeal existing Florida substantive common law that emotional distress intangible damages cannot be awarded where there is an absence of outrageous behavior and an absence of any other tort or physical contact. Further, TIME suggests to this Court that the principle of law is already well established by Florida decisions.

POINT INVOLVED 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?

The Appellant, TIME, submits that the question or principle of law would be more appropriately phrased:

WHETHER FLORIDA STATUTES § 624.155 HAS ALTERED FLORIDA SUBSTANTIVE LAW TO PERMIT RECOVERY WHERE THE ONLY DAMAGES CLAIMED ARE FOR INTANGIBLE ELEMENTS OF EMOTIONAL DISTRESS, BUT NEITHER THE FAILURE TO PAY AN INSURANCE CLAIM NOR THE EMOTIONAL DISTRESS CLAIMED SATISFY THE REQUIREMENTS OF FLORIDA SUBSTANTIVE LAW FOR THE RECOVERY OF SUCH DAMAGES?

SUMMARY OF ARGUMENT

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. The law of Florida has consistently rejected claims for only emotional distress which are unconnected with any other tort or discernable physical injury. Florida law has never recognized emotional distress as a reasonably foreseeable consequence of a failure to pay insurance benefits. This Court has very clearly indicated that damages recoverable pursuant to Florida Statutes Section 624.155 have not changed the substantive law of Florida with regard to claims exclusively for mental anguish. This Court has reaffirmed application of Butchikas

v. Travelers Indemnity Co., 343 So.2d 816 (Fla. 1976), in McLeod v. Continental Insurance Co., 591 So.2d 621 (Fla. 1992), as a condition precedent to the recovery of mental anguish or emotion distress under Florida Statutes Section 624.155.

In this litigation separate claims for an intentional infliction of emotional -distress have already been determined adversely to an insured and a summary final judgment was entered in favor of TIME in connection with such claims and no appeal was filed in connection with such judgment. Damages for emotional distress unconnected with torts for intentional infliction of emotional distress or a significant discernable injury simply are not recognized as part of Florida law.

ARGUMENT

FLORIDA STATUTES § 624.155 HAS NOT ALTERED FLORIDA SUBSTANTIVE LAW TO PERMIT RECOVERY WHERE THE ONLY DAMAGES CLAIMED ARE FOR INTANGIBLE ELEMENTS OF EMOTIONAL DISTRESS, BUT NEITHER THE FAILURE TO PAY AN INSURANCE CLAIM NOR THE EMOTIONAL DISTRESS CLAIMED SATISFY THE REQUIREMENTS OF FLORIDA SUBSTANTIVE LAW FOR THE RECOVERY OF SUCH DAMAGES.

The sum and substance of the present case is an award of $50,000 of compensatory damages to an insured for intangible elements of damages of alleged mental distress (unaccompanied by any economic damages or medical treatment whatsoever) where an insurance company authorized payment for outstanding bills which amounted to $84.18, but the payment was not actually made within 60

days because the insured's claim file was involved in an investigation process concerning an altered bill submitted by the insured. This case includes elements of inadvertence, but, the case does not present sufficient evidence for the imposition of a $50,000 compensatory penalty for damages that are not recognized under Florida law.

Analysis of the elements of damages recoverable under Florida Statutes Section 624.155 must necessarily begin with a recognition that under Florida substantive common law no cause of action ever existed for first-party bad faith conduct in the insurance context. See,, Baxter v. Royal Indemnity Co., 285 So.2d 652 (Fla. 1st DCA 1973), cert. denied, 317 So.2d 725 (Fla. 1975). In a similar manner, basic Florida substantive common law has consistently prohibited claims based exclusively upon alleged mental anguish in connection with a failure to pay insurance benefits as can be seen from decisions such as Butchikas v. Travelers Indemnity Co., 343 So.2d 816 (Fla. 1976). Florida law has never permitted one to make recovery for only alleged emotional distress for the failure to honor a contractual obligation because under Florida substantive law emotional distress is not a reasonably foreseeable result of the failure to make a payment under a contract. As such, nothing in Florida Statutes Section 624,155 that would permit the recovery of damages which are reasonably foreseeable as the result of a

statutory violation extends damages to include those that are not otherwise recognized by substantive Florida law.

