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SEP 29 1997
CLERK, SUPREME COURT
By ________
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SUPREME COURT OF FLORIDA

CASE NO. 90,869

TIME INSURANCE COMPANY, INC., a foreign corporation,

Appellant,

-vs-

HARVEY BURGER and GAIL BURGER,

Appellee.

REPLY 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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SUPREME COURT OF FLORIDA

CASE NO. 90,869

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REPLY BRIEF OF APPELLANT

TIME INSURANCE COMPANY, INC.

STATEMENT OF CASE AND FACTS

Introduction

The Appellant, TIME INSURANCE COMPANY, files this its Reply Brief to respond to the factual statements and positions asserted by the **Appellees,** HARVEY BURGER and GAIL BURGER. The parties will be referred to herein as in the initial brief, and the same symbols/ will be utilized.

Overview

BURGER'S presentation misstates the evidence and attempts to elevate arguments of counsel as through words from a lawyer are miraculously transformed into fact without evidence. For example, Florida Statutes Section 624.155 requires that a statutory notice of alleged claim be mailed to the Florida Department of Insurance

before litigation may proceed. Here, the parties stipulated at the beginning of trial only that BURGER had complied with the notice requirement (R. **7-3)**, and now BURGER makes outrageous **statements** as though the allegations by his trial lawyer in the notice document are fact. The notice document demonstrates only compliance with statutory procedural requirements, and does not elevate lawyer argument to fact (R. 7-3).

Additionally, BURGER makes repeated references to "physical injury" throughout the brief, although the record contains **no** such evidence. No medical person ever testified as to any injury, and BURGER himself testified only that he was 'upset." This Record demonstrates that BURGER answered interrogatories in this action **admitting** that no doctor had ever refused to treat either HARVEY BURGER or GAIL BURGER at any time between August of 1991 and October of 1992 due to any conduct of TIME (R. 6-39). BURGER also admitted during trial testimony that he **did not** seek medical treatment either in 1991 or 1992 from any physician who ever refused to treat him (R. 7-87). The words of BURGER at trial were that "no physician actually refused" (R. 7-87).

BURGER had absolutely no documentation of any kind or nature whatsoever from anyone suggesting that BURGER could not be treated because he had not been reimbursed $84.18 in a timely fashion by TIME (R. 7-93). When the question was propounded as to BURGER'S

medical condition with regard to not having insurance reimbursement, BURGER testified only that he was "upset" (R. 7-78). "Upset" does not translate into physical injury, and the federal appellate court has asked this Court to consider whether the emotional distress damages claims are a proper element of damage under these circumstances.

It is clear that BURGER seeks to change the actual facts to argument of counsel because this Court, and all other Florida courts that have ever addressed the issue, have clearly ruled contrary to BURGER'S position. This is not the first time this Court or other appellate courts have addressed the issue of emotional distress as an element of damages in the absence of outrageous behavior. BURGER seeks to overturn over 20 years of Florida jurisprudence that has consistently held that bad faith actions are contractual in nature and there can be no recovery for only emotional distress absent outrageous behavior. The position of TIME is supported by Florida law, which BURGER totally ignores and does not discuss in his brief, and BURGER'S criticism is actually directed to the decisions of this Court and other Florida appellate courts which have applied well-reasoned and firmly established legal principles to reject claims for emotional distress where there has been a failure to reimburse an insured $84.18 due to inadvertence.

Case and Facts

The purported facts presented by BURGER on page 3 of his brief were never presented at trial, nor was such evidence ever proffered during the trial proceedings. BURGER attempts to rely upon pieces of paper that were attached to pretrial disputes, most of which were never attached to any testimony or evidence. As recognized by the trial court long before trial, the purported "facts" as argued by BURGER were nothing more than arguments of counsel having no factual support. The trial court recognized in its December 2, 1993 order with regard to allegations that TIME had altered documents as BURGER continues to assert in this Court:

> Lastly, as to element "5," plaintiff's allegations as to the presence of malice in the prosecution is **unsupported** by any showing of any facts to that end plaintiff alludes that defendant has doctored the claims forms and that defendant must have known that plaintiff had committed no fraud, **but nothing** in the **record supports such allegations** (R. 3-6-5).