In Butchikas, this Court reviewed the concept of the manner in which an insurance company had conducted itself with regard to an insured in the third-party bad faith context. This Court was called upon to analyze whether damages for mental anguish were recoverable where an insurance company had dealt improperly with its insured under an insurance contract. In rejecting the recovery of mental anguish damages in the insurance context, this Court very clearly held:

> The rule in Florida has been that, absent a physical injury, a plaintiff can recover damages for mental anguish only where it is shown the defendant acted with such malice that punitive damages would be justified [citation omitted]. It would be far-reaching indeed to expand that notion to permit financial recovery for all of the emotional and mental strains which modern society inflicts on an individual by reason of its inevitable clashes.

This court recognized the contractual nature of the relationship between the insurance company and the insured, and very clearly held that in the absence of conduct that was malicious and willful to justify punitive damages, there would be no recovery of merely damage for emotional distress or mental anguish.

This Court again outlined the parameters of the circumstances pursuant to which mental anguish or emotional distress damages could be claimed under Florida substantive law in connection with

insurance contracts in Metropolitan Life Insurance Co. v. McCarson, 467 So.2d 277 (Fla. 1985). This Court in Metropolitan outlined that emotional distress damages can be claimed under Florida substantive law in connection with insurance payments only where an insurance company intentionally inflicts distress upon an insured by conduct that is so outrageous in character and so extreme in degree so as to extend beyond all possible bounds of decency. The conduct must be regarded as absolutely atrocious and utterly intolerable for a civilized community as a condition precedent for the recovery of such damages unconnected with any other tort. This Court approved the adoption of Section 46, Restatement (Second) of Torts, with regard to a condition precedent for the recovery of emotional distress that:

> It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice", or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and leave him to exclaim, "Outrageous!"
>
> ***
>
> The conduct, although it would otherwise be extreme and outrageous, may be privileged under the circumstances.

> The actor is never liable, for example, where he has done no more than to insist upon his legal rights in a permissible way, even though he is well aware that such insistence is certain to cause emotional distress. Metropolitan at 278-279.

Although the insurance company in Metropolitan withheld the payment of benefits and a jury had concluded that Metropolitan had acted in reckless disregard of the potential for the death of an insured, the failure to pay benefits simply could not be transformed into a cause of action that would permit the recovery of emotional distress absent some other tort.

The limitations upon the recovery of intangible damages for alleged emotional distress or psychic trauma even in the area of tort litigation found limitations imposed by this Court as discussed in both Brown v. Cadillac Motor Car Division, 468 So.2d 903 (Fla. 1985), and Champion v. Gray, 478 So.2d 17 (Fla. 1985). In Brown this Court very clearly articulated a prohibition in connection with claims exclusively for mental distress for tort claims absent physical contact. The rule was relaxed very little in Champion, and then only where a condition precedent of a significant discernible physical injury was involved. Very clearly after both Brown and Champion, even in the area of tort litigation, no recovery exclusively for mental anguish or emotional distress was permitted in the absence of physical contact or significant discernible physical injuries.

In the early 1980's Florida Statutes Section 624.155 was enacted and has been subsequently interpreted by the Florida courts as being a statute created to provide a first-party cause of action for insureds for conduct in the nature of bad faith. However, it is clear, based upon Florida decisions interpreting the statute, that the enactment did not and has not altered basic Florida substantive common law with regard to damages and the elements of damages which are recoverable.

For example, in Hollar v. International Bankers Insurance Co., 572 So.2d 937 (Fla. 3d DCA 1991), with review dismissed by this Court in State Farm Mutual Automobile Insurance Co. v. Hollar, 582 So.2d 624 (Fla. 1991), the lower appellate court very clearly held that Florida Statutes Section 624.155 did not change decisional law concerning obligations of good faith, and did not alter the measure of damages that could be recovered if bad faith could be established. The statutory provisions did not change decisional law, but simply expanded a cause of action to first-party claims. As specifically noted by the District Court of Appeal in Hollar, damages contemplated by Florida Statutes Section 624.155 were those identical elements of damages that would be viable and existed under the existing decisional law of the Florida Supreme Court in connection with claims for such insurance benefits. Upon application of very well established Florida decisional law, no

claim for only mental anguish or emotional distress, unconnected with any other tort or physical contact, has existed under decisional law or at any time with regard to the existence of Florida Statutes Section 624.155. Further, no additional causes of action or recognition of elements of damages have been created or permitted since the adoption of such statutory provision.

The District Court of Appeal in Hollar applied the well established principle of law that statutes should be construed to harmonize with existing law. Any statute that is intended to alter the established decisional law or common law within Florida, must demonstrate that specific intention in unequivocal terms. The Legislature is presumed to know the existing law when a statute is enacted, and there is nothing with regard to Florida Statutes Section 624.155, and nothing with regard to particularly subsection (7), that alters or changes substantive Florida law that emotional distress is not part of breach of contract damages that may be reasonably foreseeable upon the failure of an insurance company to make timely payment of benefits where there is a total absence of any type of outrageous behavior or other tortious conduct.

As TIME suggested to the federal appellate court, this Court has already established the parameters of damages recoverable in connection with first-party claims under Florida Statutes Section 624.155 in McLeod v. Continental Insurance Co., 591 So.2d 621 (Fla.

. There, the first-party benefits claimed were in the nature of uninsured motorist benefits and this Court recognized that under the Florida common law there was no cause of action for first-party bad faith. This Court recognized that the statute was created to extend or expand a cause of action in connection with disputes between insureds and insurance companies for first-party benefits, and recognized that such was in the nature of a claim for damages arising from contract law. This Court noted that in 1990, Florida Statutes Section 624.155 was amended, and, included within such amending language was a provision permitting the recovery of damages which would be reasonably foreseeable as a result of a violation. The Court noted that the damages recoverable are the amounts which are the natural, proximate, probable or direct consequence of a insurer's bad faith action and the damages may include, but are not limited to, interest, court costs, and reasonable attorney's fees incurred by the plaintiffs. However, upon making such statement this Court added footnote 10 on page 626 that specifically directed:

> Nothing in this decision affects the holding in Butchikas v. Travelers Indemnity Co. 343 So.2d 816, 819 (Fla. 1976), which restricted the'award of damages for mental anguish in bad faith insurer cases to instances in which the defendant acted with sufficient malice to support an award of punitive damages. Id. at 626.

It is submitted that this Court, in outlining the parameters of the types of damages recoverable, reaffirmed the requirements set forth by the Court previously in Butchikas which would prohibit the recovery for mental anguish only in the absence of outrageous conduct involving malicious behavior. This Court reaffirmed that it would not expand damages to permit financial recovery for every emotional or mental strain which modern society may inflict upon an individual by reason of inevitable clashes. A breach of contract by failing to pay $84.18 simply has not be transformed into a right to recover mental distress damages standing alone.

In this litigation, all of the claims of BURGER against TIME for the infliction of emotional distress which were set forth in separate counts of the complaint had terminated upon the entry of a summary final judgment entered in favor of TIME, and such was never appealed by BURGER. It was the position of TIME at all levels in the federal court that when BURGER was able to present only a claim for intangible damages for emotional distress upon allegations that he was upset because payment was not made, totally unconnected with any type of economic damage or any type of medical treatment, judgment should have been entered in favor of TIME. It is submitted that each time this Court has addressed the damages contemplated under Florida Statutes Section 624.155, the result has consistently been reference to the McLeod decision and the

statements of law that the damages permitted under the statute are those recognized as foreseeable by underlying Florida substantive common law. See, e.g., State Farm Automobile Insurance Co. v. Laforet, 658 So.2d 55 (Fla. 1995); Adams v. Fidelity & Casualty Co. of New York, 591 So.2d 929 (Fla. 1992).