Not only were the alleged documents never proffered, such documents were never delivered to TIME and the existence of such documents were directlychallenged.

The claims by BURGER in his statement of purported facts that he was unable to obtain needed medical treatment and that he suffered significant financial injury as well as physical and emotional injury directly related to conduct of TIME are words of lawyers contained in notice documents and constitute evidence of

nothing. As can be seen from the preliminary discussions before the trial commenced, the notice was utilized to demonstrate that BURGER had complied with the notice requirements of Florida Statutes Section 624.155, nothing more and nothing less (R. 7-3-4). TIME admitted that BURGER had complied with the statutory procedural requirements of filing a notice, but such does not elevate the filing of a notice into evidence.

- N T

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?

The argument asserted by BURGER ignores over 20 years of Florida jurisprudence and confuses concepts of amounts of damages with a determination of elements of damages. BURGER'S argument would permit a jury to determine for themselves the elements of damages to be compensated even though such would be totally contrary to existing Florida law. There is a difference between permitting juries to determine amounts when the elements are established by law, and permitting juries to decide for themselves which elements will be compensable. BURGER'S argument would render the statutory provisions unconstitutional and void for vagueness because the position asserted by BURGER would permit a

jury to determine for themselves the substantive aspects on a case by case basis without reference to appropriate legal standards. Under BURGER'S theory a jury could award compensation under the Florida bad faith legislation without regard to established law and include elements totally forbidden. Additionally, BURGER commits the fundamental flaw of totally ignoring Government Employees Insurance Co. v. Grounds, 332 So.2d 13 (Fla. 1976), in which this Court established that Florida bad faith law is governed by contractual principles rather than tort principles. Additionally, BURGER attempts to rely upon foreign decisions where the substantive law is totally contrary to that existing in Florida and that which has been expressly rejected by the Florida courts in addressing bad faith litigation.

Damages recoverable in connection with a contractual relationship are much more limited than if the action were considered to be in tort. Swamy v. Caduceus Self-Insurance Fund, Inc., 648 So.2d 758 (Fla. 1st DCA 1995). The fundamental contractual relationship under well established Florida law directs the nature of damages recoverable in the event a party does not satisfy the contractual obligations. The importance of the distinction can be seen in the decisions of this Court, including Butchikas v. Travelers Indemnity Co., 343 So.2d 816 (Fla. 1977), Metropolitan Life Insurance Co. v. McCarson, 467 So.2d 277 (Fla.

1985), and the application of such principle by this Court considering this specific statutory provision in connection with allegations of first-party bad faith in McLeod v. Continental Insurance Co., 691 So.2d 621 (Fla. 1992).

BURGER'S assertion that the recognition of bad faith responsibility in connection with insurance matters has changed the measure of damages under Florida law is simply without support. Such argument was initially asserted to this Court in Butchikas supra, and clearly rejected. This Court and all other Florida district courts of appeal that have addressed the issue as to the damages recoverable in bad faith litigation have recognized that Florida Statutes Section 624.155 has not changed basic Florida common law as to the measure of damages or the elements recoverable, and in McLeod, supra, this Court specifically advised in a footnote 'that the damages recoverable in a first-party statutory bad faith action continue to be limited by Butchikas. McLeod, supra.

BURGER'S reliance upon decisions from other jurisdictions ignores the fact that Florida has rejected most of the principles of law addressed in the cases. Florida has never recognized a tortious breach of contract in a first-party setting and, to the contrary, such cause of action was specifically rejected in Florida. Baxter v. Roval Indemnity Co., 285 So.2d 652 (Fla. St.