It is respectfully submitted that with this Court consistently reaffirming McLeod, such continues to carry forward the McLeod concept in footnote 10 that the underlying substantive law of Florida has not been altered to permit the recovery of damages exclusively for emotional distress absent satisfaction of certain conditions precedent, which absolutely have not been satisfied in the present case.

Lower Florida appellate courts which have considered the issue of damages that are recoverable in connection with actions pursuant to Florida Statutes Section 624.155 have consistently recognized that claims for intangible elements such as damage to reputation, negative publicity and loss of business due to insurance practices, are not those types of damages that are deemed to be the natural or contemplated result of a breach of the obligations by an insurance company in dealing with its insured. As recognized by the District Court of Appeal, First District, in Swamy v. Caduceus Self-Insurance Fund, Inc., 648 So.2d 758 (Fla. 1st DCA 1995), claims against an insurance company under circumstances similar to these

sound in contract, and the damages are more limited than those that would be recoverable in a tort action. Breach of a contractual duty does not impose damages for alleged mental distress in the absence of outrageous behavior. The elements of damages mentioned in Brookins v. Goodson, 640 So.2d 110 (Fla. 4th DCA 1994), were to include "interest, court costs and reasonable attorney's fees incurred in both the bad faith litigation and in the resolution of the underlying claim as a result of the insurer's conduct in delaying payment". Brookins at 113-114.

It is submitted that this Court and the Florida appellate courts which have addressed the issue have attained the correct result. Facing claims similar to that as asserted by BURGER in this case, the court would be opening claims for mental distress related to alleged inability to obtain medical treatment, even though the insured has admitted during testimony that he did not seek treatment from any physician who refused such treatment (R7-81), and even under circumstances where the insured, such as Mr. BURGER, would have been responsible for the first $1,000 of his medical bills due to his deductible provision (R7-84). It is submitted that the type of damages claimed by BURGER in this litigation, which were exclusively emotional distress damages unconnected with any type of outrageous behavior and unconnected with any type of other tort, and unconnected with any type of

physical injury, simply have not been recognized as an element of damages under Florida law and such have not been created by the statutory provision in question. It is submitted that this Court should respond to the certified question that the damages alleged by BURGER do not qualify as compensatory damages under Florida Statutes Section 624.155, and the type of emotional distress claimed does not qualify as damages under Florida law that is considered reasonably foreseeable as a result of a statutory breach. Emotional distress does not serve as an appropriate basis for compensatory damages under the Florida statutory scheme absent satisfaction of those elements required of Florida substantive law for the recovery of such damages.

CONCLUSION

Based upon the arguments, authorities and reasoning set forth in this brief and as presented in the federal appellate court, this Court should answer the certified question in the negative. This Court should hold that the damages alleged by BURGER do not qualify as compensatory damages under Florida Statutes Section 624.155(7) absent satisfaction of the conditions precedent of substantive Florida law and, alternatively, the type of emotional distress alleged by BURGER does not qualify as damage that is reasonably foreseeable under Florida law and is not an appropriate basis for compensatory damages.

Respectfully submitted,

R. Fred Lewis, Esq.
KWIN LEWIS RESTANI & STETTIN, P.A.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed this 15th day of July, 1997, to: Kevin P. O'Connor, Esq., O'CONNOR & MEYERS, P.A., Attorneys for Defendant, 2801 Ponce de Leon Boulevard, Ninth Floor, Coral Gables, FL 33134; and to Brian S. Keif, Esq., BRIAN S. KEIF, P.A., Attorney for Plaintiffs, 30 West Mashta Drive, Suite 500, Key Biscayne, FL 33149; Scott E. Perwin, Esq., KENNY NACHWALTER SEYMOUR ARNOLD CRITCHLOW & SPECTOR, P.A.,

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