DCA 1973), cert. denied, 317 So.2d 725 (Fla. 1975). Additionally, this Court has specifically rejected emotional distress as an element of damage absent outrageous behavior in connection with bad faith type litigation. The California cases relate to a common law cause of action known as tortious bad faith, but the California theory has always been rejected by Florida courts. As can be seen from the California case of Jarchow v. Transamerica Title Insurance Co., 48 Cal. App. 3d 917, 122 Cal. Rptr. 470 (1975), claims for negligent infliction of mental distress are permitted and there has been a rejection of even the impact rule in California. Such principles of law have been specifically rejected in Florida and are contrary to well established Florida authority. Additionally, even those California cases suggest that substantial damages must be sustained apart from mental distress, and under the circumstances in this case no such substantial damages or any damages exist whatsoever. See, Gruenberg v. Aetna Insurance Co., 9 Cal. 3d 566, 108 Cal. Rptr. 480 (1973).

It is interesting to note that in cases such as Bibeault v. Hanover Insurance Co., 417 A.2d 313 (R.I. 1980), the Rhode Island court recognized a common law tort action in the bad faith context, but that court refused to permit an award of attorney's fees as part of the elements of damage. As can be seen from such decisions, the elements of damages permissible under various state

laws are quite diverse. Mississippi, Oklahoma, Nevada and Nebraska have adopted far different common law principles than those existing in Florida. This Court and other district courts of appeal have considered the various principles of law and have consistently held that bad faith actions are contractual in nature and emotional distress damages simply are not a reasonably foreseeable result of a contractual dispute or the failure to make payments under a contract. Even by statutory definition, upon application of well established Florida law there can be no recovery for emotional distress or mental anguish under the circumstances in this case.

BURGER'S argument with regard to the purchase of health insurance overlooks and fails to accommodate that BURGER was responsible for the first $1,000 of expenses under any circumstance. Additionally, the purchase of the insurance contract does not in any way eliminate the insured's responsibility to a healthcare provider, and such is in the nature of an indemnity policy which reimburses for expenses already paid. The purpose of health insurance is no different than uninsured motorist coverage because both coverages are first-party benefits purchased by an insured to address certain risks or losses. Injuries sustained by an insured due to the negligence of an uninsured motorist calls forth the same types of claims as would be involved in health

insurance, and there is no magic or difference between health insurance and uninsured motorist coverage under these circumstances. Both are first-party benefit types of coverages purchased by insureds to address certain risks. None of the coverages operate as a guarantee to provide health care, but operate solely as reimbursement of certain expenses. The contractual relationship creates a debtor/creditor relationship, and as can be seen from decisions of this Court such as Metropolitan Life Insurance CO. v. McCarson, 467 So.2d 277 (Fla. 1985), there can be no recovery of emotional distress damages absent extreme and outrageous conduct. The Metropolitan decision from this Court involved consideration of first-party benefits in the nature of health insurance coverage, just as that which is involved in the present case. First-party benefit cases asserting bad faith should be controlled by consistent principles of law and not left to the whim or caprice of a jury to decide for itself which elements of damages are recoverable.

BURGER'S attempted reliance upon Dunn v. National Security Fire & Casualty Co., 631 So.2d 1103 (Fla. Th DCA 1994) is most puzzling. There, the Court again recognized, as all other Florida appellate courts have done, that Florida Statutes Section 624.155 does not expand recovery for mental pain and suffering beyond common law pr inciples. Further, the Court also recognized that

there must be outrageous behavior so gross and extreme to be contrary to all human decency as a condition precedent to the recovery of emotional distress in connection with insurance contractual disputes. All of Florida law for the last 20 years is very consistent in application and is totally contrary to the positions and arguments asserted by BURGER. Here, BURGER attempts to transform the circumstances into that which never existed, and asks this Court to overrule over 20 years of Florida jurisprudence in this area.

No Evidence of Phvsical Iniurv

There is no medical testimony in this Record as to any physical injury sustained by BURGER. BURGER specifically described his physical condition as being **"upset."** There was never a description or testimony from BURGER as to any particular injury, and the only hardship on his medical condition was "upset." This is a classic emotional distress claim. The Record speaks very directly to the issue:

> **Q.** [BURGER'S COUNSEL] During this period of time, August, 1991 through November of 1992, did the effect of not having insurance coverage work a hardship on your medical condition?
>
> A. [BURGER] Yes.
>
> **Q.** Can you describe to the jury how you were during that period of time physically?

> A. I was quite **upset** because the bills could not be paid. And both myself and my wife who had cancer surgery, in July of 1990, that the bills were not being paid.
>
> I was **upset**. I was getting notes from doctors about billing, a couple of doctors turned me over to collection agencies. And one doctor even wrote me a note he wanted to add service charges because the bills were not being paid (R. 7-78).

It is submitted that **"upset"** is not physical injury and is precisely the type of damages prohibited under Florida law. There is no two issue rule involved in this case and the federal appellate court has very clearly seen through the charade painted by BURGER. This case involves a direct issue as to whether the **"upset"** or emotional distress damages are recoverable because an insurance company has inadvertently failed to make payment on a contract. It is undisputed in this Record that the computer notes of TIME were entered instructing the payment of all of BURGER'S bills, except the $1,500 fraudulent claim, would be paid as of March 26, 1992 (R. 7-178). Due to inadvertence the sum of $84.18 was overlooked and was not reimbursed within the **90-day** statutory time period. For this, BURGER asserts an entitlement to emotional distress damages.

Punitive Damages Improper

It is absolutely clear that under Florida Statutes Section 624.155 no punitive damages may be awarded unless and until the

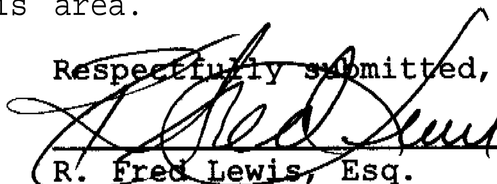
actions and conduct complained of occur with such frequency as to indicate a general business practice, and the actions are also willful, wanton, and malicious and in reckless disregard for the rights of an insured. Here, there was absolutely no evidence at all of a frequency of occurrence with regard to anything challenged by BURGER. BURGER merely relied upon the expression of opinions and conclusions, but it is clear that under Florida law the expression of an opinion cannot establish the underlying facts when there is no evidentiary support. As can be seen from decisions of this Court and other district courts of appeal such as Arkin Construction Co. v. Simpkins, 99 So.2d 557 (Fla. 1957); Federated Department Stores v. Doe, 454 So.2d 10 (Fla. 3d DCA 1984); and Monsalvatge & Co. of Miami, Inc. v. Ryder Leasing, Inc., 151 So.2d 453 (Fla. 3d DCA 1963), opinions of an expert cannot constitute proof of the existence of facts necessary to support the opinion and conclusions expressed. Opinions and conclusions having no factual support are devoid of competency. There are no facts demonstrating any other occurrences, much less occurrences with frequency as to indicate a general practice. There is no evidence of any incident of TIME authorizing payments in their system, but payments being delayed because a file was under investigation for fraudulent practices as is directly required by Florida law under Florida Statutes Section 626.989(6). The evidence in this case is

totally insufficient to justify the imposition of a penalty under Florida Statutes Section 624.155, and insufficient to permit an award of damages for only emotional distress claims.

CONCLUSION

The Appellant, TIME INSURANCE COMPANY, respectfully suggests that this Court should answer the certified question in the negative. This Court should be consistent in application of numerous prior decisions and should not overrule over 20 years of Florida jurisprudence in this area.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed this 23rd day of September, 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., Counsel for BURGER, 1100 Miami Center, 201 South Biscayne Boulevard, Miami, FL 33131-4327.

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